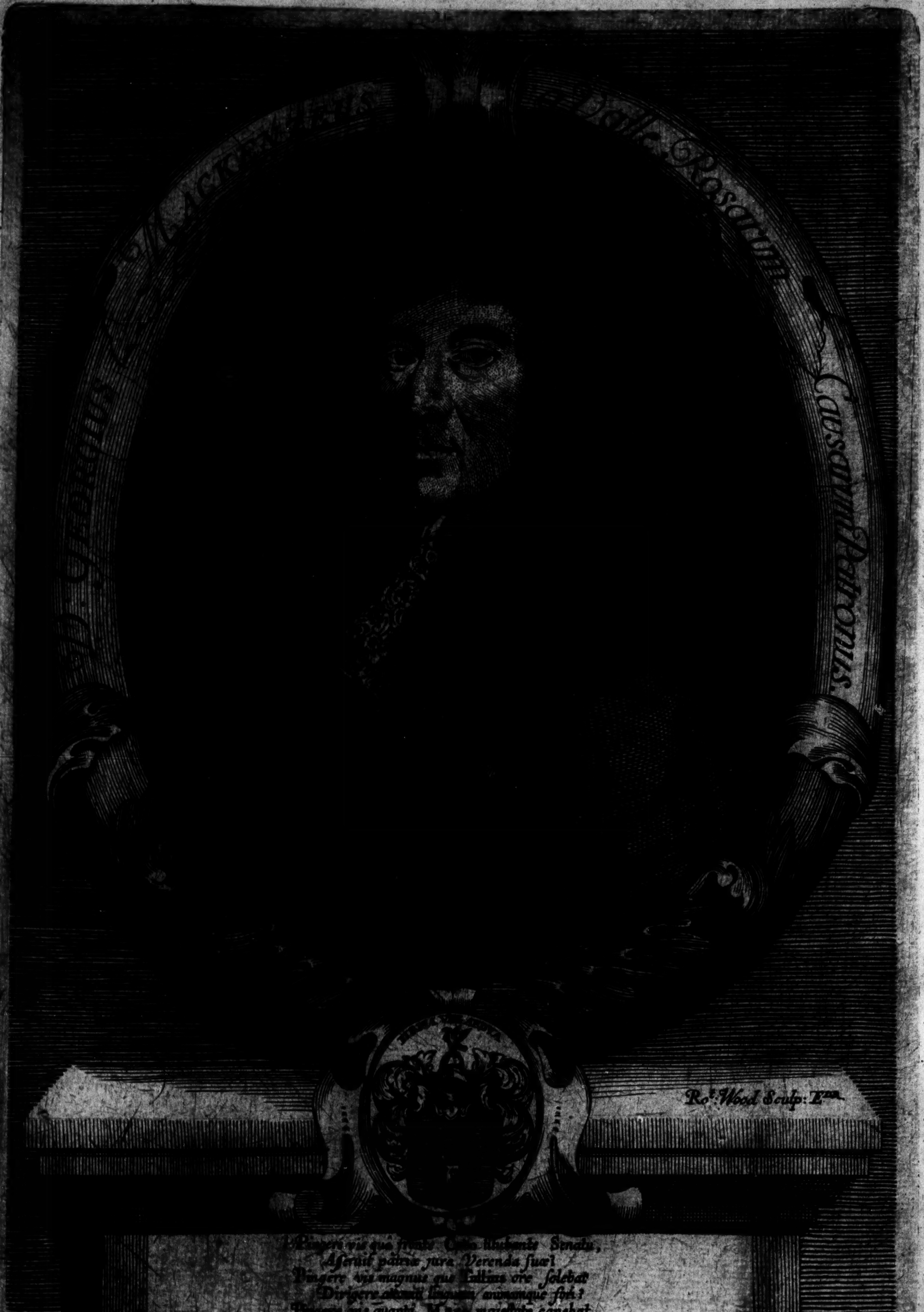
D. Georgius Mackenzius de Valle Rosarum Causarum Patronus.
Roᵗ: Wood Sculp: Eᵈⁿ.

Pingere vis quâ fronte Catos ilubente Senatu,
Asseruit patriæ jura Verenda suæ?
Pingere vis magnus quo Tullius ore solebat
Dirigere attonitis linguam animamque fori?
Pingere vis quantâ Maro majestate canebat,
Et quali tetigit pollice Flaccus Ebur?
Pinge Mackenzæum Pictor, namque altera non est
Quæ referat tantos, una Tabella viros.

Jho: Gloag M.D.
[illegible]

# THE WORKS

Of that Eminent and Learned

# LAWYER,

## Sir George Mackenzie

## Of *ROSEHAUGH*,

## ADVOCATE

TO

## King *Charles* II. and King *James* VII.

WITH

Many learned TREATISES of His, never before printed.

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## VOLUME I.

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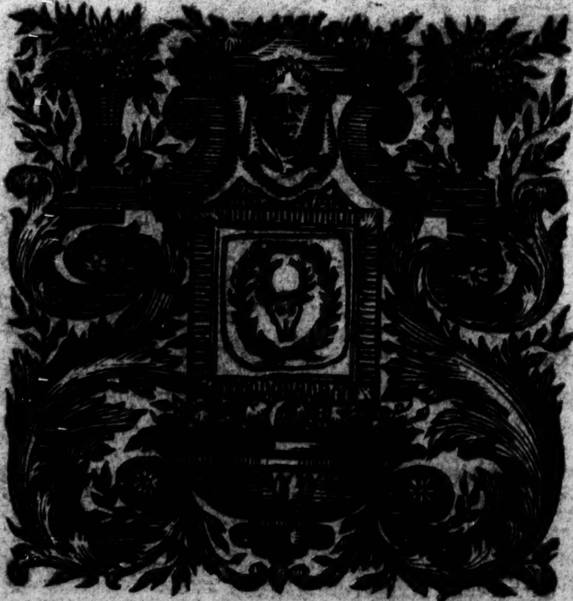
— *Equidem Beatos puto, quibus Deorum munere datum eſt, aut facere ſcribenda aut ſcribere legenda: Beatiſſimos vero, quibus utrumque.* PLIN. Lib. 6. Epiſt. 16.

I truly eſteem them happy, to whom God has given the Power of doing Things worthy of the recording to Poſterity, or of writing Things worthy of their peruſal: But moſt happy are they who have done Both.



*EDINBURGH:*
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MVSEVM
BRITAN
NICVM

# Advertiſement by the Publiſher.

I WAS encourag'd to Publish the WORKS of this Learned and Great Man, by the generous Aſſiſtance His Noble and Honourable Friends afforded me: Not only by Granting me the Privilege of Printing them, and Protecting me from Inconveniencies in the Undertaking; but alſo in furnishing me with the Valuable Manuſcripts of the Author.

THE Demands of Subſcribers for this Firſt Volume, and the Abſence of the Gentleman who did undertake to write the Author's Life, oblige me to reſerve it for the Second Volume, which is now in the Preſs; to which it shall be prefixt, with an exact Liſt of the Names of ſuch who already have, or shall encourage ſo Uſeful a Work by Subſcription.

# The AUTHOR's Life.

SIR *George Mackenzie* of *Roſehaugh*, the Author of the following Works, was a Gentleman deſcended from the Noble and Ancient Family of *Seaſort*, in the County or Shire of *Roſs*: His Father *Simon Mackenzie* of *Lochſlin*, was Brother to *George* Earl of *Seaſort*: His Mother *Elizabeth Bruce*, was Daughter to Dr. *Peter Bruce*, D. D. Principal of St. *Lenard*'s College in St. *Andrew*'s, and a Son of the Laird of *Fingask*; a Gentleman of great Learning, and deſcended from a very ancient Family. Sir *George Mackenzie* was Born at *Dundee*, in the County of *Angus*, in the Year 1636. He gave very early Proofs of a vaſt and extraordinary Genius: For in the Tenth Year of his Age, he was Maſter of his Grammar, and of all the common Claſſic Authors that are taught in the Schools. After he had learned his Grammar, he was ſent by his Parents to the Univerſities of *Aberdeen* and St. *Andrew*'s, where he finiſhed the Courſe of his Studies in the *Greek* and Philoſophy, in the Sixteenth Year of his Age. After this, deſigning to ſtudy the Civil Law, he travell'd to *France*, where he ſtudy'd for Three Years in the Univerſity of *Bourges*; and returning to his Native Country, enter'd Advocate in the Twentieth Year of his Age.

In the Year 1660, he publiſh'd his *Aretina*, or *Serious Romance*; wherein he gave a very bright Specimen of a gay and exuberant Genius. In the Year 1661, he was choſen one of the Advocates, to plead in the Caſe of the Marquis of *Argyle*, who was beheaded at *Edinburgh* the 27. of *May* that Year, for High Treaſon, againſt the ROYAL MARTYR and his Son King CHARLES II. and was very much taken Notice of, for the Eloquence and Knowledge he ſhow'd in the Laws upon this Occaſion: And having dropt ſome unwarry Expreſſions in Favours of his Client the Marquis; he was no ſooner reprov'd for it, but he replied with a ſurprizing Boldneſs, *That it was impoſſible to plead for a Traytor without ſpeaking Treaſon.* Not long after this, he was preferr'd to be a Judge in the Criminal Court. In the Year 1663, he publiſh'd his *Religio Stoici*; or, *A ſhort Diſcourſe upon ſeveral Divine and Moral Subjects*: In all which Diſcourſes Sir *George* declares, “ That his “ only Aim and Deſign is to ſhow, that Speculations in Religion are not ſo “ neceſſary, and are more dangerous than ſincere Practice; it being in Religion “ (*ſays he*) as in Herauldry, the ſimpler the Bearing be, it is ſo much the purer

“ and the ancienter.” In the Year 1665, he publiſh'd his *Moral Eſſay upon Solitude, preſerring it to public Employment and all its Appanages, ſuch as Fame, Command, Riches, Pleaſures, Converſation,* &c. In the Year 1667, he publiſh'd his *Moral Gallantry*; being a Diſcourſe wherein he endeavours to prove, That *Point of Honour* (abſtracting from all other Ties) obliges Men to be virtuous; and that there is nothing ſo mean, or unworthy of a Gentleman, as Vice. To which is added, *A Conſolation againſt Calumnies*, written in Return to a Perſon of Honour. Theſe, and ſome other Moral Eſſays and Poems, were the Productions of this Great Man's Retirements in his Youth, when he was free from Buſineſs: But being advanced to the Station of His Majeſty King CHARLES the Second's Advocate, and one of the Lords of the Privy-Council, in the Year 1674, his Thoughts and Studies were wholly taken up afterwards in the Service of his King and Country; an eminent Inſtance of which, he gave a little before his Advancement to this honourable Station, in reconciling the Senators of the College of Juſtice and the Advocates: For the Lords of Seſſion, to ſtrengthen their own Power, would not admit of any Appeals, for Remeid of Law, from their Deciſions to the Parliament. On the other Hand, the Honourable Faculty of the Advocates, taking this to be an Encroachment upon the Liberties of the Subjects, and an Infringement of former Acts of Parliament; a hot Debate aroſe betwixt them; which the King being acquainted of, He wrote a Letter, diſcharging all Appeals, and ordering the Advocates to ſubmit to the Lords of Seſſion; upon which the greateſt Number of the Faculty laid by their Gowns and gave over Pleading; which ſo incenſed the Lords of the Seſſion againſt them, that they obtained an Order of Council for baniſhing them Twelve Miles from *Edinburgh*: Upon which they retired to *Linlithgow*, *Hadingtoun*, and other adjacent Places, according to the Terms of the Act of Council. Sir *George*, tho' he was one of thoſe that laid aſide his Employment upon this Account; yet conſidering the great Loſs that the Lieges ſuſtained by it, he made a Propoſal for reconciling them, in the following Speech before the Seſſion, in the Month of *November* 1674.

“ I am, *My Lord Chancellor*, come here this Morning with very ſmooth and calm Inclinations; for I am reſolved, that in what relates to His Majeſty, my very Paſſions ſhall be good Subjects; and it is ſo much my Intereſt as well as my Duty, to obey in this Caſe.

“ My whole Comrades Employments and Reſpects falling naturally to me *jure devoluto* upon my very Entry, that I am ſure you cannot imagine but that if I enter not, I muſt be overacted by ſome ſtronger Principle than Money or Fame. But leſt I ſhould be thought to ſell my Principles, or that your Lordſhips ſhould be thought to command what you cannot juſtify; I do beg Leave, with Submiſſion to your Lordſhips, to aſk Satisfaction to Two Scruples which ſtick with me.

“ The Firſt is, Since I am fully reſolved to retire and not to plead, becauſe of my Indiſpoſition, I conceive your Lordſhips cannot in Juſtice force me to declare any Thing: For by His Majeſty's Letter, you are only commanded to debar us from Pleading till we *Declare*: And therefore by the Rule of Converſion, ye cannot debar us till we deſire to plead. The Condition is here adjected to a Quality which exiſts not; and if ye conſider the Form and even late Practices of this Houſe, ye will find, that ye have conſtantly ſo proceeded: For when the Act of Parliament ordered all the Advocates to take the *Declaration*, which was ſtronger than the Caſe of this Letter; becauſe there, there was a poſitive Law, and in it a poſitive Command; and yet ye never cited Advocates, but debarred ſuch as would not take the Oath. And in the Regulations, tho'

His Majeſty commanded you by a ſolemn Letter; yet ye only debarred, but did not cite. And if we conſider the Reaſon of the Command, or the Intereſt of the Commander, or of thoſe in whoſe Favours the Command is conceived, ye will find, that ye ought only to Debar, not cite: For His Majeſty deſigning that none ſhould appeal from you, this Letter is a Fence to your Juriſdiction; and if I be debarred till I *Declare*, there can be no fear of my Appealing, ſince I muſt diſown theſe Appeals before I plead. And what you have done againſt my Comrades, can be no Prepatative againſt me: For they were pleading in their Gowns when ye debarred them; but I am not pleading, nor do I deſire to plead: And, I hope, it is not His Majeſty's Intereſt to force His Subjects to *Declare*. And now I am a mere Gentleman and no Advocate; and ſo your Juriſdiction reacheth me not; and if ever I pretend to be an Advocate, I ſhall obey and conform. This *Declaration* is to be the Price of my Privilege and Liberty of Pleading, and, I hope, there is no Reaſon I ſhould be forced to pay the Price, till I take or at leaſt need your Wares.

“ The Second Thing wherein I deſire to be ſatisfy'd, is this; I conceive that my Employment is my Eſtate: And if any of you left your Sons Advocates, or were to Marry your Daughters to Advocates, you would think you left them well provided, if their Employment were good. It is my Plough or my Ship; nay, it is my Liferent-Right; and ſo, like theſe Rights, it cannot be taken from me, except I commit a Crime: And therefore, till I be guilty of a Crime, I cannot forfeit my Employment; and I conceive I am guilty of no Fault or Crime: For ſuppoſe theſe Appeals or Proteſtations were unlawful, which is all His Majeſty's Letter declares; yet Appealing or Proteſting is no Crime; for many Things are diſcharged which are not Criminal, and nothing is a Crime but what Law makes ſo: But ſo it is, there is no Law that declares Appealing to be a Crime. Thus we ſee it is declared unlawful to advocate Cauſes to you below Two Hundred Merks; and yet to raiſe an Advocation for a leſs Sum, is no Crime, nay not puniſhable. Prelates are diſcharged to ſet Tacks for a longer Time than their Lifetime and 19 Years, and inferior beneficed Perſons for longer than Three Years; yet the Contravention irritates the Deeds, but ſubjects not the Contraveners to Puniſhment. I have pleaded againſt the Exchequer, who are only Judges to Wards; and yet none thought this a Crime or puniſhable. 2do. We were in moſt probable Ignorance of this Unlawfulneſs: For Lawyers have after this Act, declared it lawful to Appeal and Proteſt for Remeid of Law; and expreſs Acts of Sederunt have allowed Proteſtations for Remeid of Law, ſince the Act of Parliament, & *poſteriora derogant prioribus*; or rather your Predeceſſors, who beſt knew the Import of theſe Acts, have ſo interpreted the ambiguous Words of the Act of Parliament. And whereas it is alledged, That thoſe Acts and Laws are very old, and ſo not to be founded upon. I conceive this, which is the only Anſwer that can be made, is very frivolous; for the older they are, by ſo much the nearer to theſe Times, and ſo were the fitter to interpret the Meaning of theſe old Laws: But however; they were ſufficient Warrants for us to have made uſe of them; and the following the Faith of them may breed a Miſtake, but muſt certainly defend againſt a Fault or Crime.

“ I conceive, *My Lord*, that neither the King nor you are further concerned than to have this Judicatory ſecured againſt Appeals; and the proper Way to do this, is by an Act for the future, and we are content ſuch an Act be made: But it is againſt the Nature of Law, eſpecially of puniſhing Law, to be drawn backward: And in Law, its Sanction is its Fence, and needs no Aſſent from ſuch who are to obey. And therefore we ought not in Law be put to *Declare* our

“ Submiſſion to it, but if we tranſgreſs, we are to be puniſhed; nor does even the Parliament more to their Acts. And was there ever more done than this to your and your Predeceſſors Acts of Sederunt? But yet to ſhow our ſtrong Inclinations to comply with His Majeſty, we are content to declare, we ſhall not Appeal for the Future: So that all that is betwixt us and you is, That ye will have us diſown what we have done. And will your Lordſhips loſe ſuch uſeful Gentlemen for a Word, wherein neither His Majeſty or you are concerned? Nor is it Pique or Vanity in us to deny it, ſince no Gentleman would diſapprove of what he hath done. Nor can I ſee how His Majeſty loſes any Honour in allowing us this Favour; for what is Meanneſs when done to Equals, is Clemency when done to Inferiors. And this Great *French* King was yet pleaſed, when all the Advocates in *France* quit their Gowns upon his impoſing a Tax upon them, to paſs from the one Half of what he demanded; which was more ſubſtantial than what we crave. And I hope His Majeſty will conſider, how obſequious we have been; for tho' we and our Predeceſſors were as free from Taxes as the *French* Advocates were; yet we were to pay willingly; and the *Declarations* and *Regulations* were impoſed upon us: But we preferred our Loyalty to our juſt Liberty. And therefore, having obey'd Him exactly, when His Royal Intereſt was concerned; and being content to ſecure your Intereſt againſt future Appeals: We conceive that here you ought not to be nice upon a Punctilio, which is unneceſſary.

“ Oblige in this your Native Country, who miſs us, as ye know: Oblige in this your Law, that needs ſuch Inſtruments, eſpecially in its Infancy: Oblige your ſelves, who need ſuch Informers. And remember, that to find out a right Defence, is much more hard and advantagious, than to judge it rightly.

This Speech of our Author being accompanied with that Warmth and Concern, in which he delivered all his Pleadings, that had the leaſt Tendency to the Good and Welfare of the King and Country; the Lords took it to their ſerious Conſideration, and Sir *George*'s Propoſal being accepted of, the Advocates returned to *Edinburgh*, and were admitted to plead.

For this and ſeveral other good Offices done to the King and Country, our learned Author was Knighted by the King, and, as we have ſaid, was made His Majeſty's Advocate and One of the Lords of Privy-Council, which expoſed him to the furious Rage of the incenſed Fanaticks, who were in Rebellion at that Time. But that we may ſhow how much they were in the Wrong to our excellent Author, we ſhall give a brief Account of the firſt Riſe of theſe Troubles, and of his Behaviour in them.

King *Charles* the Second being reſtored by almoſt the univerſal Conſent of all the People; the Parliament of *Scotland* being call'd, after a ſerious Enquiry into the Occaſion of the Rebellion in the Bleſſed MARTYR's Reign, they found all was to be charg'd upon the *Solemn League and Covenant*, and thoſe who adhered to it: And therefore they endeavoured to perſuade the Presbyterians to diſown it: But finding that generally they thought themſelves bound to own it; the Parliament rationally concluded, *That the ſame Men, owning the ſame Principles, would be ready, upon Occaſion, to act over again the ſame Things*; They by a Vote (which may be termed unanimous, ſince only Four or Five diſſented) reſtored Epiſcopacy, as the Primitive and Apoſtolic Government of the Church. A Government that had, in no Age or Place, forced its Way into the State by the Sword, having always ſtrenuouſly maintain'd that Great and Eſſential Principle of the Chriſtian Religion, *That the uncontroverted Magiſtrate was always to be obey'd, if not actively, yet paſſively.*

The Presbyterian Teachers, who had all along preach'd to the People, That their Government was *Jure Divino*, or of Divine Right, and therefore the People were oblig'd to maintain Them and It, againſt all Encroachments that ſhould be made upon it, and that under the Pain of Eternal Damnation; many of the poor deluded People believing this to be the Doctrine of the Goſpel, went after their Teachers, who confirmed them in the Rebellious Principles they had taught them formerly: Whereupon the Government, fearing that the old Humour might ferment into a Rebellion, diſcharged, under ſome ſmall Penalties, any Number above Five, who were not of the ſame Family or Neighbourhood, to meet in a *Conventicle*; for ſo their Meetings were called. By this Means they were left to the free Exerciſe of their Conſcience in their private Families; and at the ſame Time the State was ſecured from their Meeting in ſuch Numbers as to involve the Country again into a Civil War. Yet this Mildneſs of the Government could not reſtrain them; for they broke out again into an open Rebellion, and were defeated by the King's Forces at *Pentland-Hills* in the Month of *November* 1666. Notwithſtanding of this, the Government reſolv'd to try them once more, and indulg'd them ſo far, as to allow them their own Miniſters, ſettling them in Churches, and allowing them the Enjoyment of the Benefices in many Places. This ſatisfy'd ſome of the moderate Men amongſt them; but the hot furious Enthuſiaſts were noways ſatisfy'd with it; and having rallied their ſcattered Forces, they preach'd up open Rebellion to them, and treated their indulged Brethren with as great Contempt, as they did the Biſhops and the regular Clergy, calling them *Council-Curates*, and ſeparated from them.

The Government conſidering, that by the Laws of all Nations, riſing in Arms is to be accounted Rebellion, they declared their Meetings to be Rendevouzes of Rebellion. On the other Hand, the Rebels emitted a Proclamation at *Sanquhar*, wherein they declared, *That the Covenant was the Original Contract betwixt God, the People and the King; and therefore the King having broke it, forfeited His Crown: And by that Means, ſince He was only to be conſidered as a private Subject and Enemy to God, it was lawful for them to kill Him, and all who ſerved Him, according to the noble Examples of* Phineas *and* Ehud. And in conſequence of this Doctrine, they murder'd the Arch-Biſhop of St. *Andrew*'s, and ſeveral others. To defend theſe Murderers, they raiſed an Army, which was defeat by the King's Forces at *Bothwel-Bridge*, in the Year 1679. Notwithſtanding of all which, the King, to reclaim them, granted both an Indemnity and Indulgence to them: But nothing would ſatisfy them but the King's Life, and in one of their Meetings at *London*, it was agreed amongſt them, that 20000 Men ſhould be rais'd in *Scotland*, and that the Garriſons of *Berwick* and *Carliſle*, and all the Officers of State, ſhould be ſeis'd, which was likewiſe ſeconded by *Monmouth* and *Argyle*'s Rebellions in 1685.

Now Sir *George* being His Majeſty's Advocate during theſe Two laſt Rebellions, it was no Wonder that the Rebels had a particular Spite and Malice againſt him, who by his Office was oblig'd to proſecute them for their Lives; and therefore they call'd him, *The Blood-thirſty-Advocate, and Perſecutor of the Saints of God:* But how much they were in the Wrong to him, as I have ſaid, will appear from the great Care he took in regulating the Forms uſed in Purſuits of Treaſon, and the Mildneſs and Tenderneſs that he always ſhow'd to theſe poor deluded and obſtinate Rebels. For, as to the Firſt of theſe, By the Law of *Scotland*, Treaſon may be purſued either at the Inſtance of a private Informer, or at the Inſtance of the King's Advocate, who is *ratione officii Calumniator publicus*: That is to ſay, *By his Office the public Informer againſt Rebels.* If a private Perſon inform, then his Name muſt be expreſſed, that he, nor none of his Relations, may be uſed as Witneſſes; he muſt likewiſe find Surety that he ſhall prove it, and that he ſhall inſiſt, as being liable in *pœnam talionis*, or the ſame Puniſhment which the Law provides againſt ſuch a Criminal, in Caſe he ſhould fail in proving the Crime. Now, always before Sir *George* came to be Advocate, the King's Advocate examined the Witneſſes alone; but Sir *George* thinking that he might have been jealous'd as too intereſted, prevail'd with the Government to get this Examination referred to the Judges, who in all Nations enquire into the Grounds whereupon Purſuits are to be rais'd. To ſtrengthen the Security of the Defendant or Party accuſed, Sir *George* uſed to interpoſe with the Officers of State, before the Depoſitions were brought into the Council, aud to repreſent to them his own Scruples: And if the Officers of State continued ſtill of Opinion, that a Proceſs was to be rais'd, or the Party accuſed to be proceeded againſt; then he deſired the learnedeſt Advocates of the Nation to be called, before whom the Depoſitions were read; and if they concurr'd with the Officers of State in their Judgment, of the Matter's being Criminal, then theſe Advocates were ordain'd to concur with him in the Purſuit: And many of the moſt learned and moſt popular Advocates did concur with him, in the moſt intricate Caſes; which it is not to be imagined they would have done, had they thought that their Pleading in theſe Caſes was not according to Law, or that it was any Guilt or Fault in them.

Tho' by the Laws of ſome Nations, no Witneſſes are to be produced for the Defendant, but ſuch as do appear voluntarily; yet when our learned Advocate was a Judge in the Criminal-Court, which anſwers to the King's-Bench in *England*, he order'd, for the Good of the People, the Remedy of *Exculpation*; whereby the Defendant repreſenting that he has ſome Defences, a Warrant is given to force the Witneſſes whom he names, to appear under ſevere Penalties, and ſuch Time is granted to him and them, as may be ſufficient for their Appearance; and theſe Witneſſes, when compearing, are examined upon Oath, and the Jury is obliged to believe any Two of them (tho' no Witneſſes are allowed in *England*, to ſwear againſt the King) and this Order was afterward turned into an Act of Parliament (*a*). And to take off all Poſſibility of packing Juries in *Edinburgh*, where generally the Juries are choſen, it was order'd by the Judges, at Sir *George*'s earneſt Deſire, that the Town of *Edinburgh* ſhould give up a Liſt of all their Houſe-keepers who were able to paſs upon Juries, and that all theſe ſhould be named *per vices*, according to the Situation of the Place where they lived.

(*a*) Act 16. Seſſ. 3. Parl. 2. *Ch.* II. Art. 2.

Becauſe the Defendant did not know what Witneſſes were to be produced againſt him by the King's Advocate, and ſo could not have Witneſſes ready to prove his Objections againſt them; therefore Sir *George* prevail'd with the Parliament, that not only he, but all ſucceeding King's Advocates ſhould be for ever afterwards obliged to give, with the Indictment, a Liſt of what Witneſſes, and Members of Inqueiſt, were to be uſed by them, and an Order to be given for citing any Witneſſes that the Defendant pleas'd, with a competent Time for adducing them, Fifteen Days being ſtill the leaſt Time allow'd by that Law, for preparing the Defendant in all ſuch Caſes.

By the Form of the Criminal Court in *Scotland*, when the Day of Trial or Appearance comes, the Witneſſes who were preſent at giving the Citation, are obliged to depone upon Oath, That they ſaw the Citation truly given; and then the King's Advocate produced his Warrant: And accordingly Sir *George* did never proſecute any Man till he produced his Warrant; as appears from the Records of the Council and Criminal Court. The Advocates for the King and the Defendant being both call'd in before the Court, the Defendant hears the Indictment or Summons read; and then Forty Five Jury-men are called, and the Defendant's Objections againſt them are diſcuſs'd. And tho' of old, the King's Advocate had the naming of the Jury, as being preſum'd diſintereſted; yet Sir *George* prevail'd to get an Act of Parliament made (*b*), whereby the Nomination of the Jury was referred to the Judges, and Fifteen of theſe Forty Five are only admitted as a ſufficient Jury; and the Defendant is allow'd to challenge or reject any Thirty that he pleaſes of the Forty Five, without giving any Ground or Reaſon for it, and the Fifteen who remain make up the Jury, and are ſet by the Judges.

(*b*) Act 3. *ib.*

In this Court likewiſe, after the Depoſitions were taken, the Advocates for the King and the Defendant ſpoke to the Jury in a full Harangue: But becauſe the public Intereſt was ſtill to be preferr'd to private Men's, therefore our Law allow'd the King's Advocate to be the laſt Speaker in all Criminal Caſes, till Sir *George* prevail'd with the Parliament (*c*) to give the laſt Word to the Defendant in all Caſes, except that of Treaſon; becauſe ordinarily the greateſt Impreſſion is ſuppos'd to be made by the laſt Pleading.

(*c*) Act 10. *ib.*

Laſtly, in this Court, of old the Clerk was in uſe to be incloſed with the Jury for their Direction: But Sir *George* procured, that (becauſe the Clerk had ſome Dependance upon the Crown) he might be excluded from going in with them, and that they might chooſe their own Clerk; which was accordingly done, and eſtabliſhed by Act of Parliament (*d*). I ſhall conclude this Article in Sir *George*'s own Words (*e*), "No Man who endeavoured ſo to leſſen the Power of the King's Advocates by Acts of Parliament and Regulations, can be thought to have had any Inclinations to ſtretch it. As alſo, he may value himſelf for refuſing to accept the King's Advocate's Place, till his Predeceſſor reſigned it under his Hand: That he never informed againſt any Man, nor ſuggeſted any Purſuit: That when a Purſuit was motion'd, he pleaded as much in Private for the Defendant, if the Caſe was dubious, as any of his Advocates did in the Trial, except when he was jealouſed of Friendſhip to the Defendant, or of Love to Popularity, becauſe he had ſo pleaded in Private. And no Age did ſee ſo many Thouſands pardoned, nor ſo many Indemnities granted, as was in his Time; which, as it muſt be principally aſcribed to the extraordinary Clemency of the Kings he ſerved, ſo it may be in ſome Meaſure imputed to the Byaſs which Sir *George* had to the merciful Hand." And the Truth of all this evidently appears, if we conſider, that during theſe Rebellions, altho' Twenty Thouſand had been guilty of public Rebellion; yet Two Hundred died not by the Criminal Court (*f*); and above One Hundred and Fifty of theſe might have ſaved their Lives by ſaying, *God ſave the King*; not that the refuſing to ſay this was made a Crime, but that this eaſy Defence was allowed them to ſave their Lives; and there died not above Six in all the Time that Sir *George* was Advocate, except for being in actual Rebellion, and for being guilty of Aſſaſſination, clearly proven againſt them.

(*d*) Act 8. *ib.*

(*e*) Vind. of King *Charles* II's Government.

(*f*) *Ibid.*

But the moſt clamorous Inſtances of our excellent Author's Cruelty, is in the Deaths of *Mitchel*, *Lermonth*, *Baillie* of *Jerviſwood*, the Earl of *Argyle*, and Two poor Women, who were all executed (if we may believe the *pretended* Saints) by Sir *George*'s ſtretching the Laws too far. Now altho' it is moſt certain, that no Nation ever blamed a King's Advocate for aſſiſting in Criminal Proceſſes; nor, as he himſelf ſays (*g*), "lies there any Action or Scan-

(*g*) *Ibid.*

“ dal againſt him any where on that Account, as can be proved by many Hundreds of Citations of the beſt Laws and Lawyers. But he darkens his own Cauſe when juſt, who uſes theſe to ignorant People; and he leſſens his own Eſteem who thinks he needs them amongſt Men of better Senſe, the Law truſting him intirely as a public Servant, who manages theſe Purſuits by Virtue of his Office, and not by Malice.” Yet notwithſtanding of this, it will be found, that none of theſe People were put to Death but upon moſt juſt Grounds. For,

As to *Mitchel*'s Caſe, whereas it is ſaid, That he was executed after he confeſſed the Crime, upon Promiſe of Life. 'Tis acknowledged by all, that *Mitchel* having, upon the High-ſtreet of *Edinburgh*, fir'd a Piſtol at the Arch-Biſhop of St. *Andrew*'s, with a Deſign to murder him, he wounded the Biſhop of *Orkney* with that Shot, of which he never recovered; and being thereafter apprehended, confeſſed the Crime: But continuing ſtill to glory in it, and very famous Witneſſes having depon'd, That *Mitchel* was upon a new Plot to kill the ſame Arch-Biſhop, he was brought to Trial, and his Defences were, That the Earl of *Rothes*, to whom he confeſſed it, had promiſed to ſecure his Life; and that the Privy-Council had afterwards promiſed the ſame; of which Number Sir *George* was One. For proving of this, the Earl of *Rothes* and all who were upon the Committee of the Council, and likewiſe all the other Members of the Council whom he deſired to be cited, were fully examined upon all his Interrogatories, and the Regiſters of Council were produced; but nothing of a Promiſe was made to appear by either: And is it to be imagined by any Man of common Senſe, that they all perjured themſelves, or that the Regiſters of Council were vitiated to take the Life of ſuch an execrable Villain as this Fellow was, who died glorying in his Crimes, and recommending to others the Sweetneſs of ſuch Aſſaſſinations?

'Tis ſaid, That *George Lermonth* was put to Death for being preſent at a Field-conventicle with a Rod only in his Hand. But this is falſe; for he was condemned for being Art and Part, that is to ſay Acceſſory, to the Death of a Soldier, who was kill'd at that Conventicle, and that he commanded thoſe who kill'd him as an Officer: And therefore the Juſtices moſt legally repelled the Defence founded on his not having a Sword.

As for *Baillie* of *Jerviſwood*, 'tis beyond all Debate, that by the Law of *Scotland*, concealing of Treaſon is puniſhable as Treaſon: And it having been proved againſt him that he was acceſſory to, and concealed a Deſign of raiſing Twenty Thouſand Men, and of the ſeiſing the Garriſons of *Berwick* and *Carliſle*, and the Officers of State, he could not eſcape the Puniſhment of the Law. Yet Sir *George* had ſuch a Regard for this Gentleman, that he would not raiſe an Indictment againſt him, till Sir *George Lockhart*, and one of the learnedſt of the Judges, did declare, That the Point of Law and the Probation were both moſt clear, and concurred in the Proceſs with him: And ſome of the Witneſſes were his own Relations, and of his own Perſuaſion; I mean Presbyterians.

But the Caſe of the Earl of *Argyle* has made the greateſt Noiſe of any, becauſe it has been reſcinded by an Act of King *William* and Queen *Mary*'s Parliament. But the undeniable Matter of Fact was thus: The Teſt being enacted to be a Bulwark to the Proteſtant Religion, as upon the Event it proved; the Earl would not take it but with a Declaration, *That he did take it as far as it was conſiſtent with itſelf, or with the Proteſtant Religion: And* (ſaith he) *I declare, that I mean not to bind up myſelf to wiſh or endeavour any Alteration I think to the Advantage of the Church or State.* The Privy-Council obſerving, that the Teſt, by one Part of this Declaration,

tion, appeared ridiculous, and by the other it became ineffectual to all the Intents and Purpoſes for which it was deſigned; (for by this, every Man's Opinion became the Rule of his Loyalty, and thereby obliged to be no further loyal than he thought convenient) they earneſtly dealt with the Earl to acknowledge, That he was in the wrong, or elſe to ſuppreſs it; ſince by Act of Parliament all ſuch as put Limitations upon their Loyalty, are guilty of Treaſon, and that this Act was made upon moſt juſt and neceſſary Motives: For the Foundation of the Rebellion in the Bleſſed MARTYR's Time was, *That by the Covenant, the Subjects were not further obliged to own the King's Intereſt, than in ſo far as it agreed with the Word of God and the Laws of the Land; of which every private Man made himſelf Judge.* And if this were allow'd, no Oath of Allegiance could bind, and conſequently all Society muſt be diſſolved. Yet notwithſtanding of all this, the Earl would neither do the one nor the other. The Duke of *York*, then High Commiſſioner to the Parliament of *Scotland*, being aſſured by one of the beſt Lawyers in the Nation, that the Earl's Declaration imported Treaſon; Sir *George* was obliged by his Office, tho' much againſt his own Inclination, (upon Account of the perſonal Kindneſs he had for the Earl) to proſecute him for High Treaſon; and he was found guilty, after a full Debate, wherein Eight or Nine of the beſt Lawyers of the Nation, by a poſitive Command from the Council, did aſſiſt the Earl. And whereas many have admired, that he was not proſecuted and condemned afterwards, when the Earl by an open Rebellion invaded his native Country; it proceeds from their Ignorance of the Laws of *Scotland* and *England*: *For by them no Man can be tried for the very ſame Crime for which he ſtands convicted, tho' he may for a Crime which deſerves a greater Puniſhment; for the Law has exhauſted its Revenge by the firſt Sentence.* Yet, as Sir *George* obſerves, where a new notorious Aggravation ſupervenes, as in this Caſe of *Argyle*, which is ſo clear, that it can admit of no Debate, nor needs no Probation, it were very unjuſt that the Law ſhould not here be put in Execution, tho' the firſt Sentence had been thought too ſevere to deſerve it.

As to the Two Women that were put to Death, and there was only Two, it was for ſuch Crimes, as ſhould make any Chriſtian aſham'd to accuſe either the Government or Advocate of Severity to them; for they not only harbour'd thoſe that were declared Rebels, but the Murderers of the Arch-Biſhop of St. *Andrew*'s: And when they were proſecuted for it, they declined the King's Authority, as being an Enemy to God, and the Devil's Vicegerent. And tho' a Pardon was offer'd them, upon their Repentance, they were ſo far from accepting it, that they own'd theſe Crimes to be Duties. And this was far from the Severity that was ſhown by the Presbyterians in King *Charles* the Firſt's Time, when they drown'd in one Day Eighty Women and Children, for no other Crime but following *Montroſe*'s Camp; throwing them over the Bridge of *Lithgow*, without any Sentence, or the leaſt Formality of Law.

*Hamilton* of *Monkland* too, is ſaid to have been forfeited, becauſe he went in to the Rebels to ſeek his own Son. But this is another Miſrepreſentation of the Matter of Fact; for he was forfeited for being amongſt the Rebels, and ſolliciting a Committee of the Rebels to make his Servant an Officer amongſt them; which they having done at his Deſire, he came to *Monkland* ſome few Days after, and ſtaid with him ſeveral Months: All which was ſo evidently proved againſt him, that his own Advocates could make no Reply to evade it.

Thus I have ſhown from our excellent Author's *Vindication of King* Charles *the Second's Government*, what the Grounds and Principles were that he proceeded on, in proſecuting theſe poor deluded Creatures, who ſet the whole Nation in a Combuſtion;

buſtion ; and leave it to the Judgment of the unprejudic'd Reader, if our Author deſerves the Character of a Man of a cruel and bloody Diſpoſition, as his Enemies, the Fanatics, have repreſented him, in their ſcandalous Libels and Pamphlets.

Now, notwithſtanding that the moſt of Sir *George*'s Time was taken up in the Great and Momentuous Affairs of the Nation ; yet if we conſider, at the ſame Time, the Productions of his Pen in illuſtrating the Laws and Cuſtoms of his Country ; in vindicating the Monarchy againſt the malicious Contrivances, Aſperſions, and helliſh Principles of the Fanatics, and its other Enemies ; what he has wrote for the advancing the Honour and Glory of his Country ; we ſhould be tempt to think, that he had ſpent the moſt of his Time in his Cloſet. And this will appear from our taking a View of his excellent Writings upon all theſe Subjects. And,

*Firſt*, For the illuſtrating the Laws and Cuſtoms of his Country ; in the Year 1673, he publiſh'd a Collection of *Pleadings in ſome remarkable Caſes, to which the Deciſions of the Lords are ſubjoin'd*, printed at *Edinburgh* in *Quarto*. And the Reader will find ſeveral new Ones in this Firſt Volume of his Works. And how much theſe were eſteemed by the Learned Doctor *Buchar*, Profeſſor of the Civil Law in the Univerſity of *Oxford*, will appear from a Letter of his to Sir *George*, dated the 27th of *March* 1691. which the Reader will find amongſt the Teſtimonies of the Learned concerning our Author. Not long after this, he publiſh'd his *Obſervations on the* 21. *Act, of the* 23. *Parliament of* James VI. *againſt Diſpoſitions made in Defraud of Creditors*. In the Year 1678, he publiſh'd that noble Performance upon *the Laws and Cuſtoms of* Scotland, *in Matters Criminal ; where is to be ſeen how the Civil Law, and the Laws and Cuſtoms of other Nations do agree with and ſupply our's*, printed at *Edinburgh*, in *Quarto*. In the Year 1681. he publiſh'd his *Idea Eloquentiæ forenſis hodiernæ, una cum Actione forenſi ex unaquaque Juris parte*, at *Edinburgh*, in *Octavo* ; a Book greatly eſteemed by the Learned, both for the Uſefulneſs of the Matters he treats of, and the Purity of the Language in which 'tis wrote : As it appears from the great Elogiums given to Sir *George* for this noble Performance, by the Univerſity of *Bourge* in *France*, wrote to Sir *George*, and ſubſcribed by all their Profeſſors, by Doctor *John Voet* Profeſſor of the Laws in the Univerſity of *Leyden* ; and well known in the *Republic of Letters*, by his learned Commentaries upon the *Pandects*, in a Letter to Mr. *James Leſly*, one of the Members of our learned Faculty of Advocates, lately deceaſed. By *Ulricus Huber*, Profeſſor of the Laws in the Univerſity of *Franckerſe* ; well known to the Learned by the Multiplicity of his Writings, not only in the Laws, but likewiſe in Theology and Hiſtory, in a Letter to *Andrew Bruce* of *Earlſhall*, another learned Member of our Faculty of Advocates. By *John Hixdorf* Profeſſor of the Laws at *Dantzick*, in a Letter to Sir *George*. And laſtly, by the Learned *J. Doujat*, *Regius*-Profeſſor of the Laws in the Univerſity of *Paris*, given under his Hand and Seal upon the *Ides* of *September* 1688. All which we have inſerted amongſt the Teſtimonies from the Originals. In the Year 1684. he publiſhed the *Inſtitutions of the Laws of* Scotland, printed at *Edinburgh* in *Duodecimo* : A Book of ſo great Uſe for the underſtanding of our Law, that there has been ſeveral Impreſſions of it ſince, both here and in *England*. In the Year 1686. he publiſhed his *Obſervations upon the Acts of Parliament*, at *Edinburgh* in *Folio*. And ſeveral other excellent Treatiſes of Law the Reader will find in this Edition of his Works, never before printed.

Altho' the Government of *Scotland* be eſtabliſhed upon as juſt and reaſonable Laws as any other Country in the World, as Sir *George* has ſhown by his learned Obſervations upon them; yet no Government can be ſo ſecured; let the Conſtitution be never ſo excellent, but ſome Factious Spirits will endeavour to overthrow it: And Sir *George* conſidering, that nothing contributed more to this, than the Principles of the Fanatics and Jeſuits; he publiſhed in the Year 1684. his *Jus Regium*; or, *The juſt and ſolid Foundations of Monarchy in general*, and more eſpecially of the Monarchy of *Scotland*, maintained againſt *Buchanan*, *Naphtali*, *Dolman*, *Milton*, &c. This Book was publiſhed at *London*, and dedicated to the Univerſity of *Oxford*, who were ſo ſenſible of our Author's great Merit, that in a Convocation upon the 9th Day of *June* the ſame Year, they order'd a Letter of Thanks to be ſent to him, in the Name of the Univerſity, for his Book and his worthy Pains therein. Which we have inſerted amongſt the Teſtimonies of the Learned, to let his blindfolded Enemies ſee the high Eſteem and Value, that one of the learndeſt Societies of the World had for him. After this, Sir *George* obliged the World with an Account of the conſequential Practices of the Fanatics, in his *Diſcovery of the Fanatic Plot*, printed at *Edinburgh* 1684. in *Folio*; and in his *Vindication of the Government of King* Charles II. printed at *London* 1691. and reprinted at *Edinburgh* 1712.

As Sir *George*'s great Concern, for the Good and Quiet of the Nation, moved him to be a zealous Oppoſer of theſe wicked Principles and Practices; ſo he was no leſs concerned and zealous in whatever contributed to the Honour of his Nation, of which he gave Four very noble Inſtances.

The Firſt was by his publiſhing of his *Obſervations on the Laws and Cuſtoms of Nations as to Precedency, with the Science of Herauldry, treated as a Part of the Civil Law of Nations, wherein Reaſons are given for its Principles, and Etymologies for its harder Terms*, printed at *Edinburgh* 1680, in *Folio*: And altho' our Nation can veigh with any Nation in *Europe* for their Antiquity, and valour in their Martial Atchievements; yet before this Attempt of Sir *George*'s, there was nothing publiſhed in *Scotland* that could give us a tolerable View of the Precedency that is due to our Princes, and to the moſt of our ancient Families: For as Mr. *Nisbet* obſerves, (*i*) *Herauldry was almoſt quite forgotten by us, and our Heraulds were perfect Strangers to the niceſt Myſteries of their own Art; and this was the Reaſon that many Families aſſumed to themſelves, the Differences which placed them at too remote a Diſtance from the Noble Families of which they were deſcended; whilſt, on the other Hand, thoſe that were of no Birth, aſſumed to themſelves the Bearings of ancient Families.* To remeid this, and to do Juſtice to ſeveral Noble Families of the Nation, Sir *George* publiſhed the Elements of Herauldry: A Science, the principal Deſign of which is to remove theſe Abſurdities, and to point out to Deſcendants their Degrees of Conſanguinity to theſe Families from whence they have ſprung, by which Means; (ſays my Author) both are honoured and diſtinguiſhed from thoſe who impudently aſſume a Rank to which their Birth never gave them a juſt Title; and how well he has acquit himſelf in this, will appear from a Letter of Mr. *Nisbet*'s amongſt the Teſtimonies, whom all that have any Knowledge in that Science, will acknowledge to be a ſufficient Judge in theſe Matters.

(i) Marks of Cadency.

The Second was, by his Defence of our Royal Line and Antiquities. The Devaſtations that had hap'ned thro' the long and bloody Wars betwixt *Scotland* and *England*; and the unaccountable Proceedings of our Reformers in burning and deſtroying all our Religious Houſes and Libraries, had deſtroyed the moſt of our Records;

cords; yet an Overture was made for taking from us what Records remain'd. Whereupon Sir *George* in the Year 1673. publiſhed *an Anſwer to ſome Reaſons printed in* England, *againſt the Overture, of bringing in to that Kingdom ſuch Regiſters as are in* Scotland. But the rudeſt Attack that ever our Nation met with, as to the Antiquity of our Royal Race and the Veracity of our Hiſtorians, was in the Year 1684. from the learned Biſhop of St. *Aſaph*, in his *Hiſtorical Account of Church Government, as it was in* Great-Britain *and* Ireland *when they firſt received the Chriſtian Religion*: To which the next Year Sir *George* made a very warm Reply in his Book, called, *A Defence of the Royal Line of* Scotland, *with a true Account when the* Scots *were governed by Kings in the Iſland of* Britain. This Book was printed at *London* in the latter-End of *June* 1685; but before it was publiſhed, it was animadverted upon by the famous D. *Edward Stillingfleet* (who had ſeen it in M. S.) in the Preface to his Book entituled, *Origines Britannicæ*; to which Sir *George* made a Reply the following Year, under the Title of, *The Antiquity of the Royal Line of* Scotland *farther cleared and defended, againſt the Exceptions lately offered by Dr.* Stillingfleet, *in his Vindication of the Biſhop of St.* Aſaph, printed at *London* 1686. After which, there was no more heard of this Controverſy: But that the Learned Abroad might judge betwixt the contending Parties, both Sir *George*'s Books were put into Latin, and printed at *Utrecht* 1689. And the Prince of *Orange* wrote Two very obliging Letters of Thanks to Sir *George*, under his Hand and Seal, for this Performance: Which Letters are alſo plac'd amongſt the Teſtimonies.

The Third Inſtance of his Zeal for the Honour and Good of his Country, was the founding of the Lawyers Library in 1689. which is now ſtored with Variety of MSS. eſpecially relating to the Antiquity of our Nation, and with all Sorts of Books in all the Sciences, claſſed in that excellent Order which he adviſes in that elegant Latin Oration which he pronounced upon that Occaſion, and which the Reader will find in this Firſt Volume of his Works.

The Laſt Inſtance we ſhall give of his Zeal for the Honour of his Country, is his ſolid and judicious Reflections upon the *Advantages and Diſadvantages that would happen by an Incorporating Union betwixt the Two Kingdoms*, illuſtrated by an Hiſtorical Account of Three Attempts that had been made ſince King *James* the Sixth's Acceſſion to the Throne of *England*; all of which proved ineffectual: And it had been happy for this Nation, had the Fourth had the like Fate.

Sir *George*'s Zeal for propogating of Piety and Virtue, was no leſs conſpicuous than that which he had ſhown in illuſtrating our Laws and in defending our Rights, Privileges, and Honour of our Country: For beſides theſe excellent Moral and Divine Eſſays which he publiſhed in his Youth and which we have mentioned before, the Reader will find in this Firſt Volume *Four Eſſays upon Happineſs*, never publiſhed before. *The Moral Hiſtory of Frugality*, dedicated to the Univerſity of *Oxford*, and printed at *London* 1691; and his *Eſſay upon Reaſon*, publiſhed at *London* 1690, which the learned *Grævius* eſteemed to be ſuch a maſterly Piece, that he put a Preface to it, and publiſhed it in Latin at *Utrecht* the ſame Year, under this Title, *De humanæ rationis imbecillitate*. And how much it was eſteemed by the Learned abroad, will appear by Two Letters of *Grævius* to Sir *George*, amongſt the Teſtimonies.

Now we ſhall take a View of this Great Man in the laſt Scene of his Life.

King *James* the Seventh having ſucceeded to His Brother King *Charles* the Second, who died the 6th. of *February* 1685; that unfortunate Prince was adviſed to abrogate the Penal Laws againſt the Papiſts, which his Proteſtant Subjects, looked upon as the Bulwark of their Religion; and it was noways doubted but that Sir *George*, by his Office, would be obliged to concur with his Royal Maſter, being a Perſon of unſhaken Loyalty: But he knew too well his Duty to his God and his King, to make them claſh together. Being therefore convinced in his Conſcience, that this tended to the Ruine of the Proteſtant Religion, and of his Royal Maſter likewiſe, he did not, like the Children of *Belial*, I. *Sam.* X. 27. *deſpiſe his Royal Maſter*, *but he held his Peace*, and laid down his Commiſſion as King's Advocate, and was ſucceeded in his Place by Sir *John Dalrymple*. But he did not long continue in a private Station; for his Royal Maſter knew his Loyalty, Integrity and Parts too well, to have any real Diſguſt at him. This made the Good King perceive his Error, and reſtore Sir *George* to his former Place of King's Advocate, in which he continued till the Revolution, always firm to his Maſter's Intereſt and the Proteſtant Religion. And now the Presbyterians were reſolved to be revenged upon Sir *George Mackenzie* our Author; and therefore thoſe who aſſum'd the Government at that Time, had a particular Eye over all his Actions: And on the other Hand Sir *George* was reſolved to adhere firmly to the Intereſt of his abandon'd Maſter; and accordingly in the firſt Council that was called in *Scotland*, after the Prince of *Orange*'s Landing, the Propoſal being made, That an Addreſs ſhould be ſent up to the Prince, with the higheſt Acknowledgments of Gratitude for his generous Undertaking of freeing them from Popery, and the Offers of their Service to him for the Future; Sir *George* told them, That this was againſt their Duty and Allegiance to their lawful Sovereign; and therefore adviſ'd them to conſider ſeriouſly what they were going to do: Which put a Stop to it at that Time. (*k*) Not long after this, Sir *George* gave over acting either as Advocate or Counſellor, hoping that the Prince of *Orange* would ſtand by his Declaration, and return again to his own Country, when Matters were adjuſted betwixt the King and His Subjects; and that he might contribute all that was in his Power, to ſo good a Deſign, he wrote his *Memorial to the Prince of* Orange. In the mean Time, a Propoſal was made to that Prince, that Sir *George* and ſeveral others ſhould be declared incapable for the Future of any public Employment; (*l*) but the Prince abſolutely refuſed this, being reſolved to put no Body in Deſpair, till once he knew how they intended to behave for his Intereſt.

Their next Attempt againſt Sir *George*, was to expoſe him to the Fury of the Rabble; for at the Meeting of the Convention of Eſtates, (*m*) there came one to the Viſcount of *Dundee*, who told him, that there were Six or Seven Men in a Houſe, who intended to murder him, and Sir *George Mackenzie*; and if he would procure a Warrant to ſeiſe them, he would bring him to the Houſe where they were: The Viſcount of *Dundee* having acquainted the Duke of *Hamilton* with this, he told the Convention of it; but they abſolutely refuſed to meddle in it, (*n*) but went to other Affairs. Yet notwithſtanding of this, Sir *George* would not quit the Convention, as long as he had any Hopes of doing Service to his Royal Maſter's Intereſt: At length the Convention reſolved to declare the Crown Vacant, but they could not agree among themſelves, after what Manner they ſhould do it; for ſome were for Declaring that the King had *Abdicated* as they had done in *England*, but the moſt violent of them oppoſed this, becauſe it could not be imagined that the King had left *Scotland*. Others were for declaring, That the King had *Forlieted* the Kingdom (an old obſolete Word for a Bird's forſaking her Neſt) but both thoſe were oppoſed by Sir *John Dalrymple*, who told them, That the King by his own unwarrantable Actings, had forfeited the *Crown*; not that he had forfeited it as a Traitor, but only that he ſhould be declared forfeited, which would make all clear, and the Pretenſions that the King's Son, the Prince of *Wales*, might

(*k*) B——'s Memoirs Page 44.

(*l*) *Ibid.* Page 49.

(*m*) *Ibid.* Page 64.

(*n*) *Ibid.* Page 82, 83.

have afterwards. This was violently oppoſ'd by Sir *George*, with all the Rhetoric and Reaſon he was ſo great a Maſter of; but the next Day it was put to the Vote and carried. After which, Sir *George* left the Convention and retired to *England*, reſolving to ſpend the Remnant of his Days at the famous Univerſity of *Oxford*, where he arrived in the Month of *September* 1689. and in a Congregation of the venerable Regents of that Univerſity, he was admitted to ſtudy in the public Library upon the 2d Day of *June* 1690. In the Beginning of the Spring the next Year he went to *London*, where he contracted a Sickneſs, of which he died at his Lodgings in St. *James*'s Street, *Weſtminſter*, near the Royal Palace, upon the 8th Day of *May*; from thence his Body was carried by Land into *Scotland*. And after it had lain ſometime in the Abbay Church of *Holy-rood-houſe* at *Edinburgh*, it was, on the 26th of *June* following, buried with great State and Solemnity, in the *Franciſcan* or *Gray-Friars* Church-yard, in a Vault which he had cauſed make for himſelf, with a *Cupula* of Free-Stone over it. His Funeral was attended by all the Council, Nobility, College of Juſtice, College of Phyſicians, Univerſity, Clergy and Gentry, and ſuch a Concourſe of People was never ſeen upon the like Occaſion. There was faſtned to his Coffin a Plate of Braſs, on which was engraven the following Inſcription.

RELIQUIÆ SACRÆ
D$^{ni}$ GEORGII MACKENZIE A VALLE ROSARUM EQUIT. AURATI,
SIMON. FIL. CALENI COMIT. DE SEAFORT NEPOT.

NATUS ÆRÆ CHRIST. ANNO M.DCXXXVI.

PER ANN. XXXI IN FORO SUPREMO CAUSARUM PATRONUS,
AB ANN. MDCLXXVII. REGIUS ADVOCATUS,
REGIBUS CAROLO SECUNDO ET JACOBO SEPTIMO.
A SANCTIORIBUS CONSILIIS.
PATRIÆ DECUS, RELIGIONIS VINDEX, JUSTITIÆ PROPUGNATOR,
JURIS REGII ASSERTOR STRENUUS ET INDEFESSUS.

COLLEGII JURIDICI, (SIVE JURISPRUDENTIAM SUMMAM,
SIVE ELOQUENTIAM EXIMIAM, SIVE IN INSTRUENDA
JURISCONSULTORUM BIBLIOTHECA CURAM, ET
LOCUPLETANDA MUNIFICENTIAM SPECTES)
ORNAMENTUM IN PRIMIS ILLUSTRE.

COMITATIS EXEMPLAR,
ERUDITORUM MÆCENAS ERUDITISSIMUS,
OMNIBUS CHARUS.

SI PERDUELLIUM COLLUVIEM EXCIPIAS
A QUORUM VIOLENTIA PATRIAM PATRIÆQUE PATREM
CUM ORE, TUM CALAMO ACERRIME VINDICAVIT,
VIRULENTIAM JURE ET JUSTITIA TEMPERAVIT,
FEROCIAM CATIONIS VIRIBUS RETUDIT
AC TANTUM NON DOMUIT:

MONARCHIÆ GENIUS TUTELARIS.

FAMA, ELOQUIO, MORUM INTEGRITATE, FACTIS ET SCRIPTIS CLARUS.
ECCLESIÆ, REGI, REIPUBLICÆ, LITERIS ET AMICIS VIXIT.

M. MAII DIE VIII. A. MDCXCI.
IN D$^{no}$ OBIIT DESIDERATISSIMUS.

The Commendatory Part of which Inſcription runs thus in *Engliſh*. " He was " the Glory of his Country, the Champion of Religion, the Patron of Juſtice, the " ſtrenuous and undaunted Aſſertor of the Royal Prerogative; he was a ſhining Or-

“nament of the Faculty of Advocates, both for his perfect Knowledge of the Law, and his eloquent Pleadings; as alſo for his great Pains and Munificence beſtow'd upon the Library there. He was a Perſon of ſingular Humanity, a conſtant Encourager of Learning and learned Men, had the Love of every Body except the factious and ſeditious Sort of People, whoſe Rage he oppoſed with his Tongue and Pen, in Defence of his Prince and Country; curbing their violent Spirits with the ſtrict Reins of the Law, and forcing them for the moſt Part to contain themſelves within the Bounds of Duty and good Order. He was zealouſly affected to Monarchy, entirely devouted to the Service of the Church, his King, his Country, and all his Friends; he lived in great Reputation for his Eloquence, Sincerity, ſtrict Virtue, and learned Works, and was much lamented at his Death, which happened on the 8th of *May* in the Year 1691.

Many other Epitaphs and Poems were compoſed upon him, but I ſhall only take notice of Three, which have obtained an univerſal Approbation: The Firſt is a *Latin* Epigram, placed beneath his Picture in Taleduce in 1686. by *Thomas Gleg* Doctor of Medicin, and one of the beſt Poets of his Age.

Pingere vis quâ fronte *Cato*, titubante Senatu,
  Aſſeruit Patriæ jura verenda ſuæ?
Pingere vis magnus quo *Tullius* ore ſolebat
  Dirigire attoniti linguam animamque Fori?
Pingere vis quantâ *Maro* majeſtate canebat
  Et quali tetigit pollice *Flaccus* ebur?
Pinge MAKENZÆUM, Pictor; namque altera non eſt
  Quæ referat tantos una Tabella viros.

Thus engliſhed by Mr. *Alexander Cuningham* ſometime Profeſſor of Philoſophy, in the Univerſity of *Edinburgh*.

Painter if thou would'ſt draw how *Cato* ſtood,
  Fix'd in Defence of's Country's Laws and Good:
If thou would'ſt draw Great *Tulley*'s Eloquence,
When he inſpir'd the Bar with Life and Senſe?
If thou would'ſt draw *Maro*'s Majeſtick Lays;
Or with what Art and Genius *Flaccus* plays?
Painter MACKENZIE draw, none others fit,
To repreſent ſuch Men, ſuch Senſe, ſuch Wit.

The Second is by *Archibald Pitcairn*, Doctor of Medicin, my Learned and Worthy Friend, ſo well known in the Republick of Letters by his incomparable

Writings, wherein he has ſhown a vaſt Extent of Genius, in all the moſt valuable Parts of Learning.

NON hic *Cæſaræi* ſurgunt monumenta ſepulchri;
Sedibus his numen *Cæſare* majus ineſt.
Ille *Caledonii* Regni regumque Patronus,
Quem Patria indigitem credidit eſſe Deum,
Qui ſua tot victor Reges in regna reduxit;
Qui cives quæ ſunt regia jura docet,
Occidit & tumulo gaudet MAKENZIUS iſto
Iſta hominem moles ſola fuiſſe docet.
Ergo, *Caledoniæ* luimus perjuria turbæ
Nec prodeſt toties tamque fuiſſe pios!
Scilicet everti voluerunt *Grampia* Divi
Regna, nec Heroum tot ſupereſſe Genus
Aſpera jam magnum rapuerunt fata *Locartum*
Ultimus *Aſtreæ* filius ille fuit.
Sed non illa animos, non fortia pectora clades
Perculit; eſt tanto par medicina malo:
Eſt *Gramus* qui jura armis, qui milite leges
Protegat; haud utinam prodigus ipſe ſui.
Ah! nimium *Gramæa* potens Dis viſa propago;
Exitio virtus te tua, *Grame*, dedit.
Jam nobis ſuperunus erat MAKENZIUS unus
Eloquio patrias qui repararet opes:
Mors illum tamen atra tulit, jacet artis & æqui
Oblitus, noſtri fama, decuſque fori.
Quo rapto, poſt fata *Locarti* fataque *Grami*,
Jura ſilent, torpent claſſica roſtra vacant.

The Laſt is an *Engliſh* Poem, the great Beauty of which, conſiſts in the borrowed Thoughts of this unimitable Poem of Doctor *Pitcairn.*

NO *Cæſars* Tombs expoſed here to View,
But what claims more than e'er was *Cæſar*'s Due.
The Patron of our Country and our Kings
Deſerveth more, than what their Lawrels brings,

And which of all the *Cæſars* e'er did own,
He reſtor'd Forty Monarchs to their Throne;
And yet this Truth can never be diſown'd,
That this was done by Him, who's here entomb'd:
Yea, He the Rebels taught their Duty too,
And cruſh'd their Pow'r, when Reaſon would not do;
And had not His frail Life been but a Span,
We had been tempt to think Him more than Man.
  Well then, ſince the relentleſs Doom is ſpoke,
And there's no mortal Pow'r can ward the Stroke;
*Scotland* muſt ruin; 'tis the ALMIGHTY's Will,
All Nature joins His Orders to fulfill.
Penſive we ſit, and ſtill ſome fatal News
The reſtleſs Tide of ſullen Grief renews:
Says one unlucky Poſt, Great *Lockhart*'s dead,
And all our Law and Juſtice with him fled.
Peace! we reply'd, there's One yet ſtill behind
Who with his Sword can injur'd Laws defend.
But ſays a Second, brave *Dundee* is gone,
Expiring Juſtice does his Loſs bemoan;
Sad was the Stroke! and yet One did remain
Who with His Rhetoric could our Rights maintain.
Till this laſt Meſſage told, MACKENZIE's dead,
And now there's none to *Judge*, to *Fight* or *Plead*.

Having given a ſhort Account of the Author's Life, and ſhown how far the Poets have done him Juſtice, we come now to his Character.

His Character.

To collect all the different Characters given him by the foreign Journaliſts, and many others of his learned Acquaintances and Friends, both abroad and at home, would ſwell this Account of him to too great a Bulk; beſides it would appear altogether needleſs, after the univerſal Approbation of his real Worth and Merit by the Univerſities of *Oxford* and *Bourges*, and the learn'deſt Lawyers of his Age; all which Teſtimonies are here publiſhed from their Originals. Yet that I may do Juſtice to thoſe private Men who have, in their learned Works, expreſſed the great Eſteem they had for Sir *George*, I ſhall, from them, conclude with this brief Character of him.

He was a Gentleman of a pleaſant and uſeful Converſation, but a ſevere Oppoſer of vicious and looſe Principles in whomſoever he found them. He was a great Lover of the Laws and Cuſtoms of his Country, and from his many excellent Writings upon them it appears, that no Man underſtood the Law of Nature, the Law of Nations, the Civil Law, and the Laws of his own Country, better than he did. He was regardleſs of Riches and Popularity, frugal in his Expences, and temperate in his Diet, being a great Enemy to all Sorts of Extravagancies and Debaucheries. He was a faithful Friend, a loyal Subject, an able Stateſman, a conſtant Advocate for the Clergy and Univerſity, a zealous Defender of Piety and Religion, in all Companies and on Occaſions, againſt the Attacks of Atheiſts, Deiſts, and all Sorts of Sectaries that differ'd from the Church of *England*, of which he was a true and faithful Son. His Abilities in his Profeſſion were great, being a great Maſter of Eloquence, as it appear'd in all his Pleadings at the Bar, which were conſtantly accompany'd with all thoſe hidden and wandering Beauties, that never fail to charm and captivate the Affections of Mankind, and which he never exerted but with the greateſt Integrity, being a Perſon of ſtrict Honour and Juſtice in all his Actions. His natural Parts were extraordinary good, which he improved by indefatigable Pains, and made himſelf throughly acquainted with all the beſt Writers ancient and modern. The Gayety of his Fancy, and Fertility of his Invention, were corrected by ſo exact a Judgment, that he is copious upon all his Subjects, and yet very cloſe and pertinent; all his Thoughts are clear and coherent, and his moſt ſerious Diſcourſes have ſuch Variety of curious Remarks and Obſervations, as render them very pleaſant and diverting.

His *Virtuoſo*, or *Stoic*, ſhows what ſolid Fruits his green and tender Years were able to produce; for he was not Five and Twenty Years old when he writ it. 'Tis wonderful to find ſo young a Perſon make Choice of ſuch grave and weighty Subjects, to employ his Thoughts upon, and to treat them with ſuch Variety of Learning and Exactneſs of Judgment: His Obſervations upon Divine and Human Things are far beyond what one would imagine him capable of making at that Age. He was acquainted with moſt of the learned Men in *Britain*, particularly with thoſe of the Univerſity of *Oxford*, and of the *Royal Society*, that were alive, whilſt he was reſiding in *England*; nor was he leſs famous amongſt the learned Men abroad, eſpecially amongſt the learned Lawyers in *France* and *Holland*. In one Word, as he was a great Ornament to his Country, ſo he was a great Honour to the Noble Family of which he was deſcended; for as the excellent Author of Biſhop *Bull*'s Life obſerves, (a) *Let a Family be never ſo conſpicuous, the Learning and Piety of any Branch of it, addeth more to its Luſtre and Glory, than it is capable of giving by any Blood it can convey.*

(a) Biſhop *Bull*'s Life by Mr. *Nelſon* §. 2.

He was Twice honourably married; Firſt to a Daughter of *Dickſon* of *Hartry*'s, one of the Senators of the College of Juſtice, with whom he had Three Sons and Two Daughters; the Sons died in his own Lifetime unmarried, his eldeſt Daughter (*Agnes*) was married to the Sheriff of *Bute*, whoſe Predeceſſor Sir *John Stewart*, (commonly called the *Black Stewart*,) was Son to King *Robert* II. to whom ſhe bore the preſent Earl of *Bute*, and one Daughter, married to the Viſcount of *Garnock*. His other Daughter (*Elizabeth*) is yet alive, and has been Twice married, firſt to *Cockburn* of *Langton*, a Gentleman of an ancient and honourable Family, and now to Sir *James Mackenzie* of *Royſton*, one of the Senators of the College of Juſtice, and Son to the Right Honourable the Earl of *Cromerty*, to both which ſhe has had ſeveral Children. His ſecond Lady was a Daughter of the Laird of *Pitcur*'s, in the County of *Angus*, a Gentleman of an ancient Family; a Lady of great Piety and Virtue, who, amongſt the many other excellent Qualifications with which ſhe was endowed, diſtinguiſhed herſelf by the Love that ſhe ſhow'd to the Memory of her Huſband, which ſhe expreſs'd in her Affection to all his Relations, a Quality that is rare to be found in this degenerate Age. This Lady had to him Two Children, a Son and a Daughter, both which died unmarried;

married. But the immortal Productions of his Mind, will laſt longer than all thoſe fading and tranſitory Enjoyments of a numerous Race. The Care and Labour of the *Printer* of this beautiful Edition of them, cannot be too much commended; for he has taken all imaginable Pains to have them accurately reviſ'd, by thoſe who were proper Judges of his Productions, in the different Sciences in which they are wrote, and obliged the Readers with an agreeable Type and Paper.

## *An* INDEX *of ſome Illuſtrious Caſes lately controverted in* Europe, *more eſpecially in* Britain, *upon which Sir* GEORGE MACKENZIE *deſigned to write; found amongſt his Manuſcripts, and writ with his own Hand.*

I. WHETHER the General Aſſembly of *Scotland* could, in *Anno* 1638, refuſe to riſe, when the King, by His Commiſſioner, adjourned them?

II. WHETHER the petitioning the King for a free Parliament, as in the Lord *Balmerinoch*'s Caſe, was Treaſon?

III. THE Caſe of the Ship-Money in *England*.

IV. THE Earl of *Strafford*'s Caſe of Cumulative Treaſon.

V. WHETHER *Scotland* might ſeek Aſſiſtance from *France*, againſt King *Charles*? This is a general Caſe which takes in Queen *Elizabeth*'s aſſiſting *Holland*.

VI. QUEEN *Mary*'s Death, how far lawful?

VII. IF the Biſhop of *Roſs*, her Ambaſſador, could be lawfully impriſoned?

VIII. THE *Regalia* of *France* in Benefices.

IX. THE Ambaſſador's Franchiſes at *Rome*.

X. HOW far Free-Quarter is lawful, when Neceſſity urges it in Time of Peace, as in the *Weſtern* Shires, *An.* 1678?

XI. IF a Proclamation diſcharging then any Man to come to *England*, was lawful?

XII. HOW far the King could Name Magiſtrates, when the Magiſtrates immediately in Office would not execute the Laws? Or, if he has a Cumulative Juriſdiction with Heretable Magiſtrates, ſuch as Sherriffs, *&c.*?

XIII. HOW far King *Charles* was obliged to obſerve Acts, and a Promiſe extorted from him, to own the *Covenant*?

XIV. HOW far the *Covenant*, without that King's Authority, was lawful?

XV. IF the taking from him the Militia, was lawful? And if it was lawful to take from him the Nomination of Judges, Privy Councellors, *&c.*?

XVI. IF it was Treaſon for *Haddo* to fortify his Houſe againſt the Eſtates, by a Commiſſion from King *Charles* I.?

XVII. HOW far Compliance in *Argyle*, with *Cromwel*, was Treaſon, after *Cromwel* was ſettled? And how far the aſſiſting him againſt the *Hollander* was Treaſon?

XVIII. IF theſe Noblemen, who borrow'd Money from private Perſons, on private Security, for the *Covenant*, ſhould not have been made liable?

XIX. THE Earl of *Portland*'s Caſe: How far a Noble *Hollander*, taking a Title in *England*, and ſwearing Allegiance there, ſhould ſit in their Convention?

XX. PRESIDENT *Spotiſwood*'s Caſe of Free-Quarter, together with the Free-Quarter claimed by the Rebels at *Pentland*-Hills, *Anno* 1666.

XXI. THE Debates concerning the *Engliſh* Teſt. And,

XXII. The Debates concerning the *Scots* Teſt, and Penal Laws; how far the taking away of theſe Laws could be ſupplied by Equivalences?

XXIII. Whether the Diſſenters ſhould have taken Indulgences, according to their own Principles?

XXIV. The Diſpenſing-Power: How far it was lawful for the Biſhops to concur in calling in the Prince of *Orange* to the City?

XXV. The Nature of Abdication: And if —— did legittimate the calling of a Convention; and the Difference between Conventions and Parliaments in ſuch Caſes.

XXVI. The Difference between a King *de Jure*, and *de Facto:* What makes a King by Conqueſt?

XXVII. Whether a Convention can be turned into a Parliament?

XXVIII. Whether Perſons forfeited, can be Members of ſuch Conventions or Parliaments, until they are reſtored?

XXIX. How far Inſolencies committed by the Rabble in ſuch Interreigns, to be allowed?

XXX. The Caſe of Incorporations.

XXXI. Whether a Parliament can reſtore thoſe who riſe in Inſurrections (as at *Pentland*-Hills) to the Prejudice of a Third Party?

XXXII. The Bill of Excluſion, how far lawful.

XXXIII. How far that Act was lawful, that provided, if the King was killed, they ſhould revenge his Death upon the Papiſts?

XXXIV. How far theſe of another Religion can be excluded from their Birthright, and from ſitting in Parliaments?

XXXV. Whether the Sons of Kings ſhould be excluded, tho' others be?

XXXVI. Whether Kings Commiſſioners ſhould take Oaths and Teſts?

XXXVII. Whether, when an Office is turn'd into a Commiſſion, all in the Commiſſion have the ſame Power with him into whoſe Place they are ſurrogate, even *quoad prætereita*, as in the Caſe of *Torrington*?

XXXVIII. Whether *Quakers* ſhould be diſpenſed with as to Oaths?

XXXIX. Whether thoſe who have not been acceſſory to Revolutions, may take Oaths, when the Repreſentatives of the Country have ſubmitted to it?

XL. The Caſe of the Prince of *Wales* being lawful or unlawful.

XLI. Whether the Duke of *Monmouth* might have been legittimate by the Depoſitions of Two Witneſſes, after his Father diſown'd him, and declar'd he was not married to his Mother?

XLII. Whether Doctor *Burnet* might have transferred his Allegiance?

XLIII. Whether Judges being dead, their Children may be purſued *pro damno & intereſſe*, becauſe they judged illegally in a Criminal Caſe, as in that of *Argyle*?

XLIV. Whether there can be Treaſon againſt a Convention of Eſtates?

❧

THE

# *The* TESTIMONIES *of the Univerſities of* Oxford *and* Bourge *concerning the Author, with the Letters of ſeveral Eminent Perſons to him, referred to in the Author's Life.*

*Celſiſs.* MACKENZEE,

ACTIONES quas Advocatis Seculi tui dediſti non minorem in me Voluptatem excitarunt, quam Clientibus tuis Victoribus Solatium ſolebant afferre. At quod Clientibus rarius Uſu venire ſolet plures ego deſidero, reliquas edi vehementer peto, & quod inſatiabilis Animi vitium eſt, fidenter expecto. I.

ALCIATUS in Declamatione quam dedit *Minutio* ſuo, ex unica facti ſpecie tentavit quid in hoc Genere poſſet, tu Rem ipſam confeciſti: Quæcunque recolit is in *Burdeloto* aliiſque per totam *Galliam* ſelectiſſimis Viris, in te uno conveniunt omnia: Actiones Forenſes omnes, innocens, doctus, candidus, ab ipſis Juris Naturæ Fontibus ubique exorſus, ſumma cum Humanitate ornaſti; Leges civiles unde proh dolor! deflexæ ſunt, rectæ Rationis & Facundæ Inſtaurator alter, verecundæ revocas. Neque enim credendum eſt Homines Spurcitiem tantam è negotiis contracturos, ſi More tuo arguerint, tuoque Eloquio uterentur.

JURISCONSULTORUM veſtratium Characteres à te etiam mirâ Sagacitate conſcriptas gratanter accepi, & ad inſtar Theſauri repono, credibile eſt ipſos ſe minus noviſſe, Icones dico: Ipſorum enim nonnullos, tibi ſimillimos videre videor; cum enim quæ in unoquoque fuerunt ἰδίως optima, voluiſti diſcernere, probe noviſti ea, qnæ non minus tua ſunt, quam eorum. Nervosè omnia, attamen venuſtè delineata ſunt; ſingulos cæteris aliqua ex Parte impares pareſque eſſe conſpicio: Si quando Prælii Aſpectus fuerit appetendus, tum certe cum viri tanti inter ſe committant maxime. Aciem autem inſtructam hanc ut addi cures, rogo atque rogo.

HOC Pacto Aulam exhibebit *Scotia* qualem *Roma* non poteſt nova. Quales enim Judices pedanei ſi cum ſacri Palatii Comitibus conferantur, tales quæ ubique ferè habentur Informationes ſi cum tuis componantur. Tuo quidem More poſtulantibus Advocatis, magnos item bonoſque Viros Judices eſſe, ſanctas Leges, divina Judicia, nec plus juſto commoveri reos, eo ipſo ſtatuendum eſt; neminemque unquam ad Vallem *Joſophat*, a tanto Judicio appellaturum plane confido. Ut unà ſtemus ex Parte Advocati & Domini noſtri *Jeſu Chriſti* in Die illo longiſſimo, det Deus Opt. Max. *Amen.* Sic enixe precatur Amicitia tua cohoneſtatus, Beneficiis auctus, &

*Excellentiæ tuæ ſtudioſiſs.*

*Ex Ædibus meis* Hanburgi,
Mart. 27. 1691.

THO. BOUCHIR, *LL. D.*
*in* J. C. *Pr. Reg.* Oxoniæ.

LIBER cui Titulus eſt, *Idea Eloquentiæ Forenſis*, non ſolum Eloquentiæ, ſed nativam ſui Auctoris facundiſſimi Oratoris incomparabilis Juriſconſulti graviſſimi *Scotiæ* Regis, & Regni Advocati catholici nobiliſſimi D. GEORGII MACKENZEI, a *Valle Roſarum*, Imaginem univerſo Orbi adumbrat, non Ære fuſam, non Marmore exculptam, non minio ſed perpetuo duraturis Ingenii coloribus dedelineatam. Hic ſiquidem Auctor non tantum bene dicendi præcepta, ſed & exempla exaravit; non tantum quomodo ex arte orandum eſſet oſtendit, ſed ipſe perite, & ex arte oravit: cæteris qui idem argumentum tractaverunt tantò præſtantior, quanto præſtantiora & potentiora ſunt Exempla quam Præcepta, vera verba togæ ſequitur, qui non vanam & futilem, quæ rerum iners & vacua ſolo vocum modo auribus lenocinatur, ſed vividam, maſculam, ſucci plenam, politioris litteraturæ, peritioris juriſprudentiæ dotibus refertam facundiam colit, quam non ſola Patrii & *Scotici* juris, cujus apprimè *Patricius* & cauſas agens Callens eſt, ſed *Romanæ* Nomotheſias, quæ omnium Legum fons eſt & origo luminibus exornat & illuſtrat; imò cum ad juris Gentium & naturalis æquitatis Præcepta peroravit, non unius Gentis & Nationis, ſed omnium & majorum Gentium ſe juriſconſultum eſſe probavit; dignum cui univerſi orbis juriſconſulti, bona ac fauſta omnia apprecati ſuffragentur: Quod cordatè & ex animo hoc publico Inſtrumento faciunt, Anteceſſores & aggregati Doctores Univerſitatis *Bituricenſis*, Sexto Kalendas *Decembris* 1684. II.

DE LA CHAPPELLE, *Anteceſſor Primicerius*,
LE CLERC.
TULLIER REBEYRE.

DU BARMONT PETIT.
DE LA THAUMASSIER.
DE BEAUVOIR.

## VIRO NOBILISSIMO D. *JACOBO LESLIEO.*
## S. P. D.
## *JOHANNES VOET.*

FELICEM tuum ex *Gallia* in Patriam Reditum eſt quod animitus tibi gratulor, Vir Nobiliſſime, pariterque Gratias agam, quod longiore Terrarum ac Marium Intercapedine remotus, non dedigneris Conſuetudinis noſtræ non ita pridem inter nos cultæ meminiſſe; quam profecto optaſſem diuturniorem, ſi Deus & Res tuæ ſiviſſent: Sed cum te aliò nunc tua tuique vocarint, nunquam deſinam Mente memore revolvere Horularum Spatia, quæ in mutuis Amicitiæ non fucatæ Speciminibus exhibendis tranſegimus. Scripta mea academica non diſplicuiſſe ampliſſimo conſultiſſimoque Viro D. *Georgio Mackenſeo* Syndico veſtro, & gaudeo & non non inter poſtrema Felicitatis pono. Sed dum meum de Viri illius ampliſſimi *Idea Eloquentiæ forenſis hodiernæ* Judicium expetis, Rem póſtulas meâ quidem Opinione ſupervacaneam. Quis enim non laudet, comprobet, atque miretur traditam in eâ accuratam pro Tribunali dicendi ac perorandi Methodum, Styli non affectati ſed vere *Romani* Elegantiam, nervoſas Periodos, graves Sententias, Ver- III.

borum denique ac Rerum prudentem Delectum. Ex quibus omnibus, ipſius Authoris Eruditio non vulgaris, Acumen Ingenii, & Rei literariæ, ac præcipuè Eloquentiæ forenſis ulterius promovendæ Deſiderium laudabile elucefcit clariſſimè: Sic ut nullus dubitem, quin, qui poſt percepta Juriſprudentiæ Principia, huic Viæ inſtiterint, *glorioſæ Vocis Munimine laborantium, Spem, Vitam ac Poſteros ſint defenſuri*, ſibique paraturi Honorem, Laudem, Favorem & Prœmia ampliſſima. Hæc meæ Sententiæ Summa eſt, Vir Nobiliſſime, interim vale, & me amare perge. Dabam *Lugduni Batavorum* 18. *Octobr.* 1684.

## NOBILISSIMO DOMINO *ANDREÆ BRUCE*
### *ULRICUS HUBER* S.D.

IV. LEGI cum eximia Voluptate Libellum Regii apud vos Advocati, quo *Ideam Eloquentiæ Forenſis hodiernæ, & Specimen Actionum ex unaquaque Juris apud* Scotos *uſitati Parte complexus eſt*, quem tu, Nobiliſſime *Bruce*, mihi legendum, atque etiam ut tibi viſum loqui, cenſendum, Judicioque proſequendum ab Auctore rogatus, obtuliſti. Omnium primum ea Re mihi non parum placuit, quod & *Ideam Eloquentiæ* & Actiones ipſas non ad Regulas veterum, notorumque Magiſtrorum; ſed ad Formam Indolemque Trituræ Forenſis, qua nunc utimur, inſtituendam putarit, neque Superſtitione Præceptorum contra Naturam Cauſarum ſe trahi paſſus eſt. Dein quod animadvertere mihi licuit, eum pro Fundamento Studiorum Actionumque ſuarum in ipſo Foro habere Legem & Rationem, ſine Turba, ne dicam Plauſtris Doctorum & Auctoritatum. Neque tamen non eo Genere ſcribendi uſus eſt, quin appareat ei neque Regulas Artis, neque Doctorum Sententias eſſe incognitas. Eoque pertinet, quod ait in Meditationibus Operum primo id agendum, ut quiſque de ſe experiatur quid efficere poſſit, antequam ad aliorum Scripta conſulenda ſemetipſum diſtrahat. Quum hæ Rationes cum eo More Inſtitutoque conveniant, cum alias ſœpe, tum in Oratione cui Titulum feci *Lex & Ratio*, quæque meis Auſpiciis modò editis inſerta eſt, expoſui. Præterea Delectus Cauſarum non poterat eſſe melior, nec ad inſtruendum ſimul & delectandum aptior. Tractat eas terſè, perſpicuè, breviter & validè. Poteram deſiderare Copiam aliquanto majorem in dicendo; ſed rurſus intelligo, ſi prolixior fuiſſet, fore plures qui Tædio abſterrerentur, quam nunc Compendio offendantur. Quod autem in omni Diſciplinâ Eruditionis, maximeque in Juris-Prudentiâ præcipuum eſt, id in *Maccenzeo* veſtro mirificè elucet, rectum & acre Judicium, quod cum Eloquentiâ, Peritiâque Juris & Fori conjunctum, omnibus Numeris abſolutum facit Advocatum. Exiſtimo, ſi porrò det Operam, ut Cauſas non vulgares, eo More, Styloque, ut heic incepit, exequatur, fore ut omnium Eruditorum præ cæteris autem *Minervæ* Calculos ſit meriturus. Me ut in Amicorum ſuorum Numero habere velit, eumque Verbis meis ſalvere jubeas, officioſe rogo. Vale Nobiliſſime & humaniſſime Domine. *Franekeræ* 24. *Septembr.* CIↃ IↃC LXXXII.

## NOBILISSIME ET CONSULTISSIME DOMINE,

*Domine Obſervandiſſime,*

V. PRÆSENTIUM Exhibitor, Amicus tuus, ut video, ſingularis, reddidit mihi Literas tuas, una cum *Ideâ Eloquentiæ Forenſis hodiernæ*, à Te, Anno 1681. *Edinburgi* Typis publicatâ. Teſtimonium id perennis Tui & Sole meridiano clarioris Affectus erga me, tot Annis totis centenis milliaribus abſentem; eundemque non fervere modo continuò, ſed vel maximè flagrare; ſi enim vel Mutationem paſſus fuiſſet aliquam, non potius creviſſet, nec mei utique memor fuiſſes, nec Eloquentiam tuam mihi tranſmiſiſſes. Laudo ſanè Conſtantiam tuam, gratoque eam agnoſco Animo; nec agnoſco ſaltem, verùm & deprædico, nec poſſum non omnibus illam demereri Modis: Tu modò jube, quæ à me fieri velis, & reperies promptum prompti Amici Obſequium. Nec minus collaudo, approboque (ſi modò Approbatione meâ indiget) *Ideam* hanc tuam: ita enim decet Juriſconſultum Supremæ Inſtantiæ non ſolum deciſa ſupremi Tribunalis obſervare, ſed curare etiam, ut ab aliis obſerventur. Utrumque præſtas hâc Editione tuâ. Simile quid jam in *Teutonicâ*, ſeu Patriâ tuâ Linguâ feciſti, cum Anno 1673. Tuas coram eodem *Scotiæ* Supremo Tribunali, ab Anno 1661. habitas forenſium Actionum Orationes ederes, mihi etiam *Edinburgi* degenti donatas. Sed cui, præter *Scoticam* Linguam intelligenti? Hunc autem Orbi loquens; indèque Laus major Te, Patriamque tuam Gloriam ſequitur. Utinam & continuet continuò! imò continuabit, ſi uti cœpiſti pertexeris; quod animitùs voveo, & de cætero, quoad Spiritus meos rexerit Artus, permaneo tuus,

*Vir Nobiliſſime & Conſultiſſime,*

GEDANI Die $\frac{11}{12}$ *Auguſti*,
Anno 1683.

*Intimè addictiſſimus & obſervantiſſimus*
*Amicus & Servus*
JOANNES HIXDORFF JCtus.

* * *

VI. ILLUSTRISSIMI *Georgii Maccenzii* à *Valle-Roſarum* Regii apud *Scotos* Advocati *Ideam Eloquentiæ Forenſis hodiernæ* legi cum non mediocri Voluptate. Verè Idea eſt ad juſtam atque excellentem Speciem efformata, eòque utilior quò Præceptis Exempla ſubjicit, non ex Declamatorum Scholiis conficta, ſed ex ipſis Rerum hauſta Argumentis, atque ad omnes Juris Partes accommodata: in quibus inter Orationis Lumina, fluentes per ſe nec affectatæ nitent Ingenii Scintillæ: Regnant verò ubique, ut par eſt, Magiſtra Ratio, Eruditioque Civilis. Reſpondet Operis Dignitati Elegantia *Latini* Sermonis, patrio non immeritò antepoſiti, quippe qui licet apud Vulgum quidem mortuus, vivit vivetque ad Seculorum Finem inter Doctos, veræ nimirum Gloriæ Diribitores. Optandum itaque ut ſimilium Acceſſione, & *Scotia*, & Orbis reliquus locupleretur: Sic cenſebam *Lutetiæ Pariſiorum Idibus Septembr.* Anno Chriſtian, MDCLXXXVIII.

J. DOUJAT S.
*Anteceſſorum* Pariſienſium *& Regiorum*
*Profeſſorum Primicerius, Comes.*

Honorabili plurimum Domino, Domino *GEORGIO MACKENZIE*, Equiti Aurato,
Regio Regni SCOTIÆ Advocato.

*Illuſtriſſime & Clariſſime Domine,*

CUM Regio Principum Jure & Majeſtate nihil ſit ſanctius, utpote quod iis inviolatis & Regni Gloria & Subditorum Pax unicè conſerventur, facilè poſſis credere quam Acceptiſſimos Accademiæ, quæ Regi ſemper fida gloriatur præſtitiſſe, Honores contuleris, cum veſtras Regiæ Cauſæ Vindicias nobis non tantum tranſmiſeris, ſed & in publicum ſimul, iniquo hoc Tempore vocaris Patrocinium. Si quæ enim (poſt probatam Bellis civilibus Fidem, Ignibuſque traditos impios Libellos, de quibus Originem & Vires ſumpſerat Perduellio) ulterioris Officii Partes ſupererant, eas omnes veſtro explevimus Beneficio, qui Cauſam Principis unà videmur defendiſſe, quod doctiſſimi Laboris effeceris Participes. Qui ipſa Fundamenta penitus convellens quibus, inimica ſemper Regibus, Plebis improba innititur Cauſa, de ipſa Seditione vel bellica potiorem reportaſti Victoriam: Cum enim Armis Miles Rebelles cogat in Tempus tantum Gladios recondere, Tu, invictiſſimæ Rationis Viribus, imperas nè iterum ſtringantur. Languet quidem tantum quæ debellatur, non extinguitur, Seditio, devictumque licet humilis & abjecti Vulgus Imperii patiens videatur, vel minima elucente Spe Res novas continuò molitur: Adeò ut Regias Partes veriùs ſuſtentet qui ſuadet quam qui cogit parere, Rebuſque Imperii honeſtiùs conſulat qui inconcuſſæ Fidei divinam ſtatuens Originem, Reverentiam Principum non Metum incutit, Regibuſque ex Officio docet, non Re, vel Tempore turpiter inſervire. Hinc fit ut quamvis *Scotorum* Virtuti plurimum debeatur, quod Rebelles bis profligaverint, tibi plus ſit referendum quod *Buchananum* & *Miltonum*: Quorum licet de Scriptis derivatum plurimas Regni Partes Venenum infecerit, Tu tamen, graſſante diù Malo, tam felici tandem Remedio ſubveniſti, ut Conſcientiæ, Rationi, Legibuſque Regni antiquiſſimis neceſſè eſt renuntient ſi qui in poſterum ſint qui, in Deum Regemque unà Rebelles, audeant movere Arma. Quod itaque noſtra ex Parte unicum poſſumus, inter Libros æternæ Memoriæ ſacros, veſtros Academia reponet, Honores Autori exoptans quos ipſa nequit conferre, ſoliùſque poſſit Principis Munificentia: Nimirum ut penitùs fractis per te Fanaticorum Viribus, ſentiat Rex quantum poſſit, vel unius Subditi literata Fides, & ipſe experiaris quantum mereatur. Hæc eo quo mittimus Animo accipias, & inter Affectus Indicia æſtimes quo Te proſequitur, VII.

*Illuſtriſſime Domine,*

E Domo noſtræ Convocationis,
Vto. Id. *Junii*, MDCLXXXIV.

*Nomini Tuo Addictiſſima,*

UNIVERSITAS *OXONIENSIS.*

❧

## *To Doctor* GEORGE MACKENZIE.

SIR,

THERE's no Man readier than myſelf to give all Honout and Reſpect due to the Merits of your Friend the worthy Sir *George Mackenzie* of *Roſehaugh*, Their Majeſties *Charles* II. and *James* VII's Advocate, a faithful and loyal Servant all his Life; who was an Ornament to his Country, and gave Luſtre to his Name and Family, by his many Virtues and eminent Qualities ſcarce to be found in one but himſelf, which do and will appear in all Ages, by his many learned Works, and Merit to be perpetuated by the politeſt Pen. VIII.

TWO of Which, his *Precedency*, and *Science of Herauldry*, relate to my Profeſſion of Armories: The Firſt being ſomewhat extrinſic, containing Obſervations upon the Laws and Cuſtoms of Nations, as to Precedency of Sovereigns, Nobles, and others in high Offices ſo well done, with many Noble Queſtions of Law there learnedly diſcuſſed, to the Satisfaction of all; that I ſhall ſay no more of it.

AS for the other, his *Science of Herauldry*, I ſhall, with all Brevity, give my Opinion (it being your Deſire) of its Worth and Parts, as it was the firſt Work of that Nature publiſhed with us, adds no leſs to Sir *George*'s Honour than his others do, being the beſt done Syſtem (conſidering it altogether) of its Kind yet extant, and is preferable not only to ſuch publiſhed in *England*, but in other Countries. *Meneſtrier*'s Works of that Nature in ſome Parts may be excepted.

SIR *George* methodically begins with the Origin and Definition of Arms, their ancient Uſe on Seals, with the Power and Right of granting and carrying them in his Firſt and Second Chapters, where, and all along in his other Chapters, he judiciouſly endeavours, as a Lawyer, to reconcile the Theory and Practice of Arms to the Civil and Municipal Laws. And as an Antiquary and Herauld, he treats of the Shield, Tinctures and Furs, with ſome of the Partition Lines, and their Attributes uſed in Herauldry; where he juſtly diſapproves of the fantaſtic Blazons of the *Engliſh* by other Terms than theſe univerſally received.

HE goes on in his Treatiſe learnedly, with the Number and Nature of the proper Figures uſed in Herauldry, handſomely deſcribing them, and poliſhing their Terms, with ſome uſeful Obſervations; and after, regularly proceeds to the natural Figures of Things animate and inanimate, not dwelling on their hieroglyphic and ſymbolical Significations, as ſome nauſeouſly do; but gives ſome general Rules relative to their Poſition, Diſpoſition, and Situation on Banners and Armorial Shields, being the ſpeculative Part of Herauldry.

ALL which are exemplified with ſome few Blazons of *Scots* Families, taken from our modern Regiſter by one whom (as I'm inform'd) he employ'd to make up the practical Part, which may be ſaid to be defective for Want of Variety and Choice of Examples, which occaſioned a Brevity and Omiſſion in other Parts and Terms in this Science; and of this Sir *George* was ſenſible. And to ſupply that Defect, he deſign'd to give us a full Account of our *Scots* Families and their Blazons, from old Chartularies and Records; but becauſe he wanted Time to fit them for the Preſs, he leaves us a Manuſcript of them as a Teſtimony of his Kindneſs to his native Country, as he tells us in the End of his Preface to his Countrymen, prefix'd to his *Science of Herauldry*; and this Manuſcript has given Ground and Encouragement to others to work upon. But to return.

In his 20. Chapter he mentions ſeveral Cauſes of the Change of Arms, (no mean Part of their ancient Uſage) but inſiſts only upon Two of them, *viz. Cadency* and *Marriage*; the Firſt I cannot but ſay he handles more judiciouſly than others have done before him; but much more accurately that of Marriage. And as one of the Cauſes of Marſhalling many Coats of Arms in one Shield, tho' he has not inſiſted (nor any of the *Engliſh*) on other Cauſes, and the various Diſpoſition and Situation of many Coats of Arms in one Shield; ſo that we are at a Loſs to know, and to blazon many Foreign Enſigns we meet with, as theſe of the Empire, *Spain*, *Hungary*, *&c.*

Sir *George* indeed is more full and exact than any I have met with about the exterior Ornaments which adorn the Shield, in deſcribing and illuſtrating them by Examples very commendably, and ends his valuable Syſtem with Two exact Royal Blazons, with their Badges and Devices.

Having ſhown the Beauties and Defects of Sir *George*'s Herauldry, I cannot but, in Juſtice to him, continue to ſay of it as I have done before in my Eſſay of *Marks of Cadency*, That our Country has been happier of late than others of his Syſtem of Herauldry, being more exact, and his Obſervations and Remarks more profitable, than many other Pieces of that Nature to be met with, and to be preferred to any our neighbouring Nation can brag of; and what could we have expected from him had he been leſs concern'd in the public Buſineſs of the Kingdom, when, in all the Throng of Affairs, his different Works prove him a great Man, whoſe Genius could not be confined to one Subject, being a perfect Maſter of many; and his Merits are too well known to ſtand in need of any Encomium. From, *SIR*,

*Your very humble Servant,*
Alexander Nisbet.

* * *

Monsieur, *A la* Haye, *le* 20. *de* May 1685.

J'AY receu voſtre Lettre du 19. d'*Avril*, enſemble avec le Livre dont vous avez voulu me faire preſent. Celuy dont vous faites encore mention dans la meſme Lettre, m'a eſte rendu du meſme, & je vous remercie beaucoup de l'un & de l'autre, au reſte vous pouvez eſtre aſſeuré qu'ayant une grande eſtime pour voſtre merite je ſeray touſjours très-aiſe, de vous le témoigner aux occaſions, que je pourray en avoir par des effets qui vous feront connoiſtre, que je ſuis,

Monsieur, *Voſtre très-affectione*
Mr. GEORGE MACKENZIE. G. H. PRINCE D'ORANGE.

* * *

Monsieur, *A la* Haye, *le* 17. *de* May 1686.

J'AY receu de vôtre part le Livre que vous venez de donner nouvellement au publicq, vous pouvez être aſſeuré que j'eſtime beaucoup le zele que vous continuez de temoigner pour l'honneur & la gloire de la Maiſon Royale, & pareillement l'affection que vous conſervez à mon égard. Vous pouvez être aſſeuré de ma reconnoiſſance pour les occaſions que je pourray avoir de vous en donner de marques, & de la verité dont je ſuis,

Monsieur, *Voſtre très-affectione a vous rendre Service*
Sir GEORGE MACKENZIE. G. H. PRINCE D'ORANGE.

* * *

NOBILISSIMO ET AMPLISSIMO VIRO,
*GEORGIO MACKENSEO,*
S. P. D.
*JOANNES GEORGIUS GRÆVIUS.*

X. REDIT tandem ad te Diſſertatio tua de humanæ Mentis Imbecillitate, quam meæ Fidei credideras. Cur tam ſero in Lucem prodeat, non mea, ſed Bibliopolæ, diu variis vaniſque Promiſſis nos tardantis eſt Culpa. Genus hoc Hominum, ſemper in Lucro Compendioque occupatum, meliora negligit, ſi offerantur iis talia, quamvis ſint viliſſimæ & nullius Momenti Nugæ, quæ præſentem Quæſtum promittant. Præfixi, ut vides, Epiſtolam ad Lectorem, non dignam quidem præſtantiſſimo hoc Ingenii tui Monumento, ſed quæ Pignus quaſi ſit meæ in te Obſervantiæ & Studii. Nam illud ornare pro Meritis non eſt meæ Infantiæ. Diſertiores Laudum tuarum Præcones hæc manet Provincia. Si ego hoc tenui Officio tibi probaro Cultum illum, quo dudum te proſequor, omnia me conſecutum putabo, & valde lactabor, ſi quando dabitur Facultas luculentior ullo Genere Officii teſtatum faciendi, me tibi ad Obſequium omne addictiſſimum eſſe. Vale Vir eximie, & me ama. *Trajecti Batavorum* poſtrid. Nonas *Februarii Julianas* cIↄ Iↄc xc.

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*Vir Nobiliſſime & Ampliſſime,*

XI. CUM redit ad vos veſter Neceſſarius, non inanis, ſed Muſicarum Mercium Copia inſtructus, de quo nullus dubito, quin illuſtris veſtri Generis Decus fuerit propagaturus, non potui quin has Teſtes & Prædes perpetuæ meæ in te Obſervantiæ & Studii ad te darem. Diſputationem tuam de humanæ Rationis Imbecillitate magno cum Applauſu non in his modo Terris, ſed in longè remotis *Germaniæ* Gentibus, boni doctique Homines exceperunt. Velim hoc mihi, Homini minime blando & ficto, credas. Nam à pluribus Literas habui, qui Gratias mihi egerunt, quod noluerim tam utilis & ingenioſæ Diatribes Lectionem iis debere. Doleo vero Librariorum Vitio & Negligentiâ plures fœdioreſque Mendas in eam irrepſiſſe, contra Fidem, quam dederat Bibliopola, qui illius edendæ Partes ſuſceperat. Curæ enim ſibi fore promiſerat, ut, cum ego vacare, variis diſtrictus Negotiis, Operarum Erratis eluendis non poſſem, Homines adhiberet, quorum *Lyncei* eſſent Oculi in his Maculis delendis. Rogo nè alienæ Culpæ Pœna mihi ſit luenda, ſed ut tuum in me conſerves Amorem, Meritis quidem à me nullis, religioſâ tamen Cultum Obſervantiâ, quam ſi tibi teſtatam facere potero ullo Officii & Obſequii Genere, mirifice lætabor. Vale Vir illuſtris. *Trajecti* D. IV. *Jun. Dionyſ.* cIↄ Iↄc xc.

*Nobiliſſimo Nomini tuo Addictiſſimus,* Joannes Georgius Grævius.

# POEMS

BY

Sir George Mackenzie.

# CÆLIA's
## Country-Houſe and Cloſet.

I Sing no Triumphs, nor ſuch empty Things,
'Tis ſolid *Friendſhip* gives me Theme and Wings:
*Friendſhip!* that wiſer Rival of vain Love,
Which does more firm, tho' not ſo fiery, prove.
My Subject, thou the Muſe whom I invoke,
Fire thou my Breaſt, but fire it without Smoke:
If thou my Thoughts wilt ripen with thy Rays,
Around my Brows ſhall ſpring immortal Bays.
*Virgil* of Me cou'd boaſt no greater Odds,
Than *Friendſhip* of his *Cæſar* and his Gods:
*Friendſhip*'s as ſtrong, tho' rarer than of Old,
And Mine, like Fire in Winter, grows more bold.
I'll riſe, I'll riſe then, by a tow'ring Flight,
Above my own, tho' far below its Height:
I can my Thoughts, but cannot raiſe my Theme,
There's too much Merit in her charming Name.

The Author invokes *Friendſhip* as his Muſe.

As Warmth does Flowers, ſo Beauty ripens Wit,
And makes Men think what's High, and ſay what's Fit.
Yet, Gentle Muſe, let not thy Zeal conſpire,
With *Cælia*'s Eyes, to ſet the World on Fire:
Leſt her Adorer, thou her Victim turn.
A Poet's Flame should warm, but should not burn.

The Palace. UPON a Plain, where nothing bounds the Eye,
But what could pleaſe without Variety.
A *Palace* on a ſmall Aſcent does ſtand,
And views thoſe Valleys which it does command.
Long Rows of ſtately Elms on either Side,
The wond'ring Eye to that great *Palace* guide;
Betwixt which Rows, moſt pleaſant Ponds they ſee,
Which with the Avenue in Length agree.

Statues. *NEPTUNE* Majeſtic, on the Brink does ſtand,
Prouder there than his Ocean to command.
*Glaucus* his *Gallatea* here admires;
Nor can the Waters cool his ſcorching Fires:
But whilſt he angles in thoſe pleaſant Lakes,
He's more a Captive than the Prey he takes:
A *Cupid* covers with his Hands his Ears,
To shew he *Triton*'s shelly Trumpet fears.
The Water-Nymphs, reſting them here and there,
With various Jets, refresh the ſcorched Air.
Over theſe Ponds th' inclining Trees do look,
Making a Mirrour of the glaſſy Brook.
Thoſe fleecy Clouds, the Bottles of the Rain,
Beget their Likeneſs on the watry Plain.
The Darling Sun baths there his ſcorching Beams,
As if he wash'd his Spots in theſe pure Streams.
Here our *Antipodes* our Fancy ſees,
And Fishes ſeem to neſtle in the Trees;
Whilſt others of them ſwim upon the Sky,
And Birds, at once, here and above do fly.

Their Surface does as pav'd with Chryſtal show,
Whilſt we ſee curious Landskips drawn below.
But when thoſe Waters show their Lady's Face,
The World can boaſt of no ſuch Picture-Caſe:
Theſe Pleaſures do the Swan and Wild-Duck tame,
Who in their Beds of Down, reſt in the Stream.
The ſcally Flocks dance in the yielding Deep,
And with the warbling Birds, the Cadence keep;
Like Beams lanc'd from the Sun, themſelves they dart
So Swift, that they appear in ev'ry Part.

A kind *Wood* warms or ſhades its either Side, The Wood.
In which the Trees advance with equal Pride;
And to the Heav'ns like Arms their Branches ſpread,
To thank theſe for the Rain, by which they're fed.
Here wander thoſe whom Love has led aſtray,
But ſhe they ſhun, ſtill finds them in their Way.
To him, whoſe Heart this conqu'ring Paſſion wears,
Each Hill, each Tree, the charming Image bears.
And as with ev'ry Thing we ſtill ſee Light,
So whatſoe'er we ſee, ſhe comes in Sight.
I love a Darkneſs that's made up of Shades,
Where Trees defend thoſe whom the Sun invades;
Each Tree's a Cage, and Conſort where we hear,
How Liberty the very Birds can chear.
'Tis not the Spring can them to ſinging move,
But the ſweet Charms of Liberty and Love.
Love on Gray-Hairs, a blooming Youth can bring;
For Love is Nature's Muſic, Youth, and Spring:
'Tis Gay like Youth, it like ſweet Muſic charms,
And like the Spring our frozen Humour warms.
Under theſe Shades the happy Shepherds play,
And with their Looks ſpeak more than Tongue can ſay;
No Thought or Face, needs here a cheating Dreſs,
What true Love thinks, kind Nature does expreſs.

O how they laugh at Favours bought and ſold,
And ſcorn the Triumphs of bewitching Gold!
May no keen Ax theſe friendly Boughs invade,
Which eager Raptures of charm'd Lovers ſhade.

The Gate. OVER the *Gate* her Father's Statue ſtands:
Whoſe Actions far exceeded his Commands:
Whoſe Friendſhip, like his Wit, was juſt and ſtrong;
He would not do, nor could he ſuffer, Wrong.
In War, like Fire which ſpacious Forreſts burns,
Spreading vaſt Ruins where its Fury turns.
In Peace, his Merit juſt Reſpect did draw,
And he, by Love, did keep the Fierce in Awe.
Courage to his ſtrong Reaſon gave an Edge;
And Reaſon ſmooth'd what Courage had of Rage.
His Courage thus was wiſe, his Reaſon bold;
This cool'd its Heat, That warm'd what was too cold.

The Gardens. SPREAD to the Eaſt embroider'd Gardens ly;
The pleas'd Sun views them with a fruitful Eye,
Charm'd with his fragrant Off-ſpring, and ſeems vain,
That *Solomon* the Glorious, and his Train,
Were by the greateſt Maſter thought outdone,
By Robes he had for ſhort liv'd Lillies ſpun.
Here he does all his Morning Bluſhes place,
Upon a Roſe's or a Tulip's Face,
Whilſt others of his Rays with Power are ſent,
The Pinks and fragrant July-Flowers to paint.
And all the Whiteneſs that he can exhale,
From her fair Cheeks, he leſſen'd does let fall,
On the Narciſſus, but it there looks pale,
Aſham'd thus from th' Original to fail.
Here Labyrinths ſo pleaſe, that we may doubt,
If Art or Pleaſure hinder getting out.
A Fountain-Nymph here to the Life expreſt,
Darts trembling Waters from her Marble-Breaſt.

'Tis only here ſtill the ſame Things can pleaſe,
And without Change, the Curious are at Eaſe.
This does with *Eden* in all Things agree,
Save that its Miſtreſs will not tempted be.

An Artificial Rock.

She here an artificial Rock has rais'd,
By which, ev'n whilſt we're cheated, we are pleas'd.
Here Nature's equall'd, future Arts defy'd;
No Lady's Glaſs could have more juſtly ly'd.
Here do the Melanchollly Pleaſure find,
And print their Thoughts upon the Moſſy Rind.
From this the bearded Streams do fall from High,
And, as they bruiſed were, they roar and cry.
In other Rocks, well busk'd with Trees, Birds neſt;
Some court, ſome ſing, ſome flee, and ſome few reſt.

Multiplying Echo.

*ECHO*, ambitious to repeat her Words,
With many Mouths a ſweet Return affords:
And whilſt ſhe ſings, they in ſweet Concert ſound,
The charming Notes to the pleas'd Heav'ns rebound.

The Praiſe of a Country Life.

O happy *Country-Life*, pure like its Air;
Free from the Rage of Pride, the Pangs of Care.
Here happy Souls ly bath'd in ſoft Content,
And are at once ſecure and innocent.
No Paſſion here but Love: Here is no Wound,
But that by which Lovers their Names confound,
On Barks of Trees, whilſt with a ſmiling Face,
They ſee thoſe Letters as themſelves embrace.
Here the kind Mirtles pleaſant Branches ſpread;
And ſure no Lawrel caſts ſo ſweet a Shade.
Yet all theſe Country-Pleaſures, without Love,
Would but a dull and tedious Priſon prove.
But, O what Woods, Parks, Meadows ly,
In the bleſt Circle of a Miſtreſs Eye!

What Courts, what Camps, what Triumphs may one find
Diſplay'd in *Cælia*, when she will be Kind?
What a dull Thing, this lower World had been,
If Heavenly Beauties were not ſometimes ſeen?
For when fair *Cælia* leaves this charming Place,
Her Abſence all its Glories does deface.
To find Defects, or wish Additions here,
Do equally impoſſible appear.
From this then to her *Cloſet* I'll retire,
And what she loves, we juſtly may admire.

Her Cloſet.

THE *Room*'s Quadrangle, and the Walls do riſe,
With niceſt Juſtneſs in their Squares and Size.
She in her Floor does trample under Foot,
A Globe, in rich Moſaic Marble cut,
As her Thoughts treat the vaſt Original,
When it from Virtue them would tempt to fall;
From Heav'n, which the rich Roof does repreſent,
A Chryſtal Candleſtick ſeems to be ſent.

Our Savi-our's Picture.

OUR *Saviour* there we ſo Alive do ſee,
He *Calvin* could oblige to bow his Knee.
The *Painter*, cut ſo deep His bleeding Wounds,
That Art and Grief, both pleaſes and confounds:
Yet Lord, when I theſe Wounds thus bleeding ſee,
My Conſcience crys, It is at Sight of me!
I in Thy Death outdo his cruel Part
Who pierc'd Thy Side, my Sins do pierce Thy Heart.
Upon His Head there ſtands a Crown of Thorns,
Deſign'd to torture whom it now adorns.
In thoſe bleſs'd Fountains of His Tears, I ſee,
The Image of what's due to Sin and me.
The Pencil here, like *Aaron*'s Rod cuts deep,
Our rocky Hearts, and with Delight we weep.
I fear thoſe Tears, the *Painter* here hath ſpread;
Are far more real than the Tears we shed.

A well cut Chryſtal in a richer Caſe, *The Virgin Mary.*
Covers, and ſhows at once, that *Virgin*'s Face;
Who flees, yet gets from Mankind ſuch Reſpect,
As ſeems Idolatry, or is Neglect.

The *Infant* Jesus, looks ſo in her Arm, *The Infant.*
As if the *Painter* had Him taken warm
Up from the Cradle. Art ſo deludes the Eye,
That Men expect ſtill when to hear Him cry.

Sad *Magdalen*, does here more Pity move, *Mary Magdalen.*
Than formerly ſhe did Delight, or Love:
She waſhes now with conſtant Tears, thoſe Eyes
Which were Unfortunate in Victories:
And in theſe Streams, ſhe nobly makes expire
Her roving Humor, and her fatal Fire.
But tho' theſe Tears have waſh'd her clean again,
The ugly Cicatrice ſhall ſtill remain.
God to Repentance thus denies this Cure,
That like nice Virgins, we may keep us pure.
The Floor now with theſe lovely Locks is ſwept,
In which, as Chains, her Gallants once ſhe kept.
*Cælia* from this moſt wiſely does obſerve,
That whilſt we God, our Fame we likewiſe ſerve.
For to this *Magdalen*, half *Europe* bows,
And with Reſpect make and perform their Vows:
Nor is there any can ſome Tears deny,
Seeing ſo many fall from ſuch an Eye.
The Books of Life, give a more laſting Name,
Than the much toil'd for Regiſter of Fame.

A Rev'rend *Hermit* ſhaded by an Oak, *A Hermitage Landskip.*
Our Pity does and Piety provoke.
Beſides his Tears he nothing has to ſow,
Yet Herbs for Food, by that bleſs'd Watering grow.

The Rocks, as melting with Compaſſion, weep;
In theſe cool Cellars, he his Drink does keep.
No bruiſed Grape bleeds for his Cup, no Knife
Stabs harmleſs Beaſts to feed a guilty Life;
Which, in Revenge, Fevers and Gouts do raiſe,
Glad to aſſiſt each mutinous Diſeaſe.
All his own Fleſh in Sacrifice is ſpent:
And, when he feaſts, 'tis on our hardeſt *Lent.*
He in the Boſom of a Grove does ſit,
Which neither Sun's nor Envy's Rage can hit.
As Myſteries do Truth, ſo Groves do Light,
Not darken, but conceal from human Sight.
Whence 'twas in Groves, the *Pagans* did of Old,
Their Sacred Rites and Myſteries unfold.
Here, in a Soul, vaſt like the ſtretch'd out Spheres,
He rowls Thoughts greater than what *Atlas* bears.
Nothing that's leſs than God, ſhares in his Wonder;
In whom the leaſt Thing he admires is Thunder:
And whilſt his Thoughts mount on Seraphick Wings,
He ſees the World and Fame as little Things:
He courts not Sleep with ſoft melodious Airs,
Nor in benumming Wine needs drown his Cares.
The rich pil'd Graſs give him a Velvet-Bed,
And Trees afford him Curtains in their Shade.
What Crown'd-Head reſts in this ſo bleſs'd a State;
Or can confine his Wiſhes to his Fate?

Her Mirrour.

NEXT to her *Mirrour* a *Death's-Head* takes Place;
This ſhews what is, That, what ſhall be her Face:
And ſure it needs great Faith to make her think,
The Face ſhe bears, to that ſhe ſees, can ſhrink.
We may conclude, that when fair *Cælia* dies,
She better may, but not more lovely, riſe.

*Charles* I.

GREAT *Charles!* God's nobleſt Image among Men,
Whoſe Life deſerves His own moſt matchleſs Pen.

His Life was the beſt Law a King cou'd make;
Much Liberty He gave, but None did take.
Like God, He us'd His Power in doing Good,
Leſs ſparing of His Own, than Subjects Blood.
No Blood leſs ſacred cou'd atone the Crimes,
Of thoſe Rebellious and Blaſphemous Times.
Above all Martyrs in this magnify'd,
They for Religion, but It with Him dy'd.
This fixes that bleſs'd Race, which long has ſtood,
Great by its own, but greater by this Blood.
This Him to Heaven, and Peace to Us did bring,
And Heaven alone could have a better King.
Fretted Religion ſickens into Zeal,
That holy Fever of the Common-Well.
By this ſweet Name, fierce Men their Rage baptize;
And not to God, but *Molech*, ſacrifice.

NEXT *Charles*, grave *Seneca* has choſe his Place, *Seneca.*
The greateſt Preacher not improv'd by Grace:
His ev'ry Look and Geſture was a Law,
Which the rude World and *Nero* kept in Awe,
Till he, in Luſt, himſelf and *Rome* did burn,
Leaving bare Walls to be that City's Urn.
Virtue's but Pedantry which would oppoſe
A Prince's Will; then Councellors are Foes.
Nor can a Tyrant learn at a cheap Rate;
His firſt plain-dealing Friend, is adverſe Fate.
Fortune takes Pride to raiſe ſome blundering Fools,
To ſhew that ſhe can work with any Tools.
And when the Wiſe cannot her Favour find,
They vainly think, that ſhe not they are blind.

THERE we, with Awe, ſee *Cæſar*'s lawrell'd Head, *Julius Cæſar.*
Who firſt the VVorld, then *Rome* in Triumph led,
He gave the Law to All, to Kings a Name,
And forc'd juſt Virtue to ſubmit to Fame.

Whate'er his Eyes could ſee, his Sword could gain;
For he, like Fate, did never wiſh in vain.
*Rome*'s State ne'er ſeem'd ſo high, nor was ſo low,
He Chains put on, whilſt Crowns he did beſtow:
For each kill'd *Roman*, he to *Rome* did bring,
An enſlav'd State, or a ſubmitting King.
But when by Vict'ries, he was ripe to be
Great *Pompey*'s Victim, then he fell as he.
And yet no Crime, could *Cæſar* bring ſo low
That he could fall, but by a Senate's Blow.
Great Men can boaſt, that ev'n their adverſe Fate
Muſt ruin them, in ſolemn Pomp and State.

Pompey.

His quiet Neighbour here, is *Pompey*'s Head,
Which that great Name allows not to be dead.
Not Death it ſelf could make this Face look pale,
It was the Gaſping of the Commonweal:
Nor was it Pity, but wiſe *Cæſar*'s Fears,
Which on the Sight of it, provok'd his Tears.
*Pompey* no Pity needs, *Cæſar* cou'd ſee
In theſe grim Looks, *Rome*'s murder'd Liberty.
But when he to the Gods was known above,
They to Revenge him, did juſt *Brutus* move:
Nor cou'd they put their Sword in juſter Hands,
For his Obedience hallow'd their Commands.

Cato.

Next him ſtands *Cato*, to whoſe ſacred Breaſt
*Rome*'s Freedom fled for Shelter, when diſtreſs'd:
And leſt it ſhould have fall'n in *Cæſar*'s Pow'r,
He in his own great Heart, op'ned a Door
For its Eſcape, that it to Heav'n might fly,
And wait till *Cæſar* ſhould by *Brutus* die.
The World to his deep Judgment ſo did truſt,
That his ſole Suffrage declar'd *Pompey* Juſt.
Here he 'gainſt Fate and *Cæſar* did prevail,
And ſtill to *Cato* lay the laſt Appeal.

Heav'n poorly with the Conqu'ror did comply,
But *Cato* rather, than deſert, wou'd die.

*MONTROSE* his Country's Glory, and it's Shame, *Montroſe.*
*Cæſar* in all Things equall'd, but in Fame.
His Heart, though not His Country, was as great
As his, and fell yet by a Nobler Fate:
*Montroſe* did fall His Country to redreſs,
But *Cæſar* fell by them he did oppreſs.
Duty on Valour ſtamps a juſt Renown;
'Tis nobler to ſupport than wear a Crown.

HERE *Cleopatra,* ſhews theſe conqu'ring Eyes; *Cleopatra.*
Which *Anthony* eſteem'd a greater Prize
Than conquer'd *Rome*; this Paſſion did exceed
All Things, ſave theſe bright Eyes, which did it feed.
And yet in that brave Death whereby ſhe fell,
She ſhew'd her Love, her Beauty did excel.
Some *Cæſar* for thus ſlighting, her admire;
But my Heart warms, at *Anthony*'s kind Fire.
*Cæſar* at *Rome,* ſtrove Fools and Knaves to pleaſe,
Bought rugged Dangers, by the Loſs of Eaſe:
He Toils, and Troubles, did for them endure,
Who thought his Ruine, was *Rome*'s only Cure.
Whilſt *Anthony,* a lovely Queen poſſeſt,
And his ſafe Head, lean'd on her charming Breaſt;
That Queen who ſooner *Cæſar* overcame
Than he cou'd *Rome,* Love faſter wounds than Fame;
The Gods did ſure Revenge in *Cæſar*'s Doom,
His wronging her, more than his wronging *Rome*:
For Blood once tainted with ſuch horrid Stains,
Deſerv'd no Place in noble *Cæſar*'s Veins.
Love, from Ambition, well deſerves the Prize,
For gentle Love feeds on fair Lady's Eyes;
But vain Ambition's fed by vulgar Breath,
Which as it gives it Life, can give it Death:

This fiercely burns the Soul, That, gently warms,
The One confounds our Thoughts, the Other charms.
Crowns cannot Men make happy, and ſecure,
Kings may Affronts and Miſeries endure;
But Love and she, ſtill bleſs at ſuch a Rate,
That when she ſmiles, we ſcorn the Frowns of Fate.

*Aurelia.* *AURELIA* here, for Jealouſy does die,
The Picture bleeds, and thoſe who ſee it cry.
In Jealouſy Love covetous thus grows,
And, like ſwell'd Floods, it wildly overflows:
It is a Love that's run out of its Wits,
A Love that's ſick of hypocondrick Fits:
Unhappy Love, which its own Torment brings,
Affrighted ſtill with the wrong Side of Things.

*Virgil.* All the *Nine Siſters*, in deep Wonder ſtand,
Each with great *Virgil*'s Poem in her Hand:
Whilſt he with Modeſty, great as his Wit,
Adoring them, upon his Knees does ſit.
*Virgil* to none, but to himſelf ſevere,
Might his own Thoughts, more than his Criticks fear:
His Judgment ſprightly, and his Fancy wiſe,
And as Wit ripens, ſo his Praiſes riſe.

*Lucretia.* The Marble plying as the Artiſt pleas'd,
For fair *Lucretia* has a Statue rais'd:
He with ſuch Paſſion has inſpir'd the Stone,
That one that's deaf, would ſwear that it did groan.
It was ſuch Stones as thoſe which firſt cou'd draw
Men to Idolatry; and keep in awe
Thoſe ruder Mortals, who cou'd not withſtand
The winning Charms, of a great Maſter's Hand:
From this she ſends her noble Soul to crave
Revenge from Heaven, on him, who ſtrove to leave

Spots on her Honour, for when that is loſt,
Women, in vain, Birth, Wit, or Beauty, boaſt:
Men the beſt Things, when common, moſt deſpiſe,
Virtue's the Soul of Fame, and when it dies,
Fame, like a loathſome Carcaſe, does remain,
Each new Remembrance will refreſh the Stain.
Thus ſhe ſeems from her Body to remove,
When ſpotted by that Luſt, that ſome call *Love*.
The frighted Blood, does in ſhort Sallies gush,
And the defiled Corps ſeem yet to bluſh.

**Cincinnatus return'd from his Victory to his Plough.**

HERE famous *Cincinnatus* holds his Plough,
Whilſt branchy Lawrels ſhade his ſweating Brow:
He no Exchequer has, but thoſe hard Toils;
And *Rome*, not he, grows rich by Foreign Spoils.
Great Men are Servants when they Pay receive,
And Beggars when they Subſidies muſt crave.
Rich Robes, are but the Liv'ry of the State;
And Slav'ry is the Price of being Great.
But *Cincinnatus* ſcorns the State ſhou'd need
To tax themſelves, him or his Luſt to feed.
The great *Deborah* might have been his Wife,
Who judg'd, but liv'd not, by her People's Strife.
Greatneſs is ſeldom quite and often loſt,
There moſt Men think to reſt, but all are toſs'd:
The faireſt, yet the moſt provoking Cheat,
Which firſt our Foes, then does our ſelves defeat.

**Galilæo.**

HERE *Galilæo* makes the Stars draw near,
And at the End of his bright Tube appear:
In whoſe juſt Microſcope ſuch Things we ſee,
As in wild *Afric*, or bleſs'd *Indies* be.
Thus we may travel eaſily at Home,
And ſee new Wonders in his Glaſs's Womb.

Lillie.

*LILLIE*, who has no Rival, but his Glaſs,
Who ſtops our Youth, and Beauty, as they paſs:
His Pencil, againſt Time and Fate ſecure,
Gives what we Want, makes what we Have endure.

Some Pictures done by great Maſters in their different Excellencies.

Here *Raph'el*'s Pencil, makes all Bodies move;
We with *Coragio*'s Beauties are in Love.
Bold *Julia*'s Hiſtories the Coldeſt warm;
And *Stenwick* makes a loathſome Priſon charm.

A Storm in Landskip.

A *Painter* here, troubles the Ocean ſo,
That it does foam with Rage, and angry grow:
Amidſt thoſe Dales and Hills, ſome Ships appear,
They were Ships ſtout and tall, till they came there:
But they and I ſtand trembling at the Sight,
And Fear deſtroys, what Art meant for Delight.
He brings the Storm, both to my Eye and Ear,
And on dry Land, makes me a Shipwrack fear.

A Church in Perſpective.

In Perſpective, a real *Church* we ſee,
I wiſh all Churches did as well agree
With their Original, and that they're true
Were but eſteem'd, as I this painted do.
Long Walks of Pine, out from the Cloth ariſe,
And rather ſeem to meet, than cheat our Eyes.
O noble Art! O moſt ſucceſsful Care!
Which Churches build, and Trees plant in the Air:
He only, who made the great Globe to ſtand
On Air, in this cou'd lead the *Painter*'s Hand.
That in all Arts, we might his Art admire,
And by our Wonder, to his Love aſpire.

Shells, Ambers, and Corals.

Here *Amber* lies ſhap'd in a Thouſand Forms,
And *Corals* bred (like Virtue) among Storms.

Here ſporting Nature, shews her curious *Shells*,
Which, tho' moſt glorious, are but the Cells
Which she profuſely does for Worms provide,
To check the Infidelity, or Pride,
Of ſuch as dare not upon it rely,
Or think by Art its Favour to outvy.
Here Rocks of dazling Diamonds appear,
And we may ſee Cluſters of Rubies here.

Some of her Books, with a Character of their Authors.

BUT *Taſſo's* Works ſoon drew from them my Eyes,
Whoſe lofty Lines I far above them prize.
*Cowley* by him, whoſe melting Works are New;
*Denham* whoſe Lines are ſweet, whoſe Senſe is true;
*Waller* the Juſt, whoſe leaſt corrected Line
The beſt may own, and I could wish it Mine.
Here toiling *Johnſon*, eaſy *Fletcher* ly,
And *Don*, into whoſe Myſteries Few pry.
Religious Books she does obey, not show,
And by her Life we may their Value know.

*Cælia's* own Character.

THIS is her Cloſet, and its Rar'ties theſe,
Which though they raviſh not like her, they pleaſe.
Her *Soul*, pure like the Heav'ns from whence it came,
Still ſcorns to kindle at a lower Flame.
Her matchleſs *Virtue* our Juſt GOD thought fit
To ſet in *Beauty*, and exalt with *Wit*.
She got no Crown, becauſe she none did need;
Nor can her Slaves wish ever to be fre'd.
Her *Wit* does charm thoſe whom her *Eye* enſlave;
This gratifies the Paſſion which theſe gave.
Sure if great *Solomon* had liv'd this Day,
He would the *Sheban* Viſit, here repay;
And juſtly wonder at her *Beauty* more,
Than that Great Queen his Wiſdom did adore:
He had confin'd his Thouſand-Loves in One,
To place her Queen on an unrivall'd Throne.

*FINIS.*

# A PARAPHRASE
## UPON THE
# *CIV. PSALM.*
### By Sir George Mackenzie.

FROM humble Heart, thy lofty Praiſe I'll ſing;
By Love my Father, and by Pow'r my King.
Thy pow'rful Hands the heav'nly Reins do hold,
And Glory ſhades thee, with its Wings of Gold,
Dark'ned to Mortals, by that dazling Light,
Which, as a Garment, hides thee from our Sight.
Thou the vaſt Heavens ſpreads for thy ſtately Tent,
And the pure Streams, above the Firmament
Bow'd by thy Pow'r, in Chryſtal Arches ſtand;
Thou bends to Vaults the Heavens, by thy ſtrong Hand,
Emboſs'd by Stars, gilded by flaming Light,
They magnify thy Pow'r, and charm our Sight.
Swift, like our Thoughts, or Light, thy Chariots fly,
And find glad Paſſage, through the yielding Sky.
By its own Weight, the Earth hangs pois'd in Air,
An equal Inſtance of thy Pow'r and Care:
To waſh't from Sins, thou didſt in Seas it drown,
The Seas, as Vales, did its high Mountains crown:
But when thy thund'ring Voice began to roar,
The trembling Floods ſoon ſhrunk within their Shore:
Hills rais'd their Heads, the Valleys humbly ſunk;
The thirſty Sun, its Floods in Vapours drunk:
And now theſe Seas, gath'red in Heaps, muſt ſtand,
Preſs'd in by the ſtrong Barrs of thy Command:
Tho' their hoarſe Waves beat the complaining Shore,
Yet they thy Marches dare tranſgreſs no more.
The filt'ring Hills ſuck Waters from the Plain,
Which purg'd from Salt, the Springs reſtore again:
To theſe high Tops, they climb by ſecret Veins,
And murm'ring tumble on the longing Plains;

Fatning, in Gratitude, the yielding Ground,
Through which their gentle Streams a Paſſage found.
Theſe are the Source of Health, and Balm of Youth,
Where Beaſts may cool their Heat, and quench their Drowth:
The Trees ſuck Growth, and Greenneſs from theſe Floods,
And mix their well busk'd Branches with the Clouds.
Thou decks and baths the Hills with pearly Dew,
By which their Age, and Colour they renew.
The tow'ring Clouds are ſifted into Rain,
And drop in Life, and raiſe the buried Grain,
By thy ſtrange Art, the dull Earth's formleſs Maſs,
Starts up for Men in Bread, for Beaſts in Graſs;
Rich Wine, which often elevates Men's Souls,
Chears their ſunk Hearts, and all their Cares controuls.
The ſwiming Oyl, which makes the Face to ſhine,
And checks the Vapours of inſpiring Wine.
A Crown for *Lebanon* tall Cedars make,
Whence Houſes Men, there Birds their Neſts, do take.
In Firs amongſt the Clouds, the Storks do breed,
And their Deſires bound not their craving Need,
For fearful Deer, the Deſert Hills are made,
Who their ſwift Heels truſt more than armed Head.
Thou Rocks for trembling Conies doſt provide,
And the wild Goats in wilder Hills abide.
With borrowed Light thou variouſly doſt fill,
The lowring Moon, in changing conſtant ſtill.
Thou cloath'ſt the flaming Sun with maſſy Light,
Whoſe Rays confound, ev'n while they charm our Sight:
Thou to his winged Haſte points out the Way,
And makes him mark the Year, and mark the Day:
To his drown'd Beams, ſucceeds the ſilent Night,
Which ſpreads its Veil, where'er he ſows his Light.
Then Beaſts which were o'eraw'd by Light and Men,
Start from thick Wood, and creep from ſilent Den;
With ſtarved Voice, from Heaven their Food they crave,
(Juſter than Men) no more than they ſhould have.

But when the Sun re-kindles his new Fire,
Men take the Fields, and Beaſts to Caves retire:
And till the Night of new the Heavens invade,
Some plow the Ground, and ſome in Cities trade:
Thus thou thy Power and Goodneſs do'ſt apply
To all our Wants and Needs, commodiouſly.
Nor is't to Earth alone that thou art kind;
The boundleſs Seas, thy boundleſs Favours find;
Whoſe Moiſture is ſoon ſhapt in any Forms,
And breeds ſtrange Monſters, terrible as Storms.
There the ſtout Ships which dare controul the Wind,
In their own Strength Anchors and Harbours find.
There Whales, thoſe Hills of Fiſh, vaſt Rain-Bows show'r
From their large Noſtrils; there they play and low'r
On the ſmooth Surface of that Watry-Plain,
That polish'd Marble of the glaſſy Main.
Thus from thy open Hands, large Plenty's ſent,
Men's Wiſhes they exceed, and Hopes prevent;
With trembling Sobs, thou ſeals their Parting-Breath,
To flying Duſt, they're crumbled down by Death.
That Earth which thou didſt fix'dly make to ſtand,
Trembles, when touch'd by thy Almighty Hand.
The lofty Hills for Fear do nod and quake;
The rowling Clouds of Smoke thou doſt them ſhake.
While Life's kind Flame within this Lantern burns,
Blood goes by Arters, and by Veins returns,
The Strength thou giv'ſt, I'll in thy Praiſes ſpend,
And Here begin what There ſhall never end.
In thy ſweet Law ſome of theſe Joys I taſte,
On which the raviſh'd Angels ever feaſt.
My ſoaring Thoughts reach Here vaſt Heav'ns of Bliſs,
And ſweetly loſe themſelves in this Abyſs.
But Sinners ſhall for ever ruin'd be:
Oh! What a Curſe not to be lov'd by Thee.
To Thee, the Incenſe of our Praiſe we'll bring:
We'll Love our *Father* and Adore our *King*.

*FINIS.*

How

# MORAL
# ESSAYS

BY

Sir GEORGE MACKENZIE.

But when the [illegible]
Men take the [illegible]
And till the [illegible]
Some [illegible]
Thus [illegible]
To all [illegible]
Her [illegible]

[illegible] from their [illegible] Nostrils, there they [illegible] and [illegible] on the smooth Surface of that Watry [illegible] That [illegible] [illegible] Hand [illegible]

[illegible]

How

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How

# How to be Happy.

## Treated in Four ESSAYS.

I. That no Thing without us, can make us happy.

II. By what inward Means, Moral Philoſophy endeavour'd to make us happy.

III. That Moral Philoſophy cannot make us happy.

IV. That the Chriſtian Religion can only make us happy, and that every devout Man is truly happy.

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## I. *That no Thing without us, can make us happy.*

IT may juſtly ſeem ſtrange, that Man, who is the only reaſonable Creature, ſhould be ſo often, and ſo far miſtaken, in the great Affair of his Life; and that too, after ſo many Debates and Enquiries. For tho' to be happy be his true Intereſt, and ſhould be his chief Deſign; and thoſe vaſt Numbers of Men who have ſwarmed for ſo many Ages upon the Face of the Earth, do with Ardour purſue this Deſign in ſo many different Ways and Methods: Yet how many Millions, even of thoſe who are accounted wiſe Men, do agree in nothing, but that *all is Vanity and Vexation of Spirit*. And that which is moſt ſtrange is, that the Enjoyment of thoſe Things, for which we languiſh ſo much, ſeems to be a greater Trouble than the Want of them would have been: For 'till Enjoyment, we at leaſt imagine, that it is poſſible to be happy by them. And thus Fruition is the greateſt of all Diſappointments, and no Thing makes us ſo poor, as Poſſeſſion: For that diſcovers ſo much of Sillineſs in all that we lately wiſht, when Poſſeſſion brings them near to the Eye of our Reaſon, that Conſtancy would be here a Vice in us. Yet can I not attribute this ſo much to an Unconſtancy or Fickleneſs in our Will, as (which may ſeem another Paradox) to a Ripeneſs and Sagacity in our Judgment. And tho' the Reaſon of this Changeableneſs in Man, may be thought to proceed from a Deſign that GOD has, to have all His Creation admir'd, a great Part whereof ſhould be undiſcover'd, if Men reſted upon what ſatisfied Neceſſity, without any farther Progreſs. Or from this, That the Soul intends to ſhew its Sovereignty over all the Creation, by taſting, like the Maſter of a Feaſt, a little of every Diſh. Or, if we will believe *Seneca*, he will tell us, That *mobilis & inquieta Mens Homini data eſt, nunquam ſe tenet, ſpargitur, Cogitationes ſuas in omnia nota atque ignota dimittit, vaga, quie-*

*tis impatiens, & novitate rerum lætiſſima; quod non miraberis, ſi primam ejus Originem adſpexeris: non enim eſt ex terreno & gravi concreta Corpore, ex illo cæleſti Spiritu deſcendit, cæleſtium Curſu agitatur.* Yet really it proceeds from this, That all Creatures are by an innate Inclination led to believe, that there is ſome Thing appointed for them, which may accompliſh their Nature, and render them happy. Nor is it ſuitable to the noble Idea we have of GOD, nor to theſe kind and endearing Expreſſions of His Love to us, to think, that ſeeing the inanimate Creatures themſelves, have a Centre whereupon to reſt, that Man, who is Lord of all theſe, ſhould be condemned to ſeek what he cannot find, and to find only what cannot pleaſe.

But the moſt Part of Men, miſtaking the true Object of their Deſires, do ſeek for this Happineſs in ſome ill underſtood Object; and not finding it there, the great Error they commit is, not that they ſlight what they formerly purſu'd; but that they run for Satisfaction, to ſome ſuch other Objects, which have no other Advantage, over what they have deſerted; but that the Purſuers have not yet found, that Unſatisfyingneſs in them, which is only reſerved for Fruition to diſcover. And to ſee the conſtant Chaſe Men are in, of new Deſigns of Happineſs; one might conclude that he plac'd his Happineſs in what he wants, and that he is pleas'd not to find, but to ſeek. Man's very Touch, ſeems to be contagious; and nothing can paſs his Hand with an unſoil'd Gloſs. And tho' one ſhould in Reaſon imagine, that ſo many Diſappointments, as Men meet with, may juſtly cool that Fervour after new Pleaſures; yet the Purſuers do rather conclude, that ſeeing there is a Happineſs to be found, and that it is not in any of theſe Objects which they have enjoy'd, it muſt certainly remain in that they now propoſe. Not unlike the Seekers of the Philoſophers Stone, who, after all their Diſappointments, do ſtill conclude, that they are by ſo much the nearer to the finding out their beloved Secret, by how much Time and Money they have already ſpent.

In our Enquiry into the true Nature and Means of Happineſs, we ſhall proceed by theſe Steps.

I. *We ſhall prove, that no Thing without us, can make us happy.*
II. *We ſhall conſider, how far Moral Philoſophy can make us happy.*
III. *We ſhall prove, that Moral Philoſophy is not able to make Man happy.*
IV. *And,* Laſtly, *We ſhall prove, that the Chriſtian Religion, and that only, is able to make us happy.*

That no Thing without us, and that is not in our Power, can make us happy, is the chief Principle of Moral Philoſophy. But becauſe this has only been enforced upon us by Experience and Inſtances; therefore Men continue ſtill to miſplace their Happineſs, concluding, that others have fail'd to attain Happineſs in Riches, Honours, &c. becauſe the Purſuers, and Poſſeſſors of them, did not uſe theſe a-right; and err'd not in their Choice, but their Conduct. And therefore I have reſolv'd to prove the Truth of this Principle, from the Nature of Man, and from the Nature of theſe outward Things which we ſo much value. By which unuſual, tho' ſure Way, it will, I hope, appear, that it is Madneſs for Man to expect Happineſs from theſe Objects, which naturally cannot afford it: And that to be made happy by theſe, is both againſt their Nature and ours. Which may be demonſtrated by theſe following Conſiderations.

First, Nothing can be made happy, but by an Object which holds ſome Proportion to its Nature: But alas! What Proportion is there, betwixt the Soul, which is the Image of what is Infinite, and is it ſelf immaterial, and ſhall be eternal, and thoſe decaying and material Objects, which may pleaſe the Senſe, but cannot reach the Spirit? Does not the Soul, in one Moment, run over all that Univerſe, for a Part whereof we toil ſo much, and ſpread its Thoughts farther than the utmoſt Seas? Does not the meaneſt Man find Defects in the moſt excellent of theſe Things which the greateſt Men poſſeſs? Do they not ſay, That the *French* King would be a great Monarch, if he could conquer *Flanders* and *Holland,* to furniſh him that Trade and Commerce which his own Kingdom wants; and that the Grand Signior would be truly ſuch, if the Kingdoms he commanded were ſuch as *France* or *England*? And certainly, if he who thinks ſo, were rais'd to either of theſe Thrones, he would find therein a narrow and uneaſy Seat, until he had completed in his Greatneſs, what he formerly thought neceſſary for making him happy. And who can think, that the Soul, which is ſo nimble, as to travel in one Thought thro' Ten Thouſand Worlds, after it hath imagin'd them, ſhould be ſatisfy'd with a Piece of one of thoſe? And ſince there is a greater Diſproportion betwixt material and immaterial, than there is betwixt any Two material Things; it were much more reaſonable to think, that the Appetite of a Prince wou'd cheerfully feed even upon theſe Huſks, of which the Prodigal grew weary; or that a Lyon wou'd willingly puddle amongſt Swine, than that the Soul ſhou'd judge itſelf happy in the Fruition of thoſe Pleaſures; which being only the Object of Senſe, can ſatiſfy nothing that is more ſublime: For as we cannot fill our
Coffers

Coffers or Baggs with Virtue or Reaſon; ſo neither can we fill our Souls with Baggs or Coffers. And as Waters running through our Hands, would not ſatisfy us, except we put them in our Stomach to quench our Thirſt; even ſo, all theſe Treaſures cannot quench our Avarice, ſince we cannot lodge them in our Souls, which is that Part of us which does covet them.

Let us likewiſe conſider, that when Men begin to form in themſelves Ideas of Happineſs, and to be ſo fooliſh as to build Caſtles in the Air, there is none but carves out to himſelf what far exceeds the Enjoyment of the greateſt Monarch, or at leaſt the Narrowneſs of his own Condition. From which we may conclude neceſſarily, That no Thing that is the Object of Senſe, can make Men happy, elſe we needed not run for ſupplying thoſe, to Fancy and Imagination; which being Faculties of the Soul, can only afford it the leaſt Shadow of that Happineſs it hunts after: And the nobleſt Objects of Senſe do, without the Aſſiſtance of thoſe, furniſh us but the lame Materials of Pleaſure. And thus, if we did not imagine, that a Miſtreſs poſſeſs'd greater Charms than the Eye can diſcover, none would throw away his Life and Happineſs to pleaſe her: Nor would the bowing of a Knee, or the humbleſt Obſervances given to Favourites, make them place their Happineſs in Greatneſs, if they did not imagine thoſe Submiſſions were paid them upon the account of Merit. By all which it appears, that theſe material Enjoyments, with which the World offers to bribe us, are uncapable to pleaſe; and that they owe to the depraved Aſſiſtance of the Soul, thoſe well gloſs'd Charms, with which they delude us.

Another Confirmation of this, I take from the unfixt Temperament of our Bodies, to which every Day, bringing a new Change, varies accordingly the Reſolutions which depend upon it. He who, this Day, placed all his Happineſs in Drinking and Society, is, by a Sickneſs, forc'd to abandon, the next Day, that Satisfaction: And after that one has ſubdu'd the Inclinations of her whom he courted, as the only Object that could afford Happineſs to him; either a Diſeaſe makes him undervalue all Amours, or a later Beauty carries theſe to a new Face: Nor is this ſtrange, if we conſider, that Eating-Mortality devours ſo much of us every Hour (at leaſt every Day) as tho' theſe Decays be recruited by freſh Supplies; yet Philoſophers aſſure us, that I this Day will differ from my ſelf to Morrow; and this my Temperament and ſenſual Maſs, altering daily, (as Two Men will not reliſh the ſame Thing) ſo neither am I ſure, that my Senſes will be pleaſed always with what they now like: For I may come to differ from myſelf, as much as one Man differs from another. Youth makes Proviſion for Love and Luſt; and theſe are disbanded by more advanced Years, who adopt in their Place, Affairs and Honours; for which Men having ſpent their Strength, old Age creeps after Riches and Eaſe; and entertains with long Lectures, againſt all its early Paſſions, thoſe who do yet burn in more youthful Flames. Nor need we Agues to vary our Inclinations; for Agues, in their trembling Fits, make us envy that Heat in others, which within Two Hours we ſhall abominate in ourſelves. And if we remark our own differing Inclinations, and compare them with one another upon ſeveral Occaſions, we ſhall find that a moſt prevailing Argument, for convincing us of the Impoſſibility of being render'd happy, by any, or all of thoſe Objects, which ſatisfy only our Senſes; and when they ſatisfy, the Pleaſure is but ſhort; for the Senſe that is pleas'd, being a material Thing, wearies by being frequently toucht in the ſame Place. And the very ſame Songs and Sights, fall from being raviſhing, to be common; and from being common, to be loathſome. And to think, that what pleaſes now, will ſtill do ſo, is as ridiculous as to think, that we will be as much pleas'd with the Reliſh of our Meat when we riſe, as when we ſat down; or that when we have catcht the Hare, we will continue as much pleas'd with the Prey, as with the Hunting.

Our Senſes are not ſtrong enough to bear the Burden of theſe many Things we wiſh for, and they are much ſooner oppreſs'd than ſatisfy'd: Variety confounds them, Contrariety diſtracts them, and Enjoyment ſpends them. And at this rate, Man murders himſelf, either with Anxiety, if he fall ſhort of, or with Surfeit, if he enjoy what he deſir'd. The Frailty of of our Enjoyments here, do then, upon this Account, excuſe, as well as occaſion our Unconſtancy; and Time, in the Overthrow of what conquered our Affections, does lawfully diſingage them. Moſt of our Employments are incompatible; ſo that we muſt ſtill want almoſt the one half of what we deſire, and conſequently cannot pretend to Happineſs; for that requires the completing of our Wiſhes. If we will purchaſe Riches, we muſt want Eaſe; and we cannot inform our Jealouſy, without diſturbing our Quiet. So poor a Thing is this World, that it cannot make One happy, without impoveriſhing another; ſo that its Gifts are but Robberies, and its Favours at beſt are but Loans. And thus our Soul, which aims at Perfection, muſt ſuffer more by the Little it wants, than it can be pleaſed in the Much it hath, rather than poſſeſſes, believing nothing to be done whilſt any Thing is left undone for its Satisfaction, though its Deſires be never ſo extravagant and imaginary. And thus *Haman* confeſſes, that all his Honours avail'd nothing, ſince *Mordecai* would not do him the Honour to riſe to him: And in effect, there is more Reaſon to be troubled at a Diſappointment, which follows much Pains, and a well advanc'd Progreſs, than in that which, whilſt it offers it ſelf in the Beginning, does, if it deny us Succeſs,ſpare us our Pains and Expectations. And not only Nature, but Accidents, ſuch as, the Faſhion of our Country, or the Station we ſerve in, denies us the Accompliſhments of our Deſires in many Caſes: And if we cannot bear this Denial, we muſt be unhappy, either in diſgracing our Stations, or in fruſtrating thoſe Wiſhes which are inconſiſtent with them.

THE Frailty likewiſe of theſe Objects, as well as that of the Senſe which enjoys them, denies a Perpetuity to our Pleaſures. And as Happineſs requires a Proportion betwixt the Object and the Senſe; ſo it is lame without a Perpetuity in Both. Thus he who dotes upon Beauty finds, that after it has tied him to a fair Face; Diſtempers, Seaſons, or Age, do, by the Mortality of theſe belov'd Colours, leave him to admire, not Her, but What it was that did feed his Flame. He who depended upon a Favourite, is cruſht under his Patron, when he he falls; and ſuch as valu'd themſelves upon their Wit, or Fancy, will have their admir'd Works thrown away in the ſucceeding Generations, to make room for freſher Authors; for whoſe Diſrepute that Preference they now gain, will make way upon the ſame Principle. Conſider the Cabals and Parties at Courts and in Cities, and you will find them change with the Seaſon; and he would be laught at, who wou'd take his Meaſures there, by what he knew laſt Year. Nor do our private Intereſts yield more to the uncontroulable Empire of Fate, than do the moſt famous Kingdoms and Commonwealths, who muſt periſh by their own Proſperity, rather than ſtill flouriſh

*In ſe magna ruunt lætis ſic Numina rebus*
*Creſcendi poſuere modum.*——

MAN cannot pretend to be happy in any earthly Enjoyment, but either by poſſeſſing All, or in comparing his own State with that of others. To poſſeſs all,is only a fit Happineſs for one, and ſo incommunicable, that it cannot make Mankind happy, but makes many others unhappy to ſatisfy that One, who nevertheleſs cannot find Happineſs in that Enjoyment which a Sickneſs will pluck him from, or force him to acknowledge to be no Felicity. And as none ever attained to this imaginary State; ſo that *Alexander*, who came neareſt it, made the Univerſality of his Conqueſt, an Argument to draw Tears from thoſe Eyes, which he found could not be ſatiſfy'd with Seeing. But imagine,that one Man could poſſeſs that univerſal Monarchy; yet when he conſider'd the Inſtability of all human Affairs, and that they muſt either grow or decreaſe, certainly he would be diſquieted to think himſelf rais'd by his Proſperity ſo near to his Ruin. The Conſideration whereof, gave *Cæſar* the only Fear with which he was ever aſſaulted: For after he had completed his Victories in the Defeat of *Pompey*'s Sons, he trembled to think, that his Fortune could not but decline, becauſe it had no further Point to which it might advance. The comparing one State with that of others, cannot make us happy: For beſide that Happineſs is a State wherein nothing is wanting (not wherein we enjoy more than others) ſo ſeeing we are more apt to conſider what is above us, than what is below us, the Soul of Man looking always like his Body upward; we will not be ſecure againſt Unhappineſs, 'till we be above Compariſon; where, when we are arriv'd, we ſhall find, that we have ſatisfied only our Senſes in that Elevation; but that the Soul, whoſe Thoughts are more craving,becauſe more comprehenſive, wants ſtill its Satisfaction, and will conclude itſelf no way happy, till it overcome its Wants as well as its Rivals. And if that univerſal Monarch ſhould want Sleep, or ſhould ſee himſelf outdone by another in Learning, Wiſdom, or at any Exerciſe he valu'd; all that World which he poſſeſs'd, would ſerve him for no other Uſe, but to heighten his Deſpight, when he conſider'd he could not command what was enjoy'd by his meaneſt Subjects. We muſt conclude likewiſe, that he would be jealous of the Ambition of others, when he reflected upon his own, knowing that thoſe who want Power and Command, will ſearch for it in the very Bowels of him who hath it, and will judge every Thing lawful, whereby they may arrive at that Height from which they may give the Law to others. And doubtleſs that univerſal Monarchy would bring this Unhappineſs, that one Man cou'd not govern it, and all Men would be Enemies to it.

THESE who expect Happineſs from any exterior and foreign Pleaſures, are in this miſerable, that they place their Happineſs in that, which, becauſe it depends upon others, muſt ſtill remain too much at their Diſpoſal to be able to make us happy: And it being in their Power to divert, at leaſt it not being in our Power to retain that whereon we dote, we cannot be ſaid to be rich in theſe; no more than one can be thought ſo, who has his Maſter's Caſh or vaſt Sums of lent Money lying beſide him.

THAT Courtier who reſts his Felicity upon his Prince's Favour, cannot by the nobleſt Characters of his Maſter's Eſteem, be ſaid to be happy, ſeeing the volage Enjoyment may eaſily evaniſh. He who deſigns to perpetuate his Family, may be diſappointed by the Folly or Luxury of his Heir: The braveſt General has been affronted by the Cowardice of his Soldiers: And, in the mean time, when a rich Miſer is hugging himſelf in the Imagination, that his Treaſures are in the next Degree of Greatneſs to his Avarice, poſſibly Thieves or Fire are devouring his golden Calf: And as he cannot be ſure of his Poſſeſſion, longer than he ſees it; ſo his ſeeing it, cannot defend him againſt that Uncertainty, to which their Nature expoſes him and them, and him in them.

I doubt not, but that one of the great Deſigns of Providence, in dividing our little Time into ſo many Ages, as that of Infancy, Youth, ripe and old Age, was to convince us, by our own Teſtimony, That the Objects of our Inclinations ow'd their Value only to our preſent Apprehenſions, and had not ſo much intrinſick Worth in them as could deſerve to rival it with God in our Eſteem, and to be worthy of our Endeavours; much leſs to be a ſufficient Price for a Soul that is immortal. A little Ball pleaſes Children more than that great one of the World can pleaſe Men: And the Wildneſs of Youth is the Horror of thoſe who have eſcaped it. Why ſhould we then be ſo fond of what we wiſh for, ſeeing theſe bypaſt Trifles appeared as ſatisfying to our firſt Diſcovery, and we can never be ſure of what hath ſo oft erred? And ſince our Senſes have ſo oft deceived us; to be eager upon any thing, without other Warrant for our Deſires than their Recommendation, is to believe a Liar or a Fool; and we are therein as ridiculous as if we ſold the Expectation of our Father's great Fortune to buy a Toy, which was preſſed upon us by one by whom we had been oft cheated. It is alſo very obſervable, that there is no Object ſo deſirable in this World, but that very many ſee its Folly: And this Wiſdom is left us, that we may be Witneſſes one againſt another. That is only eſſentially excellent, which all Men naturally admire, and none of our ſenſual Pleaſures are ſuch: For that Learning which the Univerſity admires, the Camp deſpiſes as Pedantry; the Courtier thinks it a Folly to hazard his Life for the Repute of a gallant Perſon; and the Soldier who can hazard his, for a Day's Pay, is wiſer than to do ſo for a vagrant Miſtreſs. You cannot then gain the Eſteem of all, by any of theſe Toils: And ſure no Man who values Applauſe can be happy, whilſt any one is diſſatisfied. From which I likewiſe conclude, That *there is no Thing without us can make a Man happy.*

This Truth is tacitly acknowledg'd by all Men, though at ſometimes our Inadvertancy rather ſlips us into a Miſtake, than our Judgments deceive us: A great Inſtance whereof is, That all Men admire naturally ſuch as undervalue the World; not becauſe ſuch ceaſe in that Contempt to be Rivals, but becauſe they conclude a Firmneſs and Perſpicuity in their Judgment, from the Excellency of that Choiſe. Did not the old Philoſophers, under torn Cloaks and in Tubs, draw all the World to an Eſteem of them? *Alexander* could wiſh to have been *Diogenes* (the unpleaſanteſt of all Philoſophers) if he had not been *Alexander*. Theſe had with Eaſe what Fame the other could ſcarce conquer with Sweat and Blood, and have acquired a Fame as vaſt as the other's Dominions. Why admire and love we ſuch as are couragious, but becauſe they value not Life? Or ſuch as are liberal, but becauſe they value not Money? And when Cuſtom or a Diſtemper in our Soul has depraved it ſo, as to encline us to love any Thing here; we muſt ſtill be jealous, that we exceed not in our Enjoyment, (and oh! how great a Torment it is, to enjoy moderately what we love in Exceſs!) and we ſhall always fear ſo much their being rent from us, that the Fear of the one will ſuffer us but meanly to enjoy the Pleaſures of the other. *Xerxes* wept when he conſider'd, that his ſplendid Army would be ruin'd by Time, tho' he thought them invincible by an Enemy: And a Gentleman in *Florence*, after he had, in a long Rapture, doted a whole Day upon his Miſtreſs's Face, without ſuffering her to ſtir from the Place, did at Night diſtract, upon the Apprehenſion that theſe Traits and Colours would, in a little Time, hide themſelves within thoſe Wrinkles, by which Age deforms the ſweeteſt Faces.

How eaſily are Misfortunes occaſioned? The meaneſt Boy is able to burn the faireſt City; and Ruin ſeems as it were ſtill ready to invade us: Whereas the building up of Pleaſures, is a Work of much Toil and Time. The Poverty which the Merchant fleeth in running to the *Indies*; and that Fame which the Soldier purſues over his Enemies Walls and Forts, employ the greateſt Part of our Age: Whereas that which is gain'd by all this Toil can be devour'd by a Storm, or may be ſtained in one Hour. And theſe Sickneſſes which are occaſion'd by a Draught or Blaſt, are not recoverable without long Time and much Patience: They come by the Poſt, and return a-foot; as the *French* obſerve in their Proverb. The Miſtake of a Servant hath ofttimes diſappointed the beſt contriv'd Project: And a Secret of the greateſt Importance having been diſcover'd by a Miſtake, hath diſſolv'd the moſt fixed and moſt ag'd Friendſhips. And not only are all the Avenues of Pleaſure guarded by long Files of Sorrows and Pains, thro' which we muſt neceſſarily paſs; but we muſt even create Troubles to our ſelves, for heightning of our Delights: We muſt faſt, to reliſh our Meat; toil, that we may ſleep; and ſharpen our Loves, by interpoſed Abſences: We are ty'd to be virtuous, and that Virtue is ty'd to Exerciſes that are thought difficult: Nor is any Man pleas'd with himſelf or prais'd by others, for doing what is eaſy. To endure Torments without ſhrinking, to diſſemble Affronts, to fight Combats, in which we are ſure either to die by the Enemy, or by the Law; are only thoſe Actions for which we are admired: And if our Love want Rivals, or our Miſtreſs Coyneſs and Severity; the Purſuit is thought unworthy of our Pains. So that Miſery ſeems natural to this World, becauſe it is eaſy: And even that little Meaſure of Happineſs we expect, comes but by Force; and Pleaſure appears, by its ſhort Stays and unwilling Appearances, to think itſelf a Foreigner and Stranger here.

BUT albeit all outward Things were diſpos'd to favour our Deſign of being happy; yet Man, who is to enjoy all theſe, is ſo frail a Creature, that from his own Fabrick and Conſtitution, we may conclude it impoſſible for him to be happy, without the Aſſiſtance of ſome higher Power. Let us conſider him entring into the World with Tears, which preſage his Miſery; from a Womb where he was fed with the impureſt Part of the Blood, and where he did ly in the Midſt of Excrements, ſo ſenſleſs that he cannot expreſs his Wants or crave Aſſiſtance, and yet ſo weak that he cannot bear them: And albeit his Parents find a new Joy; yet they are more ſure of a new Burden: He only, of all the other Creatures, is moſt ſubject to Diſeaſes. And though every Servant can ſoon learn how to cure the Beaſts, and to know all their Diſeaſes; yet to know his, and much more how to cure them, is the Employment of the greateſt Age. And albeit Sinews, Arteries, Veins, and other Pieces, which make up his Body, be great Inſtances of the wonderful Art of his Maker; yet their Number and Delicateneſs, make Man as frail a Creature as he is wonderful. Upon how many hundred Neceſſities does that Life depend, which a Misfortune or Faillure in any one of theſe little Veſſels or Bones, can deſtroy? But beſides theſe, no Man can enjoy any outward Pleaſure longer than another pleaſes; for whoever dares to hazard his own Life, is Maſter of another's: And theſe vain Men, who boaſt that they defy the World, will fall under the Knife of the meaneſt Rogue: Every Morſel which he likewiſe eats, and every Stair he goes down, may bring Death upon him. And if we would conſider theſe Millions of Ways, by which Men have died miſerably, we would eaſily conclude, that it is impoſſible for him to be happy, without ſomewhat which may ſecure him againſt all theſe Events; and no external or finite Thing can do this.

THE Soul of Man likewiſe, which ſhould entertain him with Happineſs, is the great Nurſery of his Sorrows; and it is oft ſo diſtemper'd, that Men are troubled and pettiſh, and cannot give a Reaſon for their being ſo; and at theſe Times, Treaſures, Honours, and Miſtreſſes, Muſick, nor no outward Object, is able to pleaſe them, ſince that which can only reliſh Pleaſure, is itſelf diſordered. Are not our Judgments blinded, and yet always longing after Knowledge? So that we ſcarce know any Thing, but that we are Ignorant. Our Wills are ſo crooked, that we at once ſee it neceſſary and impoſſible to rectify them: Our Paſſions can neither be bridl'd nor ſatisfied: And though we find our ſelves Slaves to Opinion and Fancy, (theſe two ſevere Tyrants) yet can we not free our ſelves from their Oppreſſion. Our Memories retain our Sorrows after they are paſt, and our Fancy makes us endure Grief before it comes: So that our outward Sufferings would be but ſhort, if theſe two Faculties did not thus ſtretch them out. At this rate, we are triply miſerable by Fancy, before our outward Pains come upon us by Senſe, when they reach us, and by remembring them when they are paſt; *Futuro torquemur & præterito, timoris tormentum memoria reducit, providentia anticipat, nemo præſentibus tantum miſer eſt.* So that, as *Charon* obſerves, we are more miſerable than Beaſts, ſeeing they enjoy their preſent Pleaſure undiſturb'd, by too provident Anxieties. And therefore I muſt conclude, That Man muſt be an unfortunate Creature, ſeeing his greateſt Accompliſhments make his greateſt Torments, and his Remedies are become his Diſeaſes: And albeit he be his own moſt favourable Judge, and knows beſt his own Excellencies; yet he is not able to abide the Teſt of his own private Thoughts: And few dare ſit down to reflect upon their own Condition, but muſt, at any rate, ſeek to be diverted from that melancholly Employment.

MAN is naturally bent, to long and preſs for what is forbidden; and he is not ſo happy in that he is advertis'd, by ſure Beacons, of what he ſhould ſhun, as he is miſerable in that he concludes, Obedience to be Slavery: For if he be not forbidden by Laws to do what is unfit for him, under great Penalties, he may be enſnar'd; and if he be, he thinks his Liberty retrenched. And thus our Actions are infected in the Seed, and our firſt Reſolutions are criminal. But albeit our Inclinations may, at ſome Times, and in ſome Perſons, eſcape this early Pollution, and that we ſhould be ſo happy as to reſolve to do well; yet we are ſo little certain of our own Conſtancy, that the Fear it will not keep up at this Straightneſs, is enough to diſparage that Happineſs: And albeit both theſe ſhould concur; yet the Event does not ſtill anſwer our Deſign. And therefore, becauſe *the Race is not to the Swift, nor the Battle to the Mighty, Solomon* immediately breaks out into a Repetition of, *All is Vanity and Vexa* *tion of Spirit.* See we not daily, not only wiſe Projects diſappointed, after exact Pains? But ſo deſperately unhappy is Man, that the contrary of what he deſigned, is the only Return of all his Diligence; whilſt thoſe who are thus diſappointed, are rendred yet further miſerable, by ſeeing theſe Pleaſures and Happineſs they deſign'd, fall into the Poſſeſſion of ſuch as neither merited nor toil'd for the Conqueſt: And at other Times, nothing is more fatal than their own Wiſhes.

But tho' Man ſhould evade moſt of theſe Misfortunes; yet either he will account himſelf unfortunate in dying young, or elſe he will be really ſo when he is overtaken with Age; wherein his preſent Indiſpoſition ſhall make him unfit to enjoy Pleaſures; and to conclude, that he hath been unhappy in doting, ſo long and paſſionately, upon what was ſo frail and empty. This and Death, are the great and convincing Arguments, whereby Providence forces us to confeſs, what Youth and Paſſion could not comprehend. In vain are Trophies carry'd before him, whom Ambition hath deſerted with that natural Fervour which maintained it: And it is hard to warm our Courage, when our Bed and Cordials can ſcarcely warm our Blood. Praiſe and Flattery are then, by Nature, and not by us, diſcover'd to be Follies; and in ſpight of all the Paraſites at Court, a Favourite muſt conclude himſelf a ſilly Creature, when he can hardly creep to the other End of a Room. I remember, that I was once long detain'd by this Reflection, upon the ſeeing *David*, that mighty Prince who kill'd Lions and Giants, repreſented in his laſt Age upon a Couch, changing his Shirt, where the pale Colours and empty Wrinkles of old Age were to be ſeen ſitting upon that Hero, who was once ſo beautiful as to enflame the Daughter of his King, and now ſo crazy that he fear'd more a cold Blaſt, than he would formerly an Army of *Philiſtines*: And I imagin'd, that if any of the ruffling Gallants of theſe Times, had ſeen that Monarch in this Condition, they had doubtleſs ſwore, that *David* was never ſo great a Warrior as he was fam'd to be; and that he ow'd his great Name only to the Simplicity of the Times wherein he liv'd; elſe, in their Age, he had not attain'd to ſo much Praiſe. This is the great Unhappineſs of Worth, when eclips'd by any Accident, that to its other Miſeries is added, the Misfortune of being believ'd, by their late Acquaintances, to have deſerv'd no more than they then do. And ſo much are we detain'd by what is preſent, that he who hears an old Judge miſtake a Caſe, or ſees an old General timorous, does ſuffer the preſent Frailty to cover and eclipſe their former Merit.

What Age does to thoſe whom it reaches, Death does to all; and few have a Value for the World, when they are to leave it: And even the *Stoicks* (who would have us believe that Death rather ſerv'd than commanded them, ſeeing it obey'd their Call, as others do its peremptory Commands,) never had Recourſe to it, till they had firſt concluded the World unworthy to lodge them, and till they had ſo far undervalued it, that they thought fit to exchange it with the Uncertainty of a future State. And how vain a Thing does Death demonſtrate Man to be, when it perſwades his Friends, his Favourites, his Miſtreſs, his Wife, to throw him out of their Sight, and abandon him to Worms.

*——Mors ſola fatetur*
*Quantula ſunt hominum corpuſcula.*

In this Concluſion, our Experience joins with our Reaſon; and we need not a long Life, nor much Converſation, to be convinced of the Impoſſibility of being render'd happy by any thing which this World can give. Do not all Men conſtantly confeſs and regrete it? And it is ſtrange that we can expect what never any one of our Predeceſſors hath found. *Solomon* was probably enrich'd with all he could wiſh here; and it was declar'd by God himſelf, That none after him ſhould equal him; for this End mainly, That he might know and teach others, that their Wiſhes are vain: And it is moſt remarkable, that as he poſſeſs'd moſt plentifully, of all others, thoſe lower Bleſſings and Conveniencies of Life; ſo of all others he preach'd moſt their Vanity. And we ſee, by Experience, that, ſince his Time, by how much one Man exceeds another in theſe, by ſo much he exceeds him in the Acknowledgment of their Emptineſs. I commend very much the worthy Pains of a late Philoſopher, who hath collected the laſt Expreſſions of all the eminent Perſons, Conquerors, Courtiers, Stateſmen, and Scholars, whom the World admired; in which we may clearly find this Truth often preach'd. Conſider the Periods of *Alexander*, *Cæſar*, *Beliſarius*, the Third and Fourth *Hary*'s of *France*, moſt of all our *Scotiſh* Kings, and as many Favourites; and you will find by them, and many Thouſands of others, That theſe are moſt miſerable, whom the World judge to be moſt happy; and thoſe moſt happy, whom the World account moſt miſerable: And that the only Reaſon why we eſteem any happy here is, becauſe we ſee only their poliſht Outſides; whereas they are often cut by inward Anxieties, whilſt we envy their Grandeur. I have made it oft my Recreation, to demonſtrate to ſuch as complained of their own Misfortunes, that they were happier than thoſe they envy'd; by repreſenting to them, even what Misfortunes they ſuffered. The preſent Age always admires that which preceded; for no other Cauſe, but becauſe they liv'd not therein to ſee thoſe Miſeries, of which Men then complain'd with equal Zeal. Did not all Ages cry out, That Juſtice, Truth and Friendſhip, have left the Earth; That Deceit is all our Wit, Avarice all our Frugality, and Flattery all our Eloquence? Do not all complain, That Vice is the only Road to Preferment, and that natural Affection is become a mere Name; and only they who have no Reflections at all, know not theſe to be Truths? Whereas ſuch as ſeriouſly ponder them, are forc'd to long for Solitudes, and do throw themſelves in Cloyſters, thinking that they have eſcaped a Plague, when they eſcape the World.

I might, to prove the Perverſeneſs of this deluding World, remember you, that the juſteſt and moſt generous Men ſuffer always in it; ſome by thoſe whom they never injur'd, but moſt by ſuch as they have oblig'd: *Socrates*, at *Athens*, is poiſon'd; *Scipio* is baniſh'd from *Rome*; and it is made no leſs criminal to oblige our Country, than it is really criminal to oppreſs it: We envy theſe Vertues which we cannot imitate, and puniſh thoſe Services which we cannot reward. And ſo little do Men believe, that Mankind is capable of Goodneſs, that they conclude Philoſophers, who pretend to be virtuous, mere Cheats; and ſuch as are really devout, mere Hypocrites; and allow themſelves in abuſing them as Perſons (forſooth) who impoſe upon and cheat the World: Which does not only prove unanſwerably, that the World is unjuſt to ſuch as deſerve well in it; but proves alſo, that Men are naturally perſwaded that there can be nothing under the Sun which deſerves Approbation or Applauſe.

BUT if theſe Reaſons fail to convince us, let us at leaſt believe the Spirit of God, Who hath taken ſo much Pains to preach to us, by *Job* and *Solomon*, this Vanity of all ſublunary Enjoyments, and who tells us, That all our Joys are but like Cobwebs, which are poiſonous Snares; like *Egyptian* Reeds, which break under and wound thoſe who lean upon them; like a vain Shadow, a troubled Sea continually toſs'd; That Man is born to Trouble as the Sparks fly upward, and that every Man walks in a vain Shadow, and troubles himſelf in vain. And our Saviour foretells to the Righteous, That *in the World you ſhall have Trouble, but in Me you ſhall have Peace*; and aſſures the Wicked, who expect all their Happineſs in this Life, *I will hedge in your Way with Thorns*; and *the Hope of the Worldling ſhall periſh*: With many other Expreſſions of that Nature. So that, as *Solomon* obſerves, *This ſore Labour hath God given to Man under the Sun*; and we cannot expect that the World can make us happy, till we can make the omnipotent God a Liar. And not only hath He told us, that all Things here are unable to make us happy; but it is ſuitable for His Glory to have it ſo, ſeeing the World is (as His bleſſed Son aſſerts) *an Enemy to God*, and (which is very remarkable) the Scripture calls the Wicked always *the World*. Do not theſe exterior and worldly Pleaſures become Idols, and ſo Rivals to God, employing all our Time and Inclinations? And therefore God is oblig'd (if we dare ſpeak ſo of His divine Majeſty) both becauſe of His own Honour, and in Compaſſion and Kindneſs to us, to grind to Duſt thoſe *golden Calves* which we worſhip, and to break thoſe *Dagons* to Pieces which are ſet up in our Hearts, that were created to be Temples to the Holy Ghoſt. *No Man can ſerve two Maſters*. And we muſt renounce all, if we follow *Jeſus*.

YET do I not deſign, by this Diſcourſe, to perſwade Men that they cannot live pleaſantly in this World, nor to undervalue theſe outward Things: This were to diſparage the Greatneſs of God, who deſign'd to make this Glob an Inſtance of his Power and Greatneſs; and who ſet ſo high a Value upon it, as to inſtitute one Day of Seven as a Memorial for his having completed ſo great a Work; and who refutes the fooliſh Atheiſt, by deſiring him to conſider the Sun, Moon and Stars: Thereby I would unthankfully leſſen our Eſteem of His Kindneſs, who has furniſht ſo rich a Palace for Men. The World is fitted indeed for our Wonder, as well as Uſe; and no Creature is ſo inconſiderable, as not to afford raviſhing Divertiſements to our more ſerious Thoughts; Divertiſements far exceeding in Pleaſure and Advantage, thoſe dangerous and diſtracting Recreations which we with ſo much Paſſion purſue; as I ſhall endeavour to prove in another Diſcourſe. But tho' theſe innocent outward Things may ſerve as Inſtruments for our Joys; yet they ſhould not be reſted on as the fixed Objects of our Happineſs: They are the Means, but not the End; and do only then prove dangerous and unworthy of us, when we apply them not to their natural Uſe, making thoſe Riches which ſhould be our Servant, become our Maſter; that Friendſhip which ſhould recreate us, become an Occaſion of doing Miſchief to ſuch as oppoſe them; and thoſe Employments in which we ſhould ſerve our Country and protect the Innocent, the Means of oppreſſing others. Are not Statues fine things, tho' they cannot make fine Speeches; and Firrs pleaſant Trees, tho' they bear no Apples: Every Thing is created for a ſpecial End, and being forc'd to other Uſes, they fail in anſwering the Applyer's Expectation; which is the Frailty of the Uſer, and not of the Thing that is uſed. But the true Uſe which we ſhould make of the foregoing Diſcourſe, wherein I have preſs'd, *That no Thing without us can make us happy*; is to be indifferent in the wiſhing for, temperate in the Enjoyment of, and patient under the Want of theſe external Things.

II. *How*

## II. *How far the Moral Philoſophy of the Ancients can make us Happy.*

SOME thinking Men amongſt the *Heathens*, recollecting themſelves, and turning their Thoughts inwardly, did eaſily ſee that outward Things could not make them happy: And therefore they concluded, That it was fitter to tame their own Spirit, than to endeavour to pleaſe its Extravagancies; even as it is eaſier to teach Children not to ſeek every Thing they ſee, than to pleaſe them in denying them nothing; which, beſide the Impoſſibility of the Satiſfaction, does rather make them wild in endleſs Deſiring, than ſatisfied in enjoying what they paſſionately deſired. And therefore in place of acquiring Riches and Honours, &c. they ſpent their Time in ſtudying the Nature of their own Souls and of its Affections, and compil'd from theſe Obſervations that moral Philoſophy, of which they vaunted ſo much, that I have thought fit to give my Reader the moſt advantagious View of all the Happineſs that it can afford.

IN managing of which Subject, I crave leave to differ from others, who begin their Diſcourſes with a full Enumeration of the many differing Opinions of Philoſophers, about the chief Happineſs of Man, or his *Summum bonum*, as they call it: For this rather makes the Reader doubt if any can certainly know that; wherein becauſe they differed, they therefore err'd: And this alſo contradicts the nobleſt of their Principles, which is, That it is eaſy for every Man to be morally happy; that Nature inſtructs us ſufficiently in it; and that it needs not that great Maſs of Principles and Diſcourſes which others make upon this Subject.

MORAL Happineſs does, in my Opinion, conſiſt in a Man's obeying the Dictates of his Reaſon; *vivere ſecundum naturam*: For ſince every Creature is happy, when it does what is convenient for it; certainly Man muſt be happy when he obeys his Reaſon: For Reaſon being his Nature, it muſt be convenient for him to obey it, and muſt be as eaſy for him, as it is for a Stone to fall down, or for Sparks to fly upward. Reaſon is the Candle of the Lord, which He has kindled within us, to enlighten our Steps, and to lead us in the Way wherein we ſhould walk: It is the Image of that Almighty, who only can make us happy; and it is that infallible Tutor, which is plac'd within every Man's Breaſt, to be a preſent and infallible Counſellor, that we might be ſpeedily adviſ'd how to do, what is fit and juſt, and inexcuſable when we err. In this Opinion all the Philoſophers may be reconcil'd; for this is, with *Ariſtotle*, to live virtuouſly: This is, with the *Stoics*, to ſubdue our Paſſions: And from this will reſult that true Pleaſure, in which the *Epicureans* place their Happineſs.

ONE of our chief Miſtakes about Happineſs is, That we conſider not that Man is, by Nature, compoſed of Soul and Body: And therefore tho' we ſhould endeavour to be happy in both; yet the *Stoics*, and too many Philoſophers, have framed an Idea of Happineſs ſuitable only to the Soul, as if Men were mere Angels; whilſt Courtiers and Worldings ſtudy only to be happy by bodily Pleaſures: And thus both miſtaking the End, miſtake alſo the Means. But he who would be truly happy, muſt endeavour to ſtudy both; for the one is an Employment fit for Angels, and the other for Brutes: But Man, who is a Medium betwixt both, muſt participate of both. How could the *Stoics*, who were Fleſh and Blood, think to live ſo as if they wanted both? Not to be angry at, or ſorrowful upon any Occaſion, deſerv'd to be thought impoſſible for mere Man. And thus as a Muſician, who takes his Note above the true Reach of his Voice, ſpills the Song; ſo theſe contemplative and too refin'd Philoſophers, by ſublimating their Principles above the Nature of Man, who was to practiſe them, made themſelves unhappy in the Unattainableneſs of their Task, and their Principles ridiculous in the Eyes of others. This made Philoſophy to be contemned in the Opinion of the World, Men concluding it impracticable, and made them, and other vertuous Men, to be concluded mere Cheats and Mountebanks, in promiſing to cure Diſeaſes which were above the Reach of all Medicines. If we follow and obſerve Nature, we will find, that it has made ſome curious Colours, Shapes and Reliſhes, for delighting our Senſes, and has bleſs'd Man with a pregnant Invention, whereby he may find out what may ſolace him: So that Nature has not only allow'd bodily Pleaſures, but has ſerved us in this Deſign; and the Soul is not able to maintain its nobler Thoughts, without theſe Helps. But yet certainly, he who thinks to be happy by bodily and ſenſual Enjoyments, muſt imagine himſelf a Brute, and miſtakes his own Nature, which is too pure to delight chiefly in ſuch low and groſs Things.

IT is then the Duty of one who ſtudies Happineſs, to pleaſe and humour both: But ſince Nature teaches us to pleaſe moſt that which is moſt eminent and noble; therefore ſince the Soul is a more excellent Thing than the Body, it is fit that we ſtudy moſt to pleaſe it: And ſince the Body is but the Inſtrument of the Soul, or the Caſk in which it is kept, it is not reaſonable that we ſhould indulge the Body in any thing that may be offenſive to the Soul. And thus we ſhould not eat or drink ſo much as may darken our Judgment, or raiſe ſuch Clouds in our Brains, as may miſrepreſent the Objects that appear there; but rather we ought to raiſe Pleaſures to our Souls from the bodily Pleaſures that we enjoy; as when we eat, we ought to eat ſoberly, that ſo we may have the Pleaſure of reflecting upon the Pleaſures of Temperance; and in eating pleaſant Fruits, we ought to conſider the curious and maſterly Strokes of Nature, in forming ſuch delicate Creatures, and in fitting ſo exactly theſe Reliſhes to our Appetite.

THOUGH it be Vanity for one Man to admire himſelf above another; yet certainly it is Juſtice and Duty in every ſingle Man to admire thoſe excellent Parts of which he is made: This ſupports him againſt external Miſeries, whilſt he conſiders what noble Privileges he poſſeſſes, and heightens his Obligations to his Maker, whilſt he reflects upon the great Favours which he has received. And if we conſider ſeriouſly the great Variety of theſe Organs, which ſerve our Bodies, and how conveniently thoſe do accommodate our Neceſſities; how the ſame Eye receives Thouſands of Objects in its little Room, without Confuſion; and how the Ear does faithfully repeat diſtant and different Sounds; and how, without Conſideration, we form ſuch Variety of charming and convincing Expreſſions by the ſame Motion of our Tongues and Lips; we cannot but cry out, Oh! how wonderfully are we formed! and conclude, that we our ſelves are to our ſelves a Miracle.

BUT yet all theſe are but dull Reflections, when compar'd with the Excellencies of our reaſonable Souls; which are ſuch wonderful Creatures, that the *Heathen* Philoſophers concluded them to be a Part of the Divine Eſſence, *particulæ divinæ auræ*; a Metaphor borrowed from Scripture, which ſays, That God breathed in Man his Soul: Nor does the Body ſeem, when compared to the Soul, any more than the Inſtrument is to the Muſick. Oh! what a Wonder is it to conſider how the Memory lays up, in faithful Repoſitories, ſo many intricate Ideas! And when its Maſter intends to call for any of theſe, how he can run over all theſe Drawers in an Inſtant, and find out the intire Story or Diſcourſe which had been laid up many Years ago; and that without miſſing one Circumſtance? Is it not ſtrange, how nimbly the Fancy will chooſe Pieces of the various Things which we know, and adapt them ſo prettily and cunningly to one another? How it can form to it ſelf new Worlds, and pleaſe it ſelf with infinite Succeſſions of new and differing Scenes? And who would not be aſtoniſhed at the miraculous Productions and Enquiries of the Judgment? How it riſes to the Heights of Heaven, and penetrates into the Secrets of Earth: How it comes to bind into certain Rules the vagrant Motions of the heavenly Bodies; and finds, by Reaſoning and Reflections, how the precious Stones have been coagulated, what paints the gaudy Flowers, and how the ſeveral Fruits grow up from little Seeds. Is it not pretty to ſee, how ſubtilly Reaſon follows Truth, thro' ſo many Windings and intricate Caſes, as Lawyers daily hear and treat; and how one Man will bind another ſo by the Force of Argument, that neither Honour nor Confidence can tempt him to reſiſt? And how the Soul is charm'd with Truth; as the Ear is with Muſick, or the Eye with Beauty? What is more pleaſant, than to conſider the great Variety of Humours, and the different Genius's of Men, which appears not only in the ordinary Paſſions, ſuch as Envy, Ambition, *&c.* but in the different Kinds and Aſſociations of theſe Paſſions and Humours, no Man being vain or ambitious in the ſame Way exactly with another? And therefore, in Company, my great Taſk and Pleaſure is, to conſider this admirable Variety: And I am as little vex'd, when I fall into froward Societies, as I am when brought into a great Gallery, wherein are many ſtrange and ſome ugly Faces.

THESE Reflections force me to admire, why Men, who have the free Exerciſe of Reaſon, can grow weary of being alone, and are aſham'd becauſe they are not either Rich or Great. How can we be troubl'd for want of Company to tell us Stories and News, whilſt we have within our ſelves ſuch Varieties as are in our Memories, or as may be produc'd by our Judgment and Fancies? And do we not ſee that ſome have been ſo pleas'd with theſe Reflections of their own Spirits, that they have ſeparated themſelves from Mankind, merely to contemplate; and all excellent Men have long'd to be alone? But this dull Wearineſs proceeds from want of Reflection, and want of Acquaintance with our ſelves: Few retire into their own Breaſts and rouze up theſe Seeds, or blow up thoſe Sparkles, that are in their own Souls; but beſtowing all their Care upon outward Follies, they live and die Strangers to their own Excellencies.

FROM the foregoing Diſcourſe we may conclude, That our Happineſs ought to depend upon our ſelves, and not upon outward Poſſeſſions or Expectations: For how can we imagine, that ſuch finite Things, as Earth or Mettal, can ſatisfy or fill the Soul, which is the Image of Him who is infinite? Or how can the Soul, which can exhauſt all earthly Things in one Thought, and form Thouſands of Worlds in a Moment, be ſatisfy'd with a ſmall Portion of this, in which we live? And our Souls, which are the only Judges of Pleaſure and Happineſs, are of ſo different a Nature from that Gold and Silver which we deſire, that we may be ſure that a Woman will as ſoon marry a Monkey, or that a wiſe Man will chooſe to puddle with the Swine, as that our Souls can be ſatisfied, or made happy, by outward Enjoyments.

ANOTHER great Leſſon depending upon the ſame Principle is, That we ought not to place our Happineſs in what is not in our Power, or does not depend intirely upon our ſelves: For theſe not being at our Diſpoſal, cannot ly under our Command; and ſo others may rob us of our Happineſs; and not being ſure when to loſe it, we can never poſſeſs it with intire Satisfaction: Fear is inconſiſtent with true Pleaſure; and to place our Happineſs in what depends not upon us, or is not at our Diſpoſal, is ſuch a Folly, as if we beſtowed our Stock to build a Houſe upon another Man's Ground, or became enamoured of the Rainbow, or like *Jonas*, doted ſo upon a Gourd, as to reſolve to be no longer happy than it laſted. Such Fools are they who expect Happineſs from Riches, which take ofttimes the Wings of the Morning; and from Applauſe and Fame, which is but the Creature of the giddy Multitude, variable, mean and unſtable, like them: And how can it be expected, that from the ignoble Crowd ſhould proceed any Thing that is not ſo? Beauty, by the ſame Reaſon, is too paſſing and frail a Fancy to be the Foundation of our fix'd Hopes: And ſince a Miſtreſs may change, Men ought to keep themſelves in a Condition to change, as well as ſhe. And after an exact Review of the Actions and Miſfortunes of Men, we will find, that few are otherwiſe unhappy, than by having miſplac'd their Felicity, in hoping to be happy by the Poſſeſſion of what they were not able to attain, or to retain if attain'd by them.

TO avoid theſe Miſfortunes, 'tis moſt neceſſary, ( tho' little conſidered ) that every wiſe Man ſhould endeavour to command his own Spirit, and to ſubject to his Reaſon, his Fancy and Paſſion: For theſe Two are, by their Wildneſs and Extravagancy, the great Enemies of our Happineſs. It is an ordinary Error in ſuch as deſign to be happy, That they will deny themſelves no Pleaſure: For they fooliſhly think, that to be happy, is to enjoy immediately whatever they deſire. And from this proceeds, that the luſtful Youth runs diſtractedly upon pleaſing his Luſt; that the Ambitious, with a yet greater Fervour, preſſes for Advancement; and every Man indiſcreetly chooſes, and impatiently purſues what his firſt and unexamin'd Thoughts propoſe to him. Whereas this unkind Way of pleaſing our ſelves, may pleaſe at preſent; but does certainly lay a Foundation of future Diſquiet; for it makes our Paſſions and Fancy wild and unruly: By feeding them too much, we learn them to caſt their Rider, and to diſobey the Bridle of Reaſon and Perſuaſion: Whereas we ſhould breed our Spirits, as we do our Children; to whom, if we give every thing that they crave or deſire, we will certainly ruine them; and notwithſtanding of all the Pains we may take to pleaſe them, they will be oftner diſpleas'd than ſatisfied: Whereas if we take pains to rectify their Opinions, and to inſtruct them in what they ought to deſire; we ſhould, by refuſing them ſome preſent Pleaſures, quiet them for the future, and ſo make them joyful and pleaſant Children. Thus he who would be happy, ſhould learn to command his own Breaſt, and to maſter his own Thoughts ſo far, as to be ſure that whatever his Reaſon propoſes, he may be ſure to follow it: For to what Purpoſe ſhall our Reaſon weigh exactly what is propoſed, or our Experience teach us what it has obſerved, if we cannot follow their Determinations? Nor ought this Oppoſition, which we are to make to our firſt and raſh Inclination, be eſteemed a doing Violence to our ſelves, and a fooliſh pleaſing of Philoſophy more than of our ſelves: For he who oppoſes himſelf, upon Deſign to tame his own Spirit, has by it but ſuch Trouble as a Soldier who fights ſtoutly to gain a Victory; or as Merchants have, who travel a long Journey to gain much Riches: Nay, the Pleaſure here is greater; becauſe the Conqueſt is both more noble and more certain. Nor will this Oppoſition be ſtill neceſſary; for a little Time will eſtabliſh that Habit of Wiſdom and Virtue in the Oppoſer, that will take off all Neceſſity of future Oppoſition: And in oppoſing our preſent Humour, we ſatisfy our Reaſon, which is the nobler Faculty.

TO examine this Rule by Inſtances, let us conſider, that he who refuſes to drink exceſſively at the Deſire of others, doth for ſometime offend thoſe who perſuade him to a Companionry in their Vice; but thereafter, he eſtabliſhes to himſelf a Character of Sobriety, whereby he is ſecure againſt ſuch Aſſaults: Nor can he want Pleaſure, even for the preſent, when he conſiders how brutiſh, nay, and how ſick theſe will immediately become, and how much the next Day they will praiſe his Sobriety, when for a whole Week they will be tormented with the Effects of one Night's Pleaſure. And he who convinces himſelf, that Avarice is a fooliſh and dangerous Vice, may be troubled at firſt in forgoing ſome Occaſions of enriching himſelf; but he ſoon, by frequent Victories over that Vice, quiets himſelf againſt a Thouſand Troubles that would enſue upon his continuing ſo: He ſees his Neighbour grow rich, with the ſame Pleaſure that he ſees his own Trees flouriſh; and conſiders the Loſs of his own Mercats, with the ſame Indifferency that another Man doth hear of the burning of ſome Streets in *Paris* or *Amſterdam*. But that we may the better underſtand how to make this excellent Leſſon practicable, I ſhall lay open to your Conſideration, thoſe enſuing eaſy and certain Helps.

The Firſt great Miſtake lies, in living without Conſideration: He who would be happy, ſhould ſit down with himſelf and think; I am come to a World wherein many are miſerable; and therefore I will conſider how I may be happy: And when I am convinced of what is true Happineſs, I will not be diverted from proſecuting that Deſign. Whereas now, moſt Men live by Chance, and conſider not why they do what they are about; or elſe they form to themſelves ſuch fooliſh Deſigns as are in Faſhion, and ſo periſh by Example: As for Inſtance; When they enter upon any Employment, or into any Office, they conſider not that they ought to do virtuous Things, but Things that are uſual or ſuitable to their Avarice or Ambition: And this proceeds either from not thinking much upon every Thing that paſſes; or elſe, from their being ſway'd by Cuſtom, and the common Opinion of others.

But whilſt I contend, That he who deſigns to be happy, ought to propoſe a certain and fixed End to himſelf, I reſolve not to overturn that other great Leſſon, which is, Rather to follow Providence in it's Deſigns, than to think to dictate to it; to be ſo indifferent in all outward States, as to deſign nothing but to follow the preſent Occaſion. But I reconcile theſe thus: Man entering upon the Exerciſe of Reaſon, ought to conſider, that 'tis fit for him to be reaſonable, and to follow Nature: But in the Proſecution of that Deſign, he ought not too preciſely to aſtrict himſelf to any one Form of Deſign, or to endeavour to predetermine what is to come. Providence has an over-ruling Power over us; and we ought not to preſcribe to it, but to follow it, and comply with it. He who reſolves to live in Publick, will be eaſily miſerable or diſappointed, when he is forc'd to retire: And he who confines his Happineſs within his little eaſy Cell, may be ſoon rendred miſerable, when he is pull'd from both, by publick Calamity or private Want. But he who propoſes nothing to himſelf, but to be virtuous, and to obey the Dictates of his own Reaſon, is eaſily remov'd from his preſent Station; and the Commands of Providence ſeems the Product of his own Inclinations, ſo gently doth he follow what is enjoined. Nor is his Deſign diſappointed: For he lov'd publick Employments only becauſe it was an Occaſion of doing good; and therefore, when that Occaſion is remov'd, he is not tied to work without an Inſtrument; but endeavours to improve his Retirement, and gives as great Example of Virtue, in bearing generouſly the Want of Power, as he did formerly in the Exerciſe of it. There is no Station which has not its own Occaſions of doing good: And therefore, no Accident can hinder a good Man from being virtuous and happy. But, upon the other Hand, he troubles himſelf too much and too unneceſſarily, who reſolves to tie up Providence by his Deſigns; and tho' they hit, he is but pleaſed, and ſcarce that: For he thought his Expectations his Due, and ſo in Succeſs he gets but what he thought his own: Whereas if he fail, he is certainly miſerable; for he concludes himſelf rob'd of what was his Property.

He then who would be happy, muſt, in the firſt Place, endeavour to have a right Judgment of Things; for no Man can uſe rightly what he doth not underſtand: And in judging of Things, we muſt conſider them, firſt, as they are in themſelves; ſecondly, with relation to us.

If we conſider Things, as they are in themſelves, and under that true Value which we ought to have of them, we will find that we are much miſtaken in valuing ſo highly Fame, Revenge, &c. What is Fame, but an empty Muſick? For mad and proud Men are led by the Ears to commit Folly: And Power is but a guilded Slavery. But we poor Creatures, are deceiv'd by pretty Names and painted Pageantry: Whereas, upon the other Hand, Tranquillity of Spirit, and Freedom from eating Cares, is a ſubſtantial Good, fit for our Nature, and ſuitable to our Reaſon: And yet Men eſteem that ſo little, that they think themſelves condemned, when, by being turned out of thoſe airy Employments of State, they are return'd to themſelves and their Liberty; and they, by a ſtrange Paradox, conclude themſelves Priſoners, becauſe they are allow'd to do what they pleaſe, and to follow the Bent of their own natural Inclinations, and not the violent Motion of others.

If we conſider the Value of Things, with a due Reſpect to our ſelves, we will find, that one great Occaſion of Men's Unhappineſs is, That they graſp at all. For many Things are excellent, that are not fit or neceſſary: For thus, a Courtier, who ſhould be buſy in ſerving his Prince and Country, repines that he cannot be ſo happy as to enjoy Retirement; and a Lawyer, that he is not thought to underſtand Affairs of State. Man's Soul is too narrow for all Things; and he is therefore happy, who endeavours to provide himſelf with what is fit and neceſſary. And ſince there is a Proportion to be obſerv'd betwixt our Station and our Wiſhes, I would adviſe every Man to keep his Thoughts and Deſigns as low as can be: For we contract Debt, and bind new Neceſſities upon our ſelves, by every Degree we aſcend. Thus, many Things are requiſite for a Lord, which are not neceſſary for a Gentleman: And I have ſeen Unhappineſs entailed upon Poſterity, by the raſh Ambition of a Parent, who, for once taking his Meaſures ill, made his Family for ever unfortunate.

ONE of the chief Things which makes us miſtake ſo oft the Value of thoſe Things, which we deſire to poſſeſs, is, That we follow too much rather the received Opinion of others, than the Dictates of our Reaſon: Like Beaſts we run one after another; not where we ought, but where others do: And thus we periſh by Example. And albeit we are ſo vain, as to think our ſelves the wiſeſt of all Men, and ſo ſelfiſh, as to prefer the meaneſt of our own Intereſts to all Mankind; yet we follow the Practice of that Multitude which we ought to deſpiſe, and ruin our Quiet to gratify their Cuſtoms. Why are unneceſſary Riches valued above the Tranquillity of the Mind? And Coaches and large Territories, above Juſtice and Sobriety, but becauſe theſe are generally eſteem'd by the unthinking Crowd? And therefore, he who would rightly value Things, ſhould firſt learn to deſpiſe the Multitude; *ſanabimur, modo à cœtu ſeparemur*; and ſhould propoſe to himſelf ſuch as are Patterns of Vertue; *Socrates, Zeno, Seneca.* And ſince the hearing of others doth much influence us, 'tis very fit to read oft the Lives and Works of theſe admirable Men. to have their Pictures beſide us; and to converſe much with our Comrades and Acquaintances upon ſuch Subjects: For if every Man loves the Science he profeſſes, and which he ordinarily ſtudies; and even Liars, by repeting oft a Lie, do create in themſelves a Belief of what they ſay: Sure it is more than probable, that conſtant Diſcourſe and Reflection, will fix upon us deep and ſtrong Impreſſions of what we hear theſe Ancients teach, and of what is ſo oft inculcate upon us by Converſation. And to ſhew that Vice can be leſſen'd by Converſation or Cuſtom: Do we not ſee, that the Cuſtom of our Country prevails with us, to hate that Drinking, which is ſo lov'd by whole Nations? And that Honour reſtrains even ſilly Maids, in their hoteſt Years, from Luſt? And if whole Nations, or ſilly Women can, by Reflection or Cuſtom, ſubdue Vice and tame their own Spirits; What may be expected from one who reſolves, with all his Might, to be wiſe, and to make the Government of himſelf the greateſt Task of all his Life?

THE chief Enemies of our Quiet are, a diſcontented Conſcience and ſtormy Paſſions: The firſt of theſe is avoided by living innocently; and the other, by much Meditation and Attention.

A Good Conſcience is the Applauſe of a ſatisfy'd God, and of a well obey'd Reaſon: It is to our Soul, like Health to our Body, like Calmneſs to the Sea, and like the Remembrance of by-paſt Victories and Conqueſts. He who hath this, hath, as the Scripture ſaith, *a continued Feaſt*: He is ſure of a favourable Judge in all Accuſations, and of a ſtrong Second in all Dangers: He fears not the Poiſon of Tongues, having this Antidote; nor the Perſecution of his Enemies, having this Sanctuary.

WHAT a noble Landskip hath he who ſurveys a by-paſt Life, free from Spots and Blemiſhes, and knows that he poſſeſſes that Innocence which the Wicked are forc'd to admire: Whereas guilty Thoughts arm all Accidents againſt us, and make us tremble at the Approach of all who draw near us: Thoſe aſſure us that every Man is our Enemy; and every Enemy will prevail:

*Hi ſunt qui trepidant, & ad omnia fulgura pallent.*

THE guilty Man's Face informs his Accuſer; and his Tremblings and Contradictions furniſh Witneſſes againſt him: Nor can his reſtleſs and diſorder'd Thoughts, ſuffer him to conſider of ſuitable Remedies; he can think upon nothing but Fears and Puniſhments. So that he who would be happy, muſt live ſo, that his own Conſcience muſt maintain him in all his Afflictions, ſo that it may be his Guard and his Advocate. Nor is the gaining this of much Toil or Difficulty: For he who is not at the Pains to be wicked, and to oppoſe his Reaſon, will neceſſarily be good, and ſo muſt have a quiet and ſatisfy'd Conſcience; which follows Goodneſs as neceſſarily, as Light doth the Sun.

AS to our Paſſions, I think they ought not to be extirpated, but moderated: For, to extirpate them is as unnatural, as it were to cut off a Leg, becauſe it may be troubled with the Gout; or to quit our Friend, becauſe he hath ſome Infirmities. Every Thing to which Nature inclines us, is natural, and therefore is fit for us: For Nature is the true Judge of what is fit. And do we not find, that Ambition keepeth Men from doing mean Things: Anger raiſes juſt Reſentments againſt Vice: Love is that which civilzies barbarous and wild Perſons; and ſome Sparkles of Envy kindle noble Emulations: So that the Paſſions are to be us'd like Phyſick, whereof a regular Doſe cures, but too much deſtroys the Patient. And I muſt confeſs, that nothing prejudg'd more the *Stoic* Philoſophy, than this Appathy or Freedom from Paſſion, which they taught to be not only excellent, but eaſy: For this induced all Men to believe them to be Cheats, and did force themſelves to do many Things which paſſed for vitious; as the not ſeeming troubled at the Death of Friends, nor at the Afflictions of their Parents. In this, whilſt they were Men, they ſtudy'd to live like Angels; and after they had vex'd themſelves in forcing Nature, they found their Undertakings as impracticable, as if they had ſpent all their Time in teaching a Lion to fly, or in ſtudying to keep the Fire from being hot.

I ſhall reduce all my Precepts of moderating the Paſſions to theſe Two; *viz. Deſire little*, and *Suffer much*. 'Ανέχȣ καὶ ἀπέχȣ. *Suſtine* & *Abſtine.*

Desire is an unquiet Mother of many Paſſions: For the ambitious Man deſires Honour and Applauſe; The covetous, Money; The vindictive Man, the Deſtruction of his Enemy; The luſtful Man, the Enjoyment of his Miſtreſs, *&c.* And for quieting this Claſs of Paſſions, poſſibly theſe general Helps may be uſeful.

First, Every Man who finds any Deſire to ſtir in him; ſhould advert to its earlieſt Motions: For young Monſters are ſooneſt overcome; and no wild Beaſt can be tam'd, but whilſt it is young. And when he begins to examine it, the firſt Reflection ought to be; Is this Deſire fit for my Nature, Quiet, or Station? And if it be deſtructive to either of theſe, we ought to cruſh it. The next Reflection to this, ought to be, To what Expenſe of Care and Trouble the Thing deſir'd will bring us; and what inconvenient Conſequences it may occaſion? Elſe, like unwiſe Merchants, we may give too great a Price for what we are to get; or like unwiſe Stateſmen, we may engage in a Deſign, without Conſideration of the Iſſue. And it is ſtrange, that we ought to be thought Fools, for not conſidering what belongs to our Eſtates or politick Deſigns, and not for not conſidering what is of greater Conſequence.

When our Deſires begin to preſs and to grow violent, we ought to conſider, How oft Things formerly deſir'd have diſappointed us: How they flattered us with promiſing Hopes, and drew us thereby into killing Snares: How ridiculous the next Day, did the Deſires of the former ſeem to us: And how, without being ſatisfied, we were aſhamed of our former Wiſhes. Why then ſhould we ſerve ſo violently, what has ſo oft cheated us? And what Aſſurance have we now, that this freſh Pleaſure will be more laſting than thoſe ſo oft and ſo juſtly deſpiſ'd by us? Our Reaſon alſo, as well as Experience, may ſlacken much our paſſionate Deſires, if we conſider, that we who are the Deſirers, are naturally inconſtant: And not only doth Age diſcredit the whole Scene of youthful Pleaſures, but Sickneſs, Example or Cuſtom; will alter our former Inclinations, and leave us not admiring our lately beloved Objects, but why we did admire them. The Objects likewiſe which are ſo violently deſir'd by us, are frail like us; and tho' we would fix our Paſſions, yet we cannot fix their Objects. Our Miſtreſſes grow ugly or inconſtant: Our Prince alters his Inclinations: A Servant burns our Houſe: Or a prevailing Faction forfeits us. And thus, like fooliſh *Jonas*, we dote upon that Gourd which is to fade next Evening.

Providence does ſo abſolutely diſpoſe of us, and the Succeſs of our Deſires are ſo little in our Power, that it is Imprudence in us to deſire too much, what we can ſo little command: And Providence is ſo kind and ſo knowing, that we ought with great Subordination to refer our Fate to its Diſpoſal. We deſire paſſionately to have Children; but Providence denies us that Enjoyment, knowing what Croſſes they may prove; and like Children we repine and weep, becauſe our Tutor will not allow us to eat thoſe Fruits which are poiſonous, tho' ſweet, or to go to Places which are infectious.

Every wiſe Man alſo ought to uſe himſelf to live upon little, and to make a very few Things only neceſſary to him. *O! how many Things are there, which I need not*; ſaid *Socrates*, with a glad Heart, when he looked upon the gawdy Palaces and rich Shops of *Athens*. He who can be content with Little, thinks Little very Much; but to him who is not contented, even his Much is but very Little. This will keep him much out of the Reverence both of Fortune and all other Men: And ſince Diſappointment only makes miſerable, this will make him very happy. And therefore whenſoever he deſires any Thing, he ought firſt to conſider, not if that Thing which he deſires can be of Uſe to him, for all Things may be ſuch, but if he can live without theſe Things. Every Thing has two Aſpects, and the Colours of Things vary both in Nature and Morality, according to their ſeveral Poſitions. If we conſider Great Men, as having many Conveniencies to do Good, in being juſt and charitable, in protecting their Country, and in reſiſting Oppreſſion; Greatneſs may ſeem deſirable: But if we conſider it as being attended by Hatred, and threatned conſtantly with Ruin; as wanting Time to reflect upon God and Nature, and as burden'd with Cares and Fears; it is the moſt undeſirable of all Conditions. And therefore every wiſe Man, when any Deſire preſents it ſelf, ought to think much upon theſe Circumſtances in it, which ſuits beſt with his own Duty, Station and Condition. If I want a Coach, I conſider how many diſcreet Gentlemen live ſo; and if I miſs the Money that I expected, I conſider that I muſt only want that Suit of new Hangings, or faſhionable Cabinet, without which I have liv'd long happy; that the famous *Socrates* wanted theſe; and that the next Year theſe will be laugh'd at as unfaſhionable.

SOME of theſe Philoſophers too preſcribe, as an Help for moderating our Paſſions, that we ſhould tame one Paſſion by the Help of another. And thus againſt Fear, they adviſe the being ambitious; for theſe who deſign great Things, can never be afraid: And againſt Anxiety for the Affairs of this World, they preſcribe the being in Love; and againſt Love, they preſcribe Drinking and good Fellowſhip. Yea, and *Ariſtotle* himſelf adviſes the bending of our Souls to the oppoſite Side of our Inclinations; as if we find our ſelves inclin'd to Avarice, then to frequent Occaſions which may force us to be prodigal, as the Company of young Ladies, and of great Acquaintances: *And thus*, ſays he, *a Rod that is crooked becomes ſtraight, by bending it to the oppoſite Side.* But theſe are only Tricks put upon our Nature; and either we have the Uſe of Reaſon, in ſuch Conjunctures, and then we may correct our Errors by ſurer Means; or we have it not, and then we will not be able to force our Inclinations, even to theſe ſeeming Remedies.

THE ſurer and better Way to govern our inſolent Deſires, and to confine them to their Duty, is to eſtabliſh in our own Breaſt a ſtrong and fixed Habit of Vertue; to be watchful over our own Inclinations, and to make the being Reaſonable, our great Employment, as it is our Duty: Whereas now, moſt Men believe and think, that to be Rich or Great, is their Buſineſs for which they are ſent into this World; and that to deſpiſe Riches or ſerve our Country, to aſſiſt the Diſtreſs'd, and to diſtribute Juſtice, are mere philoſophick Notions, preach'd only by the Melancholy, and practis'd by none.

Avarice;

AS theſe general Remedies may be advantagious for a thinking Man; ſo there are Reflections which are ſpecifick againſt particular Paſſions. And thus he who finds himſelf too anxious in deſiring to be rich, ought to conſider, that Nature requires little, and is oppreſs'd with much; that every Thing which a Man loves, expoſes him to the Unconſtancy of Fortune: For if it be worth, the anxious deſiring it will torment us to be robbed of it. Nature teaches us, that our Thirſt is as ſoon ſatisfy'd by drinking out of a clear Spring as out of a mighty River; and as that Water is more clear, ſo the Hazard of taking it is leſs. To ſeek more than Nature requires, is to endeavour to ſatisfy Fancy, which is too vaſt for the whole World and all that is in it: And we may as ſoon think to ſatisfy the Appetite of a large Fire, by throwing in more Fewel, as to ſatisfy the Mind of a covetous Man with Riches: For in both, the new Food adds new Appetite; Riches have ofttimes made a good Man ill, but they never made an ill Man good. Luxury and Prodigality is yet as fooliſh a Paſſion; for one Diſh refreſhes, whilſt three nauſeate or ſurfeit: And tho' we had Ten thouſand Suits, we can uſe but one at once, and the ordinary Suit is both moſt eaſy, and ſecures beſt againſt the Cold that attends Changing: Does not an embroider'd Suit weary more than warm? And is there not the ſame Reaſon for being ſatisfy'd with having Shoes without Lace, that there is for having Shoes without Diamonds? Oh! to how many and to how wild Things is he a Slave, who is a Slave to his own Luxury!

Ambition;

THESE who deſire to be Great, are, by that ſame Ambition which tempts them to command others, forc'd to become the Slaves of ſuch as raiſe them: And that it robs them of their natural Liberty is clear; for he who depends upon a Patron, has ſomething elſe to obey beſide his Reaſon. And what is in Ambition which can pleaſe our Nature; ſince it never gives us Time to conſider what rare Things Nature has form'd, nor to follow what Nature requires? And what better is thy Perſon, that another bows his Knee to thee? Or why ſhould'ſt thou trouble thy own Quiet, to pleaſe a Thouſand who would rejoyce at thy Fall, and who watch thy Errors and Failings? To be forc'd to attend and humour thoſe who are above and below thee, is a great Slavery; but to endeavour to pleaſe the Multitude, whom no Great Man can pleaſe, is a great Madneſs: For even the being Great, picques and diſobliges ſuch as are not ſo. We ſhould conſider alſo, that either the Prince or the Multitude never fail to ruin the Ambitious: Every Man conſiders him as his Rival: And as they believe he was rais'd for no Merit; ſo when he falls, the World aſcribe his Ruin to his want of Wit: And as he was hated when he ſtood; ſo he is ſcorn'd when he falls. When therefore thou begins to envy a Great Man, conſider not what is ſplendid, but what is ſlaviſh and troubleſome in his Condition. Think with thy ſelf, even when thou ſleeps quietly, now ſuch a Man is diſquieted with his Fears and Hopes: And when thou converſeſt with thy honeſt and learned Neighbour pleaſantly, and pours out thy Secrets into his Breaſt, conſider that the other is converſing with his Rivals, watching or watched in all that paſſes. When thou ſeeſt him ſurrounded with a Throng of Dependers, remember how few of theſe love him, and that theſe attend him as Men go to a Well to exhauſt it. And when thou art diſpleas'd to ſee him grow ſo ſoon and ſo very rich, remember that the next Favourite, or an unexpected Accident, may leave him nothing of all that, but the Grief of having loſt them.

Anger.

He who is afraid or aſham'd to be thought mad, or to be ſo, may by the ſame Reaſon be perſuaded to fear the being repute, or the being really angry: For theſe differ but in Degrees, Anger being a ſhort Fit of Madneſs. And this Paſſion may be corrected or repreſſed, either by ſhunning the Occaſions of Anger, as *Cæſar* did when he burnt his Enemies Letters and Memorials; or by ſhunning to give a haſty Judgment of what occurs: For many Things have inflam'd thee, at which thou waſt afterwards aſhamed; and Miſtakes are more frequently the Occaſions of Anger, than real Injuries are. Take exact Notice when thou ſeeſt any Man angry, how ridiculous he appears to thee; and how many have been prais'd by others, and ſerene within their own Breaſt, by laughing at thoſe Injuries which now inflame thee. Conſider alſo, how ofttimes thou did'ſt admire, why thy Friend was angry at ſuch frivolous Occaſions, and how little either thou or he did, or can redreſs Wrongs by being angry; nay, and thereby thou art uncapacitated to repair the Injury, ſince it diſcompoſes thy Reaſon, by which thou muſt expect Relief, and gives thy Enemies freſh Matter of Triumph, in that it kindles in thee new Extravagancies.

Revenge.

Revenge is but an Effect of Anger, and is to be cur'd by the ſame Remedies. Here likewiſe a wiſe Man ought to conſider the fatal Conſequences, before he proceed to effectuate his Deſigns: And thus, if he deſign to murder him who offended, he muſt repreſent to himſelf, that the Pleaſure will end with the Act, and will be ſucceeded by Grief, Shame, Repentance and Puniſhment. He ought to conſider the Uneaſineſs of the dark Retreats, to which he muſt fly, and of the Priſons where he muſt ly, the Terrors of a Scaffold, of an Executioner, and of a Gibbet. But above all it will be more generous to think, how ridiculous it is to place thy Happineſs in his Deſtruction, and that others have been admir'd for ſcorning a greater Injury than what thou haſt ſuffer'd by him. *Socrates* reveng'd himſelf nobly, when, by pardoning one who had injur'd him, he drew him, by that generous Act, into an Admiration both of Vertue and him. If the Injury be lately receiv'd, it is Prudence rather to ſtudy to cure our own Wound, than to injure him who gave it. To revenge Injuries done us, by ſuch as are greater than we, is Madneſs; for ſeeking to repair one Injury, we draw on us many more: And to revenge Injuries done by ſuch as are below us, we affront and injure our ſelves. And therefore *Virgil*, giving us a Map of Hell, paints Revenge and Anxiety poſſeſſing both Sides of its Porch and Entry.

Envy.

We may cure Envy in our ſelves, either by conſidering how uſeleſs, or how ill theſe Things were, for which we envy our Neighbours; or elſe how we poſſeſs as much or as good Things. If I envy his Greatneſs, I conſider that he wants my Quiet: As alſo, I conſider that he poſſibly envies me as much as I do him; and that when I begun to examine exactly his Perfections, and to balance them with my own, I found my ſelf as happy as he was. And tho' many envy others; yet very few would change their Condition even with theſe whom they envy, all being conſider'd. And I have oft admir'd, why we have ſuffered our ſelves to be ſo cheated by contradictory Vices, as to contemn this Day him, whom we envy'd the laſt; or why we envy ſo many, ſince there are ſo few whom we think to deſerve as much as we do. Another great Help againſt Envy is, That we ought to conſider, how much the Thing envy'd coſts him whom we envy, and if we would take it at the Price. Thus when I envy a Man for being Learned, I conſider how much of his Health and Time that Learning conſumes: If for being Great, how he muſt flatter and ſerve for it: And if I would not pay his Price, no Reaſon I ought to have what he has got. Sometimes alſo I conſider, that there is no Reaſon for my Envy: He whom I envy deſerves more than he has, and leſs than I poſſeſs. And by thinking much of theſe, I repreſs their Envy, which grows ſtill from the Contempt of our Neighbour and the over-rating our ſelves. As alſo I conſider, that the Perfections envy'd by me, may be advantagious to me: And thus I check my ſelf for envying a great Pleader, but am rather glad that there is ſuch a Man, who may defend my Innocence: Or to envy a great Soldier, becauſe his Valour may defend my Eſtate or Country. And when any of my Countrymen begin to raiſe Envy in me, I alter the Scene, and begin to be glad that *Scotland* can boaſt of ſo fine a Man; and I remember, that tho' now I am angry at him when I compare him with my ſelf, yet if I were diſcourſing of my Nation abroad, I would be glad of that Merit in him which now diſpleaſes me. Nothing is envy'd but what appears beautiful and charming: And it is ſtrange that I ſhould be troubled at the Sight of what is pleaſant. I endeavour alſo to make ſuch my Friends as deſerve my Envy; and no Man is ſo baſe as to envy his Friend. Thus, whilſt others look on the angry Side of Merit, and thereby trouble themſelves, I am pleaſed in admiring the Beauties and Charms which burns them as a Fire, whilſt they warm me as the Sun.

Hope rather ſeems to be, than is fit for a wiſe Man: For he who hopes, deſires; and ſo fears: And a wiſe Man ought to be ſo pleas'd with his preſent Condition, as to depend little upon the future: He ought to be indifferent in all Things, and ſo needs hope nothing; and he ought to admire nothing, and ſo ſhould hope for nothing: For Hope is a joyful Expectation of what one admires, and a wiſe Man is ſtill happy. And to what Purpoſe ought he to hope, who has already what ought to be hop'd for? But if thou muſt hope, then hope only for Things within thy Reach, and for Things that are neceſſary: He who hopes only for Little, is not much diſappointed if he miſſes, and is pleaſantly ſurpriz'd when he gets what is more than he expected. When thy Cropt is upon the Field, expect but a Half of what it uſes to yield, and compt with thy ſelf upon the Half of what thou uſes to gain by thy Profeſſion; and even as to that too, conſider oft, what if I gain not even ſo much, have I not liv'd happily theſe many Years bypaſt without it? And do not others live pleaſantly without any ſuch Hopes? Remember how oft thy Hopes have diſappointed thee, bringing thee what thou do'ſt not value, or what thou do'ſt very ſoon contemn.

*Nor is there half ſo warm a Fire*
*In Fruition as Deſire:*
*When we have got the Fruit of Pain,*
*Poſſeſſion makes us poor again.*

The next great Leſſon of Philoſophy is, To ſuffer patiently what Adverſity can bring. In which we may the eaſier prevail, if we firſt have curb'd the Extravagancies of our immoderate Deſires; for he only is too much afflicted who has deſir'd ſomewhat too ardently.

The firſt great and general Help in this generous Exerciſe is, To conſider exactly what God and Nature has appointed: And therefore to grieve, becauſe thou art ſick, or art born a Beggar, or that thou want'ſt thoſe charming Excellencies which another poſſeſſes; is as much Folly as to complain, that thou art not born with Wings, to fly wheresoever thy Inclinations do lead thee; or that the Lion is ſtronger, or the Deer more longevous than thou art: And by this ſame Reaſon thou may'ſt repine, becauſe thou art not a King; or a King that he is not an Angel. It was free to Nature to have beſtowed or not, what thou poſſeſſes; And as thou would'ſt be offended at thy Servant, or think him extravagant, if he repin'd becauſe thou loved another better, or beſtow'd more upon thy Friend than upon him; even ſo, and much more, art thou ridiculous, if thou would'ſt bound the great Author of Nature, whoſe Bounty is free and undeſerved: And He has beſtow'd ſo much upon all, and leaves ſtill ſo much Happineſs even with the Miſerable, that they muſt be unjuſt if they complain. Who would not give all he poſſeſſes for Life? And therefore he who ſtill lives, does even in the Midſt of what he calls Miſery, enjoy what is more deſirable, than that of which the Happieſt are vain. They who are blind or ſick, would buy Sight or Health with all the Riches of that Prince whoſe Riches they envy; and yet they conſider not, when they are poor, that they enjoy Light and Strength, thoſe noble and belov'd Bleſſings. Thus we have ſtill ſufficient Materials for Happineſs; but are ſo ſtupid or ſo peeviſh, as not to underſtand how to uſe them: And the excellenteſt Things are made moſt common, to the End that Man may be unjuſt when he complains of his Maker. He who reſolves to improve what he poſſeſſes, has little Reaſon to complain of any Want; and he may have the Satisfaction of owing to himſelf many Pleaſures, which when Fortune beſtows, are either too dear bought, or too uncertain to be much boaſted of. The Soul of a wiſe Man has in it nobler Treaſures, and can afford more pleaſant Landskips than all the Creation beſide. In vain complain we of Impriſonment, whilſt our Thoughts are at Liberty: And to be deny'd the Liberty of ſeeing many Towns and Countries, is a fooliſh Complaint to him whoſe Soul can comprehend the Glob in one Thought. To govern Kingdoms, is leſs noble than to govern our own Breaſt by Reaſon; and to conquer Armies, is leſs glorious than to ſubdue our own Vices or Luſts; which is very clear, if we conſider the preſent Pleaſure, or future Fame of both. And I'm ſure that *Socrates* was leſs diſquieted, and is now more glorious, than the *Athenian* Tyrants, who in taking his Life did conſecrate to immortal Fame that Name, which is ſtill ſo dear to Kings and Princes; and which *Auguſtus*, the greateſt *Roman*, confeſs'd to be greater than all that *Rome* could give. Thus then it is in every good Man's Power to be happier than thoſe whom the Vulgar envies, and to raiſe himſelf above all that Fortune dares do, or that Adverſity can inflict; and not to need ſuch extrinſick Happineſs, is the greateſt Happineſs of wiſe Men. It might ſeem ſtrange to thinking Men, that we ſhould account theſe Accidents Unhappineſs, which fall ordinarily to the Share of the beſt Men; and theſe to be glorious, which the Wicked ordinarily enjoy: For thus we leſſen either God's Juſtice or His Kindneſs. That one juſt Man was poor or miſerable, might have been accidental; but when we ſee that moſt of them are ſo, and when we hear that it is foretold to them, they muſt and ſhall be ſo; nay, and that the Croſs is made the Badge of God's Love; we muſt conclude, That ſince God cannot be miſtaken, we are; and that theſe are only Evils to them who uſe them ill.

God does not only deſign theſe Things for a Part of our Happineſs; but they are really ſo, if we conſider that the proſperous and undiſturbed Enjoyment of outward Pleaſures, effeminates and corrupts that Strength of Reaſon, which is the only Glory of Man. Who ever ſtood out againſt an Age of continu'd Pleaſures? And ſuch as have been glorious in their Adverſity, have been contemptible when they attain'd to that Proſperity for which they ſtrove. Whilſt, on the other Hand, God marks out great Souls for Affliction, as wiſe Generals chooſe the beſt Soldiers for the hardeſt Exploits; or as Maſters chooſe the ableſt Scholars for the moſt intricate Debates. And as this is a ſure Mark of the Almighty's Favour; ſo it is a ſure Way to the perfecting of thoſe who ſuffer: For as the Oak grows ſtrong by the conſtant Agitation of boiſterous Storms, or as the Body becomes hardy or robuſt by repeted Sufferings and Trials; ſo the Soul ripens into its laſt Perfection and Accompliſhment, by the Oppoſitions and Strugglings of conteſting Fortune.

Let us rectify our Opinion, and we will ſoon overcome our ill Fortune, if we but overcome the ill Opinion we have of it: Let us call that a Fight, which we now call Miſery; and conſidering the noble Reward of a quiet Mind, and the yet nobler Reward of a juſt Maſter, let us fight as ſecure of Victory. And if we will but ſuffer for God and Vertue, what Adulterers ſuffer for ſatisfying their Luſt, or the Covetous in feeding his craving Avarice, we will overcome what now ſeems terrible to us. The Reward ſweetens all Toil, and he who has his Eyes fixed upon that, will not have Occaſion to conſider too narrowly all thoſe Circumſtances in his Sufferings, which becauſe too much conſider'd, do terrify others.

Fear is ordinarily occaſion'd by Surprize or Admiration: And therefore it is fit that a wiſe Man prefigure to himſelf what may befall him. He ought to uſe himſelf to think, What if I be driven from my Country, or be forfeited? What if I be impriſoned or undervalued? If he ſeriouſly weigh theſe Inconveniencies, he will not only, by the Cuſtom of looking upon them, think them leſs terrible; but he will thereby find, that moſt of theſe Things which we fear, are only terrible to our Fancies; and that he who puts a juſt Eſteem upon the Things of this World, will little fear the Loſs of thoſe accidental and external Things, to which no Man ought to faſten his Happineſs. What is within us cannot be loſt, and what is without us and depends upon others ought not to be judged ours; and ſo their Loſs is not to be fear'd, no more than we ought to fear the reſtoring of a Loan, or the Inconſtancy of the Weather. What we fear does ofttimes alſo either miſs us, or elſe pleaſes when it falls to our Share. He who fear'd Baniſhment, has in it found that Retirement which ſav'd his Soul; or furniſh'd him with Sciences, whereby he became famous after Death, and with which he was charm'd when alive: And the very bearing what others fear'd, has made moſt Men famous: And very oft, whilſt the preſent Day threaten'd Ruin, the next did unexpectedly bring us a welcome Diſappointment: As fell out lately upon his Majeſty's happy Reſtauration, by which the ſettl'd Deſpair of many, vaniſhed into an unexpreſſible Joy; ſo that Men could as little bear their Proſperity, as they could the Weight of that Slavery under which they lately groaned. And to what Purpoſe ſhould a wiſe Man grieve for what is not come, ſince he yet can feel his Ills nowhere but in his Fancy? And ſince we may cure what depends upon our ſelves, certainly we may cure the greateſt Part of our ſtinging Fears, ſince theſe proceed rather from the Strength of our ill govern'd Fancy, than from the Strength of thoſe Accidents from which we think they will riſe. Admiration alſo is another great Occaſion of Fear; for no Man fears to loſe but what he admires: And therefore *Horace* adviſes his Friend wiſely,

> *Nil admirari prope res eſt una Numici,*
> *Solaque quæ poſſit facere & ſervare beatum.*

He who thinks his Happineſs conſiſts in uſing vertuouſly the preſent Occaſion, whatever it may be, can never fear what Occaſion may fall out to be: And he who is indifferent for all Accidents, muſt be ſo happy as to fear no Accident.

Those Ills which uſe to diſquiet Men, are either imaginary, ſuch as Affronts, Infamy, Impriſonment, Degradation, &c. and in theſe we ſuffer not by our Enemies, but by our ſelves:

And as we are not to be pitied by others; ſo we can eaſily relieve our ſelves, and theſe are rather Effects of Madneſs than of Misfortune. Why ſhould what others ſay of us, trouble us? Since that touches no Place of us but our Imagination; and before we hear what they ſay we are not troubled: Which argues infallibly, that it is not their Diſcourſe, but our own Thoughts which trouble us. And therefore, if we can be Maſter of our own Spirits, our Torment is at an End. If to be ill ſpoke of were a Misfortune, it were in every Man's Power to make us unfortunate; and ſo no Man ſhould be happy but by Accident. And ſince we are not angry when mad Men ſpeak of us; why ſhould we be angry at what the Vitious and Liars ſay? And ordinarily ſuch as invent or tell Lies, are of ſo little Repute in the World, that what they ſay is hardly believed; and God has ſuch a ſpecial Regard to Innocence, which is His own Image and Picture, that He wipes it clear from all that Duſt, and thoſe Spots which others raiſe about it, or would throw upon it. Nor did the frequent Accuſations formed againſt *Ariſtides* and *Cato*, prevail with the World to leave off to think them the wiſeſt and moſt innocent amongſt Men.

The being baniſh'd from our native Country, or impriſon'd within it, are only unſufferable to ſuch as cannot fix their own varying Thoughts, or place their Happineſs in the Recollection of their own Spirit. And in the Proſecution of what is vertuous, if thou do'ſt that which is good, in the Place where thou art, no more is required of thee. And that Soldier, who keeps the Poſt to which he is fix'd, deſerves as well, and is as well pleaſed, as he who is commanded to ſcout about. Thoſe who live in the Place where thou art baniſhed, are fully pleas'd with the Place to which thou art confined, and would think themſelves equally miſerable with thee, if they were ſent to the Place for which thou do'ſt grieve. Nor would the Keeper of that Priſon where thou lieſt, be better pleas'd than thou art, if he were remov'd from a conſtant Attendance upon that Place, where thou art forc'd to ſtay but for a While: So that the Difference betwixt thee and him is only Fancy; and if thou do not maſter Fancy, and make it ply gently to thy other Conveniencies, it will make thee miſerable however; and thou wouldſt be but releas'd from thoſe to remain its Priſoner.

Bodily Pains and Sickneſs ſeem, of all other Afflictions, leaſt curable by Philoſophy, and to be plac'd without both the Limits and Juriſdiction of the Spirit: Which though it may govern Ambition, Revenge, and our other Paſſions, which are ſubject to the Empire of our Spirit, becauſe they are its Offspring; yet Sickneſs and bodily Pains being ſeated in the Fleſh and Blood, ſeem to be without the Reach of ſpiritual Reflections. But yet a wiſe Man has this Advantage of all others, that tho' he cannot cure, yet he can mitigate thoſe Pains which others heighten, by Fretting, Impatience, and Repinings. They double their own Pain, and protract its Cure by repining angrily, that this ſhould have fallen upon them, and that it ſhould hinder them from their Affairs; whilſt he wiſely comforts himſelf in that he has ſuffer'd ſo ſeldom; and concludes, that he is more concerned in ſubduing his Impatience, than he could be in any of his worldly Affairs; in which he muſt be leſs concern'd, becauſe they are the more extrinſick to him. And whatever Advantage *Cæſar* could propoſe to himſelf, by conquering his Enemies, or a King in ſubduing his rebellious Subjects; the ſame, or greater Pleaſures, doth a vertuous Man reap, in ſubduing and quieting thoſe mutinous and diſcontented Thoughts, which would otherwiſe diſturb the Tranquillity of his Mind amidſt thoſe his Afflictions. And whilſt others are angry at the Loſs of what Riches they might have gain'd whilſt they were ſick; he learns, in the ſame Sickneſs, to tame that Avarice which ſuggeſts thoſe Thoughts, and are as incommodious as Sickneſs to ſuch as are in Health: For there is nothing can convince us ſo much as Sickneſs, of the Vanity of Riches, ſince theſe can neither cure nor comfort a Man who is ſick: And it is here, that they learn to conſider, that Riches are not neceſſary to Happineſs; becauſe he who is in Health, ſhould, if he remember his Thoughts when he was ſick, think himſelf richer in a wholſome Body, than *Cræſus* in his ſwell'd Treaſures; and that to ſick Men, Riches can ſerve for nothing, but either to hire them Phyſicians to prolong their Pains, or to diſquiet them the more, when they think they are not able to enjoy thoſe many Things they poſſeſs.

The vertuous Man doth wonderfully divert himſelf in Sickneſs, by that pleaſant Proſpect which he hath of all the Works of the Creation; reflecting ſometimes upon the wonderful Fabrick of the particular Creatures, the rare Specialities by which they are diſtinguiſhed, and the Powers with which they are endowed; and at other Times, he recreates himſelf with the wonderful Simetry and Proportion which is to be found amongſt theſe: But above all he is raviſh'd to think upon that Infinite Wiſdom, by which all thoſe are governed.

His Sickneſs affords him Leiſure to fix all thoſe Thoughts upon God, which in his Health were divided amongſt his other diſtracting Cares. And as the Beams of the Sun do warm moſt vigorouſly, when they are gather'd together in a fix'd Burning-glaſs; ſo the Beams of right Reaſon are eaſilieſt and firmlieſt united in a Soul, which is not toſs'd with Multitudes of

Employments and Projects. In this State likewiſe Ambition, Luſt, and moſt of all Vices, are at ſo low an Ebb, that the Soul, having nothing elſe to wreſtle with but ſingle Pain or Sickneſs, which hath nothing of it ſelf that is vitious, is ſooner able to gather Strength than at other Times. And ſince ordinarily theſe Afflictions make a Man better, they cannot but be good in themſelves: And tho' they ſeem to deprive a Man of bodily Pleaſures, ſuch as Feaſting, Converſation, *&c.* yet thoſe are but ſmall Aggravations of Misfortune to ſuch as are ſick: For they value little in Sickneſs ſuch Recreations, ſince they loſe the Reliſh as well as the Enjoyment of them; and in place of theſe, they have the Freedom of Speculation and Thinking, which are more raviſhing Recreations. Nor doth Sickneſs want even its bodily Pleaſures: For a little Eaſe, after Trouble; a little Sleep, after Watching; a little Drink, after its being kept back by the Phyſician's Order; and the Hopes of a ſpeedy Recovery; are Pleaſures far exceeding the Enjoyments of Health, which are too familiar to have any Charm; and Health it ſelf, after it is recovered, is as great Pleaſure as a Remiſſion would be to one upon a Scaffold; whereas to ſuch as have not been ſick, Health doth dully glide away, poſſeſs'd, but not felt. So that we owe to Sickneſs the Diſcovery of this extraordinary Pleaſure, and of finding out, by this new Way, many other Pleaſures not formerly known. If our Sickneſs be but ſhort, it is eaſily born; if long, it cannot be uneaſy: For if it were violent, it would ſoon end our Sorrow; and even Cuſtom leſſens the Burden which it brings.

THE greateſt Advantage of Sickneſs is, That it does enable us beſt, of all Things, to accompliſh that which ſhould be the greateſt Task of Health, and is the nobleſt Employment of Life, and that is, To prepare our ſelves againſt Death; which, when it is fear'd, does imbitter all the Pleaſures of ſuch as are in Health: But on the contrary, when it is wiſh'd by ſuch as have prepar'd themſelves well for it in Sickneſs, makes Death to be nothing elſe, but a pleaſant Paſſage from this to a better Life, and the guilded Door of a rich Eternity.

THO' Death be amongſt the Number of thoſe Things which we ſhould neither fear nor wiſh, which we ſhould wait for without purſuing, and bear without murmuring; yet of all Things Men do the moſt generally, and yet the moſt unjuſtly, fear it.

THE Conſolations againſt Death, are either ſuch as are fit for mere Moral Man, and were taught by the old Philoſophers; or the yet nobler Comforts to which Chriſtians may aſpire: And tho' we as Chriſtians may make uſe of both; yet I am reſolv'd to ſet them down a-part, and touch here only upon the Moral.

NATURE and Reaſon taught Moral Philoſophers, and ſtill teaches us, as mere reaſonable Men, not to fear Death; becauſe 'tis not ſo much a Puniſhment as a Law of Nature: And we may as juſtly and wiſely repine at our being ſubject to Winter, or at the fading of our Flowers. Nature entertains this noble Frame by alternate Succeſſions; what now flouriſhes muſt fade; and ſuch as poſſeſs'd the Earth before us, dy'd to make us Room: We got Life upon that Condition; and either that Life was ſo pleaſant, that we are oblidg'd to regret the Loſs of it, or not: If it was pleaſant, we ſhould take in good part the Loans we have had of it, and reſtore it back at the Day appointed: If it was not pleaſant, the Loſs of it ought not to afflict us. 2. But why ought we to be afflicted at what is univerſal? And if we be happy or unhappy here, by Compariſon no Man can be unhappy in this Point, ſince all Men are equal in it. And why ſhould Men be afraid to go where all the World is gone, and are going? Or, Who ſhould think it an Affliction to ſhare with the nobleſt Conquerors, and with the wiſeſt Philoſophers, to be ſent where the generous *Scipio* reſts with the juſt *Cato*, and mighty *Cæſar* with the wiſe *Socrates*. This is none of thoſe Ills wherewith one Man can upbraid another: And 'tis that from which the Tyrant who beſtows it, cannot defend himſelf. 3. To ſuch as are happy, Death ſhould be welcome; becauſe it prevenes thoſe diſadvantagious and leſſening Alterations: For the Wheel of Fortune muſt turn down when it can riſe no higher; and we have ſeen many who have confeſs'd themſelves to have liv'd too long, becauſe they out-liv'd their own Happineſs. Happy had *Pompey* been, if a Fever had kill'd him before the Deciſion at *Pharſalia*; and yet his Friends and ſelf had bewail'd his untimely Death, even at that Time. Whereas upon the other Hand, Death, to ſuch as are in Miſery, or as are afflicted with Sickneſs and Pains, is and ſhould be as welcome, as a Harbour to ſuch as have been toſſed at Sea, or as a gentle Sleep to ſuch as have been toil'd with Sickneſs. Here the Priſoner is loos'd from the Bands: Here the Bankrupt's Debts are paid: The ſick Man is cured of his Diſeaſes: And ſuch as Fortune has diſgrac'd, forget the Injury they have received. And thus we ſee, that as the Miſerable have Reaſon to rejoyce; ſo the Fortunate know not but they have been yet more oblig'd by it: And therefore they ſhould not repine at what may be their Happineſs. 4. We ſee, that for as terrible as Death ſeems, every Perſon makes an eaſy Shift to win over it; and even Cowards and Women are able gently to endure it when it comes: And we ſhould patiently undergo what we muſt neceſſarily bear.

THEY conſider'd, that this Life was full of Miſery, or at leaſt Uncertainty, where the Happieſt was ſtill in Fear; where not only is the Richeſt ſubject to Poverty, and the Wiſeſt to Infamy; but that bodily Pain and Torment might, in one Hour, imbitter all the Pleaſures they could hope for, and that Death would at laſt devour and ſwallow up in one Morſel, all theſe Joys we had been treaſuring up in the longeſt Courſe of Happineſs. Gibbets, Galleys, Gouts, Gravels, Racks, and Infamy, are Accidents which have unexpectedly ſurpriz'd ſuch as were dreaming of Pleaſures, and none was ſo fortunate as not to feel the Edge of Sorrow very oft, where he leaſt expected it. Whereas, upon the other Hand, our Pleaſures are as imperfect as they are few: We want Health to enjoy our Riches, or Riches to maintain us in Health. If we have Children; Death, Sickneſs, or Diſobedience, alarms us: If we want them, we conclude our Life uſeleſs: And at beſt we ſee but the ſame Things over and over, dull Repetitions of what was once pleaſant. And therefore, a wiſe Man is no more diſcouraged at Death, than a Traveller is who leaves a City which he has fully conſidered, and where there is now no new Thing to inform his Judgment, or to excite his Curioſity.

THE *Heathens* were comforted againſt Death, when they conſider'd how patiently others ſuffer'd that Death which they feared; and *Petus*'s Wife, finding her Huſband unwilling to die, ſtruck firſt herſelf with the fatal Knife, and giving it to her Huſband, ſaid, *Non dolet Pete; Huſband it is not painful.* They conſider'd what Glory *Cato* gain'd by giving himſelf that Death, which he might have ſhun'd from his Enemies; and that *Regulus*, by returning to ſuffer certain Torment from the *Carthaginians*, was thereupon more eſteem'd than for all his former Victories. They balanc'd the Pleaſure of Fame againſt the Horrors of Death, and the Immortality of Praiſe againſt the Shortneſs of Life: And knowing they were by Nature to die ſhortly, they reſolv'd by Vertue to die bravely, forcing Neceſſity to bow and comply with their Deſigns, and making themſelves Immortal, even by their Mortality.

## III. *That the Moral Philoſophy of the* Heathens *was not able to make us happy.*

THE Ancient Philoſophers were ſo convincing in their Arguments, againſt thoſe who doted upon outward and fugitive Enjoyments, that ſuch as heard them, concluded them infallible; and they ſo flatter'd ſuch as were reaſonable, in promiſing, *That Reaſon was able to perform all that could be deſired; and that it did equal Man to the Gods whom he ador'd*; that the beſt and ableſt of ſuch as heard them magnified all they ſaid, as much as they did magnify human Reaſon. The Eloquence likewiſe with which they ſmoothed and adorned all they taught, and the Elegancies of the *Latin* and *Greek*, did alſo charm very ſenſibly ſuch as were delicate, and were by their Learning the ſole Diſpenſers of Fame: And ſo it was not ſtrange, that this Philoſophy did make deep Impreſſions upon the Minds of Men, who knew nothing that was more ſublime than human Reaſon. Nor is it ſtrange, that we who, tho' Chriſtians, were taught to admire thoſe Authors in our Youth, the pleaſanteſt Part of our Age, ſhould retain ſtill theſe Impreſſions; which becauſe they were the firſt, could not but be the moſt ſticking and pleaſing. And it ſeems that God Almighty ſuffer'd this Philoſophy to be admir'd, that Men might be convinc'd, from their own ſerious Reflections, that all ſublunary Helps were unable to make Men happy; and that Man was no more able to make himſelf truly happy, than he was able to make himſelf a Man. The Light of Nature ſhews ſufficiently the groſſneſs and Folly of external Pleaſures; but its Beams were not ſtrong enough to reach Heaven: And thus he only knew what to fly, but not what to follow. And therefore I ſhall repreſent in this Diſcourſe, ſome of theſe many Things which may clear, *That Moral Philoſophy is not able to make us happy.*

FIRST, That this divine Philoſophy was formed, and had its Principles eſtabliſh'd by the *Father of Spirits*, who beſt underſtood how to direct the Hearts of Men in the Search of Happineſs; becauſe He had made the Hearts that were to be directed: And therefore the Scripture urges unanſwerably, *Shall not He who made the Eye to ſee, ſee*, &c. That the firſt Founders of the ſeveral Sects of Moral Philoſophy, being themſelves ſubject to Error, could not mould any Thing that was free from it. And beſides this general and original Imperfection, we ſee that each of theſe Philoſophers form'd his Idea's ſuitable to his own Temperament; which not being pleaſant to all, his Principles could not pleaſe all, nor could that be any univerſal Happineſs which was adapted to ſo very few. Thus *Zeno*, being naturally melancholy and moroſe, plac'd Happineſs in Retirement, Severity and Inſenſibility: *Epicurus*, being a pleaſant Gentleman, ſeated his in Pleaſures: And *Ariſtotle*, being a Courtier, who did daily ſee Action and the external Advantages of Fortune highly valu'd, did place Man's chief Happineſs in the Accumulation of all the Advantages of Soul, Body and Fortune. So that the firſt Two made Happineſs by as much too narrow, as the Third made it unattainable by making it too large; and all of them conſider'd themſelves, and not Mankind, in their miſtaken Principles.

SECONDLY, That ſo much celebrated Philoſophy did found all its Happineſs upon the Soul of Man, ignorant of any higher Aſſiſtance, expecting all their Conſolations from the Vigour, Firmneſs, and the Illumination of their own Thoughts. But if they had conſider'd the natural Propenſity that is in Man to all manner of Wickedneſs, and how he does not ſlide but run into Error: Or if they had impartially obſerv'd, how the ſtrongeſt Spirits do yield daily to the weakeſt Temptations; and how the beſt of Men are unable to practiſe or purſue even what their own Reaſon teaches them; how they were forc'd to acknowledge, that *video meliora proboque, deteriora ſequor*; they could not have ſolidly concluded, that their own Reaſon or Thoughts were able to make them happy; eſpecially ſeeing when Men are in Extremity, their Thoughts are diſorder'd as well as themſelves, and ſo are no more able to help their Maſter, than a ſick Man is able to cure himſelf; or a melancholy Man to chear up his own Spirits. And moſt of our Paſſions being the Product of Fleſh and Blood, prove as deaf to, and unmanageable by Reaſon, as the Vitious are by the Vertuous, or Fools by wiſe Men. And tho' Philoſophy were able, by its Reaſonings, to regulate the greater and more remarkable Actions of our Life; yet the firſt Ebulitions and Sallies of our Paſſions, thoſe *motus primo primi*, are ſo ſudden and fly out ſo unexpectedly, that they deſtroy ofttimes our Quiet, before the other is able to come up to our Aſſiſtance. Whereas the Chriſtian Religion aſſures us of Help in all our Misfortunes, from that Great God who is daily ſerv'd by Legions of more ſublime Creatures than our Reaſon is, and who are ſo exalted by the Privilege of their Creation above us, or what we enjoy, that *Abraham*, though a Patriarch, was put to his Knees upon their firſt Approach; and yet theſe are promiſed to us as *miniſtring Spirits*, having their native Power to ſerve us heightned by their Zeal to ſerve ſuch as their Maſter delights in. What infinite Advantages then poſſeſſes the Chriſtian Religion above Philoſophy; ſeeing the one teaches us but to rely upon our ſilly ſelves, but the other to look up to *the Rock that is higher than we*. If our Reaſon fail us, Faith promiſes divine Aſſiſtance, wherein we ſhall ſee both the Power and Kindneſs of the Beſtower, and which ſhall bring us the Comfort of a Reſcue joined to the Pleaſure of a Wonder.

THOSE Philoſophers recommended *Recollection and the retiring into our own Breaſts, as the nobleſt of all Employments:* Whereas few Breaſts are ſo pure; and all are ſo weak, that there is little Pleaſure to be had in the pleaſanteſt Review we can take of our own Thoughts and Actions; which being but a Dunghill of Corruption, do ſtink the more by how much we rake them up. But the Chriſtian Religion recommends to us to ſeparate from the World, and to gather in our Thoughts from all exterior Objects, that we may fix and centre them on God, in whom are to be found new and raviſhing Pleaſures, ſo far from being exhauſtible, that they become the greater by how much they are the more nearly and the more frequently conſider'd. Here we may behold the *Beauty of Holineſs*, in its incomparable Luſtre; Majeſty, without Rigour; Greatneſs, without Pride; Empire, without Tyranny. Here we may hang like innocent Babes upon the Breaſts of his Conſolations, neither caring nor conſidering what may befall us; ſecure in a Protection which can never be overcome, and a Friendſhip that can never fail.

THE Third Conſideration I ſhall bring is, That as Man, blinded by his original Guilt, could not himſelf diſcern which was the true Way to Happineſs, eſpecially being diſtracted by thoſe many Hundreds of Opinions propos'd by Philoſophers upon that Subject; which, as they were ſo many infallible Proofs of the natural Blindneſs of Mankind, and the Vanity of that Philoſophy; ſo they ſhew that Man had need of ſome external Power, higher and greater than himſelf, to open his Eyes, and to direct his Steps. And this the Chriſtians find in the Books of the Old and New Teſtament, wherein God Almighty Himſelf has dictated Precepts, that are *a Light to our Eyes, and a Lantern to our Steps*, and which no Man can read without a ſecret Joy, as well as Conviction; it having not only upon it ſome Impreſſions of that Majeſty, with which it was written; but having in it likewiſe thoſe ſweet and gentle Conſolations, that may make every Croſs eaſy, and every Burden light. What Book of Moral Philoſophy doth aſſure us, That the Son of God once died and ſtill intercedes for us? That He puts up all our Tears in His Bottles, makes our Bed in our Sickneſs? That we are all Members of His Body; and ſo whatever Good or Ill is done to His poor or afflicted Members, He takes as done to or againſt Himſelf?

A Fourth Advantage of the Chriſtian Religion above Philoſophy is, That the one can only comfort us in Afflictions; but the other can avert them from falling upon us. *Julian* was neceſſitated to ſee his Armies beaten, but could not defend them by his Philoſophy; whereas *David* cried unto the Lord, and he delivered him from his Enemies. And *Seneca* could not eſcape the Sword of *Nero* by his Stoiciſm, when *Peter* eſcap'd that of the *Jews* by his Devotion, and was as much raviſhed at his Eſcape, becauſe it was the Mark of his Maker's Kindneſs, as becauſe it was the Means of his Deliverance. But this Infirmity of mere Moral Vertue, did moſt eminently appear in its greateſt Maſter, the Great *Brutus*, that Martyr as well as Wonder of his Common-wealth: For after he had obſerved all its Dictates moſt exactly; yet finding both himſelf and it oppreſs'd at *Philippi* by avaricious *Lentulus*, ambitious *Octavius*, and luſtful *Antony*, he was forc'd, with his laſt Breath, to cry out againſt *Vertue*, as an empty Name: Whereas many Thouſands of Martyrs have had their Zeal for God kindled more and more by the Flames in which their Bodies did burn for His Truth, and did think their Death not an Effect of His being unable to relieve them, but of His Kindneſs, in beſtowing on them the Honour of dying in His Quarrel. Philoſophy cannot advertiſe us of future Inconveniences: And tho' it could guard againſt them, yet it cannot foreſee Misfortunes: Whereas Religion puts us under the Protection of One who never ſlumbers nor ſleeps; who could advertiſe *Joſeph* and *Paul* by Dreams, to avoid Dangers that were imminent, and which would have overtaken the wiſeſt of thoſe *Pagan* Philoſophers.

A Fifth Advantage is, That the richeſt Return Philoſophy can make to its Martyrs, for their greateſt Sufferings, is, *The Happineſs of reflecting upon their own Vertue: Virtus eſt ſibi præmium.* But the Chriſtian Religion is far more noble, and rewards us not only with what is our own, but it promiſes us Joys which are as far above our Expectation as our Merit; that can not only reward our Sufferings, but which can make our Sufferings ſeem not only eaſy, but ſweet. I believe *Epicurus* could laugh but faintly in *Phalaris* Bull, tho' aided by the ſtrongeſt Auxiliaries that his Morals could furniſh; whilſt Saint *Laurence* could find the Joys which were ſent him from Heaven, ſtronger than the Torments of being roaſted on Coals. Philoſophy promiſes only to make us happy *in bounding*, but Devotion in enlarging our Pleaſures: The one teaches us *to moderate our Deſires*; the other, to heighten them: The one confines us within the narrow Limits of *Moderation*; but the other aſſures us of Raptures of Joy.

A Sixth Conſideration is, That the Chriſtian Religion does command more Purity than Moral Philoſophy does: The one ordains us *to do no Injuſtice*; the other commands us not to think, and which is more, to regret that others ſhould do what is ſo: The one *forbids us to rob from Men what is theirs*; the other commands us to give them what is ours: The one will have us *do our Neighbour no Wrong*; the other commands us to love him as our ſelves: The one *forbids us to undervalue our Neighbour*; the other commands us to undervalue our ſelves.

A Seventh Conſideration is, That the Chriſtian Religion allows all the Means that Moral Philoſophy does, for curbing Vice and exalting Vertue; and adds to theſe others, which are much more efficacious and much fitter for thoſe noble Deſigns. Thus theſe *Heathens* perſuaded us, *to ſcorn Fame and ambitious Thoughts, becauſe they enſlaved us to the Humour of others, and expoſed us to Hazards, and waſted that Time which was ſo precious, and which might have been much better ſpent upon our inward Reflections.* But Devotion, beſide all theſe, adds, That we are commanded to have no high Thoughts of our ſelves, and to glory in nothing but Almighty God, who abſolutely diſpoſes of our Fate; That no Man ſhould be vain of theſe outward Things which are given him; and, That theſe Things alienate our Minds from ſeriouſly minding thoſe more ſublime and excellent Duties that lead to Eternal Life: And, That our Saviour, who might have infinitely out-ſhined all the Emperors on Earth, did yet ſhun all theſe gaudy Preferments. Thoſe Philoſophers perſuaded us, *not to be avaricious, becauſe little could ſatisfy Nature*; and yet they could not ſecure us even of that Little. But the Chriſtian Religion obliges us to believe, and ſecures us that there is an Omnipotent God engag'd, both by Honour, ſince he has promis'd, and by Intereſt, ſince we are his Family and Children, to provide for us; and that ſince He provides for the Ravens, Lions and Sparrows, that He will not ſuffer us to want, who bear His own Image. Nor can it be imagin'd that we, whoſe Intereſt over-rules our natural Inclination, can yet be ſo juſt and tender, as to provide for own Families, and that yet He will not provide for us, if we endeavour to be a Part of the Family of the Faithful. They could only perſuade Men, *to forgive Injuries, becauſe it was a Thing noble and generous, and gain'd Repute amongſt wiſe Men.* But Chriſtianity teaches us to forgive, becauſe in this we imitate and pleaſe an Omnipotent God, who knows how to revenge, if it be neceſſary; and to reward, if we can believe Him. They taught us, *That we needed not be troubled with what Men ſaid of us, becauſe our own Conſcience was ſufficient to abſolve us, if we were innocent.* But Chriſtianity teaches us, That we have a nobler Judge than our Conſcience, who ordinarily clears the Innocent, even in this World, by extraordinary Means, far exceeding the Powers of Philoſophy; but will not fail to clear them in the next, to the Conviction of Men and Angels. They recommend to us, for exalting our Vertue, *to do every Thing, as if* Cato *or* Socrates *were looking upon us.* But Chriſtianity obliges us to believe, that we have the Omniſcient God, *who is of purer Eyes than that He can behold Iniquity,* to be both our Judge and our Witneſs; who can reward and puniſh what they could not; and whoſe Judgment we ſhould more reverence than theirs, becauſe we cannot imagine in Him the leaſt of theſe Imperfections, with Thouſands of which we know that the beſt Man that ever was born can be eaſily charged. They deſire us, *to bear Sickneſs patiently, becauſe it is natural; we cannot ſhun it, and Cuſtom will leſſen it.* But Chriſtianity aſſures us, That in Sickneſs God does not puniſh us as an Executioner, but chaſtiſes us as a Father; that by this fiery Trial He purges us from our Droſs, bearing Himſelf a Part of our Infirmities. And tho' all the Philoſophers join'd their Forces in writing *Conſolations againſt Death*; yet it overcame both them and their Diſcourſes: All they could ſay was, *That Death was a Harbour or a Sleep.* But we think it the Way to a Crown and Empire. They needed *Conſolations againſt it*; but itſelf is to Chriſtians the greateſt Conſolation.

Too many Proofs alſo of the Infirmities of their Principles, may be had from their own celebrated Writings, and the Foundations laid by them in theſe: As for Inſtance, the great Foundations laid by *Epictetus*, on which all his *Enchiridion* is built, is, That ſome Things are in our Power, ſuch as are the internal Faculties of our Mind; and ſome are not, ſuch as are the external Goods of Fortune: Whereas, in effect, our Inclinations are not under our Power ſince the Fall: And the wiſeſt and beſt of Men find daily, that our Will is crooked, and our Judgment is blind, our Hearts are deceitful, and our Senſes rebellious; and are therefore forc'd to cry out, *Oh, Who ſhall deliver us from this Body of Death!* *Seneca* in his Treatiſe of a *Happy Life*, recommends nothing to us, but to follow Nature: But that being blind, cannot guide us; and our chief Prayer ſhould be, That God ſhould reform it rather, than that we ſhould be enabled to follow it. And in his Treatiſe of the *Shortneſs of Life*, he recommends to us to be careful of our Time; but could not teach us how to acquire an Eternity with it; and to retire into our own Breaſts; but knew not how to adorn theſe, by making them *Temples of the Holy Ghoſt*: And what Advantage can we have from his Book, teaching how to acquire Tranquillity in our Souls, ſince his Great Leſſon therein, of not deſiring tranſitory Things, is unattainable by ſuch as are not *renewed in the Spirits of their Minds*: And we can no more hinder ourſelves from deſiring, than we can from being cheated or beaten: And how few would be tormented by Ambition or Love, if they could help it? And tho' all deſire to *die the Death of the Righteous*, and to fix their Thoughts in Prayer; yet how impoſſible is it, without Him *who both worketh to will and to do in us?* Nor could either *Plato*, in his *Socratic* Diſcourſe of the *Immortality of the Soul*; or *Seneca*, in his many *Conſolations againſt Death*, flie higher than, *That either our Souls were to die with our Bodies, and then we ſhould be free from Pain*; or, *if they were to ſurvive, we ſhould live with the Gods and predeceas'd Philoſophers.* Whereas the Chriſtian Religion removes the Doubtfulneſs of one Part of that *Dilemma*, and raiſes the Joys of the other; Union with God, and the Joys and Songs of the New *Jeruſalem* being unknown to them, who did not know that the Son of God ſhould take away the Sting of Death, and ſhould, as their Elder Brother, prepare Manſions for them in Light inacceſſible. And therefore, all that *Socrates* or *Seneca* could do was, to die in Tranquillity: And they were troubl'd with too many Doubtings in their Death, to have any firm Tranquillity in it. Whereas many Thouſands of the Primitive Chriſtians have died in Extacies and Raptures of Joy. And to conclude this Preference, I muſt remark, That theſe Philoſophers could hardly, in the beſt of Times, bridle ſome few unruly Vices in ſome one or other of the beſt of their Diſciples, after much Converſe: Whereas the Chriſtian Religion was able, in the Mouths of poor Fiſher-men, to renew at one Sermon, many Thouſands in all the Faculties of their Minds; and this too, even in the Days of *Tiberius*, *Caius* and *Nero*, when God had ſuffer'd Mankind to become vitious beyond his own corrupt Nature, and flagitious beyond the Belief of thoſe who ſucceeded them; as if the Exceſs of their Sins had been reſerv'd to be ſome ſmall Proof of His Infinite Power and Goodneſs diſcover'd to Man in the Chriſtian Religion. The beſt of their Actions alſo ſhew the Imperfection of their Principles: And thus, *Cato*'s killing himſelf, ſo much magnify'd by *Seneca* and all the Philoſophers, was but a delicate and ſkilful Diſguiſing of his Pride and Fear, being afraid to be led as a Trophy in *Cæſar*'s Triumphs. And *Lucretia*'s killing herſelf, ſhews rather her diſdainful Impatience than her exact Vertue. And *Bias*'s throwing his Money into the Sea, leſt he ſhould be tempted by it to love Riches, was a vain Caprice, to be eſteemed an Acknowledgment, that Philoſophy was not able to defend its Followers againſt Avarice, or to inſtruct them in the charitable beſtowing of Riches.

As Chriſtianity is thus fitter for making every private Man happy; ſo it is much fitter for making the World in general ſo. For Philoſophy does perſuade every Man *to make himſelf happy*: But Chriſtianity being the Image of Him who has a general Kindneſs for all Mankind, commands us that, like Him, we endeavour the Happineſs of all Men. The *Stoics*, whoſe Happineſs conſiſted in Tranquillity, did *forbid Pity and Compaſſion, as that which troubled their Quiet*. But Chriſtianity obliges us to be ſenſible of the Afflictions of others: The one looks upon Man as *a ſeparate Piece of the Creation*; the other looks upon him as a Member of the Body of *Jeſus Chriſt*; and ſo engag'd like the Member of a Body, to mind what is advantagious for the whole Body in general, and for every particular Member of that Body.

They were indeed to do what was for the Good and Glory of their native Country; but the chief Motive of that Inclination was, That they might thereby raiſe their own Praiſe rather than its Intereſt: Therefore *Virgil*, ſpeaking of what mov'd *Brutus* to cauſe put to Death his own-Sons, becauſe they had combin'd with *Tarquin* ſays,

*Hinc & amor Patriæ, & laudis immenſa Cupido.*

And conſequentially to this Principle, it could not be expected, that they would act generouſly for their Country, and expoſe themſelves for it, when their Endeavours were not to be known: And we find, that even the moſt vertuous of them, ſuch as *Fabius Maximus*, oppos'd the Intereſt of his Country with as much Fervor, as he had formerly promoted it, in oppoſing the young *Scipio*'s going againſt *Carthage*, tho' nothing could be more for the Security of *Rome*; leſt thereby he ſhould depreſs his Glory, tho' by raiſing that of *Rome*. Other Inſtances of this are to be ſeen in *Cicero*'s deſiring an Hiſtorian to make Mention of him with great Honour in his Hiſtory, and where he wanted, to add: And in *Seneca*'s owning that he would not accept of Knowledge, if he might have it on that Condition, That he ſhould not publiſh and make a Shew of it. But God and the Chriſtian Religion, having deſign'd to make all Mankind helpful to one another, has oblig'd them to believe, that they are Fellow-Members of the ſame Body: And therefore, as one Member of the natural Body will care for another, the ſame is to be expected from Chriſtians in their Commonwealth. He alſo promiſes to reward what is done in ſecret, to invite Men to do what is vertuous and excellent, without any other Witneſſes ſave Himſelf. And our Bleſſed Saviour improves this Point far beyond any *Heathen*, in His excellent Sermon in the VI. of St. *Luke*: *If ye do good to them which do good to you, what Thank have ye? for Sinners alſo do even the ſame: And if ye lend to them of whom ye hope to receive, what Thanks have ye? for Sinners alſo do lend to Sinners, to receive as much again. But love ye your Enemies; and do good, and lend, hoping for nothing again; and your Reward ſhall be great; and ye ſhall be the Children of the Higheſt: For He is kind to the Unthankful and the Evil.*

Though I have thus toucht upon ſome of the moſt remarkable Advantages of Religion above the Moral Philoſophy of the Ancients; yet I may in general conclude, That it was impoſſible for theſe Philoſophers to have founded a ſolid Happineſs upon any Thing in Man, ſince they underſtood not his Nature and his original Infirmity, which render'd him ſo frail and liable to all Errors, that it was impoſſible for him to will what was good, much leſs to perform what he will'd, or his true Excellency and Glory; being ignorant of his being capable to become the Son of God and Heir of eternal Glory. And therefore they were forc'd to recur to vain and fooliſh Extravagancies, for ſupplying thoſe Defects, in aſſerting, *That Man was to be admir'd for his Vertue above the immortal Gods, who not being capable of Error, were not to be prais'd for Innocence, to an equal Degree with Man, who could by Reaſon ſecure himſelf againſt all thoſe Frailties, to which the Gods had expos'd him by Nature*. And tho' they had underſtood his Nature; yet they could not know from that, how to make him happy; ſince true Happineſs conſiſts in being raiſed above all Frailties, illuminated from all Errors; and this requir'd not the rectifying, but the renewing of his Nature: And this Nature could no more perform, than a blind Man could reſtore himſelf to his Sight, or a ſick Man to his Health. And therefore the Chriſtian Religion having firſt diſcover'd to us, the true Occaſion and Source of his Infirmity, it points out to us ſufficient and proportional Remedies, to enable us not to wreſtle only againſt our Nature, as they did, but to get our Nature renewed and rais'd far above all that we can now wiſh. And yet I think that theſe Philoſophers were ſent before our Saviour upon deſign, to draw Men from overvaluing outward Enjoyments. And it is very remarkable from Chronology, that Philoſophy was moſt admired, and Philoſophers moſt numerous, in the Ages which immediately preceded our Saviour's Birth. And we may eaſily ſay, That they have raiſ'd human Reaſon to ſo generous an Heighth, that they continue ſtill to ſurpaſs other Men, as far as devout Perſons ſurpaſs them: And that theſe great Sages did make Way for the Bleſſed *Jeſus*, as the Dawning breaks a Paſſage for the riſing Sun; and their Eyes were open'd ſo, as the blind Man's in the Goſpel, who at firſt ſaw only *Men walking as Trees*. And therefore it is moſt neceſſary to read their Morals, but not to reſt upon them; as we take Preparatives before we get the Medicins, which truly recover us.

## IV. *That the Chriſtian Religion is excellently contriv'd, for rendring Man happy, both Here and Hereafter.*

I NEED not have diſparaged all other Enjoyments, that I might raiſe our Eſteem for Devotion, if we did not live in an Age, wherein few take Time to think, either what they are, whence they came, or whither they are going; and wherein Devotion is too frequently left to be conſider'd by ſuch as are debarr'd from all other Pleaſures. Nor do I eſteem Devotion the leſs, becauſe few take Sanctuary there till they be rebuted elſewhere; ſo that it is rather made a Sanctuary than a Choice: For it is probable, that God, in His Wiſdom, ſuffers Man to ramble, for ſome Time, amongſt other Objects, that he may, from a Principle as well of Experience and Reaſon, as Obedience, conclude, That to ſerve Him is Man's Happineſs, as well as his Duty, and that he is no Loſer by that Service, and that he needs not long for thoſe Objects from which he is call'd: But that, to thinking Men, Devotion will eaſily appear that which is only able to make us happy, and that it affords Joys far exceeding all other Enjoyments, ſeems moſt evident to me, from theſe Conſiderations.

THE Firſt is, That when God created the World and peopled it with Mankind, He ſurely deſign'd that they ſhould adore Him their Maker; and that this ſhould be their Nature, becauſe that was to be their Buſineſs: For every wiſe Artiſt, ſuits the Nature of what he makes to the Employment for which it is deſigned. And therefore it is ſuitable to Reaſon, for us to believe, That ſince we were made to ſerve God, His Service muſt be our Happineſs, which made the Apoſtle call the Service of God, *our reaſonable Service*.

THAT is moſt reaſonable for us to do, which is the Product and Iſſue of moſt ſerious Reflections. But ſo it is, that ſuch as think moſt, do of all others conclude Devotion the beſt Employment: And we and others, ordinarily, are only then diverted from it, when we become ſo fantaſtick, as to think upon nothing that is ſolid; or when our Breaſts are crowded ſo with other Thoughts, that we want Time to think upon this. And thus God Almighty ordinarily complains, That His People conſider not; for if they could retire inwardly into their own Souls, and conſider its Nature and Conveniencies, they could not but become convinced of the Excellencies of Devotion, and that it were Man's real Intereſt.

ALL other Objects, being leſs than our immaterial and vaſt Souls, cannot fill them: But God having infus'd many Thouſands of them into their Bodies in one Hour, is much greater than they. He whoſe Glory the Heaven of Heavens cannot hold, is too immenſe not to fill our narrow Spirits; and He who can confound them with Horror, and can diſtract them with Fears, is ſure able to make them happy when He thinks fit. And it is a Wonder that we conſider not, that He who has, does, and ſhall ſatisfy for ever Thouſands of Angels, which are neither ſtraitned in Bodies, nor clouded with Ignorance as we are, is not able to ſatisfy our narrow Spirits. He is the only Object which our active and nimble Soul can never exhauſt, and with which we may be ſooner raviſh'd than cloyed in our Love to other Objects. We muſt draw in and contract our Souls, to fit and adjuſt them to thoſe Objects which are much leſs than themſelves; but in loving God, we extend them to all the Greatneſs and Vaſtneſs that they can admit.

IF any one Man could make ſuch another glorious Body as the Sun or Moon; if he could make Life exerciſe all theſe ſame Functions in ſo ſmall Bounds as a Gnat, as fully as it does in a huge Elephant; if he could force thoſe vaſt Treaſures of the Waters of the Ocean to remain in their Heap; or form ſuch another Inſtrument as the Eye, which receives, in one Inſtant, Thouſands of various Objects without Confuſion: We ſhould doubtleſs admire him, and be raviſh'd with his Friendſhip; eſpecially if he were alſo generous or kind. Who would not have been extremely ſatisfy'd with the Familiarity of *Cæſar* or *Scipio*? Yea, we are yet enamour'd with the Memories of ſuch as were victorious or generous, tho' they never did or ſhall oblige us. How much more then, ought we to be raviſh'd with the Love and Eſteem of that infinite God, before whom theſe were but Worms, and who, by the Power of His Word, commanded all theſe, and the Sun, Moon, and whole Frame of this World, to riſe out of their Nothing, and will again command thoſe glorious Things to ſhrink into their firſt Condition? Who is a Monarch, without Oppreſſion; always victorious, without any Aſſiſtance; and who is an Artiſt, whoſe Skill knows no Bounds, and who can never fail in His Deſigns. How much then ſhould we admire our Great God, who at once governs all theſe innumerable Hoſts of Angels and Multitudes of Men, and ſuits them all to His own Ends; Who keeps them from deſtroying one another, and forces them to do ofttimes what is noble and generous againſt their own Inclinations; from whom flows, as Rays from the Sun, all thoſe ſcatter'd Excellencies which we admire in them; and who inſpires into ourſelves all thoſe pretty Motions which do pleaſe us?

THO' we, dull Creatures, cannot be warmed into a Love for that infinite God; yet more noble Souls than ours have given, even amongſt Men, a convincing Proof, that God deſerved infinitely above all other Objects: For who was ever content to ſeparate himſelf from the Neighbourhood of all his Relations, from the Enjoyments of all outward Pleaſures, to think conſtantly upon any one Creature? Or who was ever content to die and be tormented for its Love? Whereas many Thouſands have retir'd into Deſarts and Cloyſters; many have abſtracted themſelves from publick Employments; many having ſuffer'd their Bodies to be pulled aſſunder, to be roaſted, thrown to wild Beaſts, and ſubjected to unexpreſſible, as well as unſufferable Torments, for the Love of Almighty God; and have in thoſe expreſſed a Satisfaction and Joy, which was able not only to ſolace themſelves, but to aſtoniſh, and ofttimes to convince, their Perſecutors, of the real Happineſs which conſtantly attends the Service of God. From which we may conclude, That Devotion does afford not only more Pleaſure than any other Object, but even as much as we are capable of.

THE Happineſs of Man muſt, certainly, conſiſt in that which can moſt accompliſh his Soul; the Soul being the nobleſt and moſt excellent Part of Man: And ſure nothing can ſo much ſublimate that noble Part, as Devotion; for this raiſes it from above that Duſt and thoſe low Things amongſt which it wallows. Devotion unites the Soul with God, becauſe it makes the Soul love him; and all Love is an Union. And as 'tis not imaginable but that God would accompliſh wonderfully that which lov'd Him; ſo ſure He will accompliſh what He deſigns to love: For ſince even Men are ſo grateful to what loves them, and ſo careful to be thought to love nothing which is unworthy of their Love; we muſt, in Reaſon, conclude the ſame more forcible in Him, whoſe Kindneſs and Power exceeds ours, much farther than the Heaven, wherein He reigns, is raiſed above the Earth wherein we crawl. If theſe Fruits ripen beſt which are ofteſt under the Rays of the Sun, and if Converſation does eaſily transform us into a Reſemblance with theſe with whom we converſe; then certainly Devotion, by learning us to converſe with God and to love Him, muſt refine Men into a wonderful Pitch of Perfection above the Rabble. Thus Devotion is call'd, the Illumination of our Souls, *a Light to our Feet, and a Lantern to our Steps*. And how can Almighty God dwell in our Hearts, and how can they become the Temples of the Holy Ghoſt, and not be much more glorious Creatures than the Souls of the Wicked are, which are clouded with Darkneſs, and overſhadow'd with a Vail of natural Miſt? Do we not ſee, that all Arts and Sciences have grown up with Religion, ſince our Saviour's Birth; and that thoſe Parts of the World which adore Him, are infinitely more ſubtile and judicious than theſe which are poſſeſs'd by Infidels? What Man could ever, by the Light of Nature, or by all the outward Advantages imaginable, pretend to that wonderful Proſpect into the future State of Affairs, which the Prophets of old, and many Saints have in our Ages enjoyed? That many ſtrange Events were foreſeen by them, can only be deny'd by ſuch as will not believe even what they ſee and hear: And that this ſhews a noble Flight in the Soul, is as undeniable.

FROM this ſacred Character, ſeal'd upon the Soul of Man by converſing with God, did ariſe the Glory which ſhin'd ſo in the Face of *Moſes*, that the Children of *Iſrael* could not ſee it unvailed, after he converſ'd Forty Days with God in the Mount. From this it was that the Apoſtles were transfigur'd with our Saviour ſo glorioſly: And from this does ariſe that Eſteem which all Men have for ſuch as are religious, whoſe very Preſence does over-aw the rudeſt and moſt impious Men: Many Inſtances whereof I have obſerved in my private Experience; and I read in the Eccleſiaſtick Story, That when a barbarous King deſign'd to ruin

*Italy*, and had gather'd together an Army ſufficient for a more difficult Enterpriſe, invited both by Hopes of vaſt Treaſure and a vaſter Fame; yet he was diverted by the Interceſſion of one of the Fathers of the Church; whoſe firſt Looks did more terrify him, than all the Faces of his Enemies had ever done.

FROM this ſame Source flows likewiſe thoſe noble Epithets; (which, tho' falſly aſſum'd by ſome Infidel Emperors; yet are truly due to ſuch as are really pious) as to be *the Sons of the moſt High*; The *Friends of God*; His *Treaſure*; His *Jewels*; and *Co-heirs* of Heaven: Privileges which cannot but be attainable, becauſe the Spirit of God, which cannot lie, has promis'd them; and if attainable, make Religion, by which they may be attained, fit and worthy of the nobleſt Souls.

WHEN I conſider how frail a Creature Man is, who is born a Prey to every Thing that pleaſes to invade him; and how he lives in a World ſo corrupt, that he cannot be ſecure from being poiſon'd by ſuch as entertain him, from being robb'd by ſuch as travel with him, who may be defamed at Pleaſure by ſuch as envy him, and condemned upon the falſe Depoſitions of ſuch as bear him at Malice, whom every Tyrant may kill, and every Cheater may deceive; I admire that he puts not himſelf under the Protection of Almighty God, and ſecures not himſelf by Devotion, ſeeing nothing elſe can, and that this can do it fully; for God only can foreſee every Thing which may enſue, and can order every Thing which He foreſees at His Pleaſure. And as the Wicked muſt always be afraid, like him who travels in an Enemy's Country (for God is an Enemy to the Wicked; and the World is His, and at His Diſpoſal) who ſojourns in a Wilderneſs infeſted by Robbers and wild Beaſts; or like one walking in a dark Room which he knows not, without any known Friend or Aſſiſtance: So he who is really pious, is moſt happy and ſecure; becauſe he is ſure, that *all Things ſhall work together for the Good of thoſe who fear Him*, and that He will keep His own, *as the Apple of His own Eye*; nor can *a Hair of their Head fall, without the Determination of their Heavenly Father:* He it is who can bridle the Tongue of our Adverſaries, and ſeal their Mouths, as He did thoſe of the Lions; 'tis by His Commiſſion that the Peſtilence rages: Nor dare the deſtroying Angel kill, where the Door is ſign'd. To ſuch as fear Him, Fate is not blind; nor can they be the Prey of Chance; and if Things ſucceed not according to their Wiſhes, 'tis becauſe their Wiſhes were not fit enough for their Intereſt. And therefore the pious Man, and he only, can ſay with *David*, not as a King, but as a Lover of God, *Pſal.* 4. ver. 8. *I will lay me down in Peace and ſleep; for Thou only makeſt me dwell in Safety.* O happy Security! far exceeding what Treaſures or Guards can promiſe. O glorious Condition! to which if any Thing were neceſſary, it would be immediately added. And therefore, after I am amaz'd with the Conſideration of all the capricious Revolutions of human Affairs, which toſs and tumble in a perpetual Uncertainty, wherein the Fates and Merits of Good and Bad are wonderfully confounded, I ſit down and admire ſecurely that Great God, who does range all our Errors into an exact Symmetry, and our Diſcords into an exact Harmony.

ALL the other Objects of our Pleaſures may afford us Satisfaction for the preſent, but they cannot ſecure us of their own Permanence: But God being *the ſame to day, Yeſterday and for ever*, there can be no Hazard of Loſs, where there is no Poſſibility of Change. In Him, ſays the Pſalmiſt, *is Fulneſs of Joy, and at His Right-hand are Pleaſures for evermore.* We need not fear that Miſinformation may breed Miſtakes in Him, whoſe Knowledge is infinite; nor that Intereſt will tranſport his Affection from us to others, whoſe Affection is as free as it is great; in which we need fear no Rivals, becauſe it cannot be exhauſted; nor Enemies, becauſe it is Almighty, like Himſelf. All outward Enjoyments ſatisfy only ſuch as are of ſound Body or Judgment; but if either of thoſe be diſtemper'd, we immediately call all theſe but *miſerable Comforters*. But Devotion is then the greateſt Conſolation, when we need moſt to be conſoled; it quits us not on our Death-beds, nor in our Afflictions, as thoſe other falſe Friends do; but it then aſſiſts us, when theſe deſert us. And this remembers me of a Courtier, who when his Prince (whoſe great Minion he was) ſent to comfort him on his Death-bed, and to aſk, What he would have Him do for his Satisfaction? anſwer'd with a Smile, *That Princes could only make ſuch happy as were ſo formerly; for moſt were happy who were in Health; but that Souls were above their Juriſdiction.* All the Kingdoms of *Perſia* and *Media* could not keep *Belſhazzar* from trembling, when he ſaw *Mene tekel* wrote on the Wall: But He who wrote that for his Horror, could ſoon have calm'd the Tempeſt He raiſed, and could have, by diſplaying one Glimpſe of His Favour, raviſh'd that unhappy Prince with as great Joy in the next Thought; as He did *Paul* when, being carried up to the Third Heavens, he was ſo pleas'd, that he knew not whether he was in or out of the Body.

HE who calm'd the Sea, can calm our Paſſions, and caſt out theſe Devils out of our Souls and tame them, as he did *Daniel's* Lions. There will be no Room in his Breaſt for Paſſion, whoſe Soul is fill'd with Devotion; nor are they compatible with that ſovereign Good. How can he fear Danger, who is under the Almighty's Protection? What need is there for Envy in Him, who undervalues all Things that are the Objects of our Envy here; and who is only happy in that wherein He rather wiſhes than fears Rivals from: Which one of the Miſtreſſes of the laſt King of *Spain*, when ſhe fled from him into a Cloyſter, did very prettily repreſent to him, *That all earthly Powers were but empty Things, ſeeing tho' he was by Love forc'd to value her above his Crown, againſt which Paſſion all the Power of* Spain *could not defend him; yet could he not induce her to love him.* Since then it is only our Soul, which is the true Judge of Happineſs; and that our Souls and Thoughts are ſeated beyond the Reach of outward Things, but yet are Subjects to their Creator, who does, in one Moment, over-rule all the various Thoughts which ſwim in the Brains of all this great Multitude who now live; let us conclude, That He only can make us happy, who can quiet our Paſſions, or raiſe Paſſions in us which make Happineſs, but do not diſturb it: No other Object can keep alive our Affection to it. If our Affection begin to decay, or we our ſelves to be dull and melancholy; then in vain do they ſolicite us: But God, who is the Father of Spirits, and whoſe Breath they are, can kindle and raiſe our Devotions; He can command thoſe Spirits which He hath made: And as He ſcatter'd the Light over the dark World at the Beginning; ſo He can *ſhed abroad the Light of His Countenance in our Hearts, and make us glad of His Salvation.* No Guards can withhold thoſe Succours; no Force can intercept them; nor can they be robbed and taken from us, when they are entred.

If the Men of all Nations were gather'd together into one Place, to deliberate what they ſhould ſet down, as fit and convenient Rules for their own Government, and whereby to ſecure their Societies from all Oppreſſion and Invaſion in their Property and juſt Pleaſures; and if God ſhould allow them to chooſe what, after a ſerious Conſideration, they ſhould judge moſt convenient for their Perſons and Intereſts; they would doubtleſs agree in thoſe few moral Laws which God has preſcribed. Nor has He preſcrib'd any Thing to Man, which is not both agreeable to his Nature and fit for his Intereſt, though it is probable that ſome particular Perſons, who conſult not either the Good of Mankind in general, or the Advantage even of their own Perſon and Intereſt, do think themſelves too much confin'd thereby. This will eaſily appear in the Laws of the ſecond Table, whereby we are commanded *not to ſteal, kill, commit Adultery, &c.* For there is no Man but would complain of theſe as Injuries. He who would debauch his Neighbour's Wife, would be glad that others ſhould be puniſh'd for tempting his: And he who, to gratify his Tyranny or Revenge, would kill his Neighbour, is glad the Law has fenced about his own Life with all imaginable Severity. And tho' this is not ſo obvious, yet it is as true in the Laws of the firſt Table: For I am ſure that if all Nations were perſuaded, that there were an infinite Eſſence, who could defend them againſt all the malicious and hid Deſigns of their Enemies, which they could neither foreſee nor divert; who could know and puniſh even the malicious Thoughts of ſuch as plot our Ruin; who delighted to maintain the Oppreſs'd, provide for the Hungry, and protect the Innocent, and after a few Years, would beſtow an Eternity of Pleaſure; ſure all Men would, without a Law, adore Him, and think themſelves obliged thereto by Prudence, as well as Law. And when they conſider'd, that an Oath is the great Security whereby all our Rights are decided, when other Proofs fail, they would doubtleſs reverence Swearing as an advantagious Inſtitution. And as to the obſerving a Sabbath and reſting upon it, that is fit for our Nature, which is frail, and needs ſome Relaxation: And ſince the Avarice of Man would not allow it to himſelf, God was ſo kind as to oblige us, by His Law, to be merciful to our ſelves.

Tho' Faſting may ſeem to be a Torment to ſome, yet it is fit for our Bodies, and we our ſelves or our Phyſicians preſcribe it; and if we conſider God's Deſign in impoſing thoſe Laws upon us, we will find that He deſigned our Advantage in all theſe. For what is His infinite Majeſty concerned in having us, poor crawling Worms, to adore Him? He was infinitely happy before we, or our World, had a Being, and needs not now our little Services which cannot reach or advantage Him; but having created Man to be the Witneſs of His Glory and the Object of His Goodneſs; and knowing that Man would be prone to undo himſelf, He thought fit to propoſe Laws to him, whereby he might be oblig'd not to wrong himſelf, nor others who were to live in a Society with him.

What can we propoſe to our ſelves, even in this Life, by the Rules of common Prudence, but even, according to that Rule, we ought to expect more certainly and fully from Devotion? Thoſe who deſign to live at Court, propoſe to themſelves a great Fortune, by ſerving a great Monarch who is able to reward all the Slavery they ſuffer there; and to pleaſe him, they will oppoſe their own Inclinations and Relations. But how infinitely does our Great Lord ſurpaſs all thoſe Monarchs, whom He ſends to graſe, as He did *Nebuchadnezzar*, who was a King of Kings, and whom He can diſſolve into a Cluſtre of Worms, whilſt they yet live to ſee their own Misfortune, as He did *Herod*, when theſe Monarchs dare aſpire to compare with Him? And I admire, that when Courtiers ſee their Prince kneel to a Deity every Day, and reverence ſuch as they think do ſerve Him ſincerely, that they do not reflect, that it were Wiſdom to ſeek His Favour to whom that Reſpect is paid, more than his who does pay it. O how little Things are Kings, when they fall under the Indignation of the Almighty! Nor can I but admire, that Soldiers, who read how by one Angel the *Aſſyrians* were beat in a Night, and that the chiefeſt Captains have been affronted by unexpected Accidents, even in our own Age; do not think that it is fit to ſecure His Favour who is the Lord of Hoſts, without which *in vain is the Help of Man.* The avaritious Man ſhould conſider, that *the Lord gives and the Lord takes,* and that we may riſe up early and ly down late, and eat the Bread of Sorrow, and yet be poor in ſpight of all Endeavours. How many Thouſand Accidents do pull away our Riches? And if He thought fit to bleſs ſuch as fear Him with Riches, it were eaſy for Him, who created the World by a Word, and who can command the Hearts of Kings, *as Rivers of Waters,* to heap Riches on them. If we believe that God is our Father, and that He is infinitely powerful, it is impoſſible we can think upon Want: He tells us, that He provides for the Sparrows, and He did feed His Prophets by Ravens in a Wilderneſs, and made the Rocks guſh out in Water for His People. Such as toil for Fame do court a capricious Pleaſure, which depends upon the various Humour of many Thouſand unjuſt Creatures; but Religion has oftentimes acquired it even for ſuch as never beſtowed a Thought upon the Conqueſt. Let us conſider, how much the greateſt Monarchs, Captains, and Beauties, admire the holy Patriarchs, the bleſſed Apoſtles, and happy Martyrs: To them Monarchs dedicate their Children, by them we call our Towns and Ships, and their Feſtivals are obſerv'd with great Veneration: Nor is there any Man ſo abſurd, as that he would not wiſh rather to be one of thoſe, than to wear the moſt glorious Crown upon Earth, if he be a Chriſtian, and that I preſuppoſe my Reader is. Theſe Misfortunes which ruin the Fame of others, heightens their's, and they become more glorious by their Sufferings, than thoſe who have the Power to make them ſuffer. Oh happy State! where every new Affliction brings freſh Glory. Such as are fond of Learning ſhould conſider, how ſmall a Part of Nature do we know, and our Knowledge is but a Miſt, even where it reaches; but He who made all theſe Things, about which we debate, and who created that Soul by which we are to know, can eaſily open the myſteriouſneſs of the one, and illuminate the darken'd Conceptions of the other.

WHEN I conſider, that Religion ties Men, out of Love to God and in Expectation of Heaven, to be faithful; I admire why the World employs any but ſuch. What Aſſurance can they have of their Gratitude, who are ungrate to Almighty God, who has been kinder and more bountiful to them than any Benefactor can? And by what ties can they expect to bind ſuch as have broke all to God Almighty? Whereas there is no Reaſon to fear His Fidelity and Gratitude; who knows, that by theſe Errors he forfeits not the Favour only of ſuch as advanc'd him, but the Favour of that infinite God, from whoſe enriching Hand he expects a far greater Sallary. Thoſe who only ſtand in awe of their Patron, are no farther bound to Exactneſs in his Service, than in ſo far as his Patron's Knowledge or Information can reach: But he who knows that he is under the all-ſeeing Eye of God, is every where obliged to the ſame Exactneſs. Oaths and Promiſes are the great Securities of Truſt and Fidelity amongſt Men: And what ſignifies theſe amongſt ſuch as are not devout? They are but like Laws without a Penalty, and like to Commands which proceed from one who is weaker than the Perſon commanded. It is Devotion that ties Subjects to obey their Prince, when he cannot force them; that obliges Husbands to be kind, when their Wives are become ugly or extravagant: It ties Judges, to prefer Juſtice to their Relations; and Stateſmen, to prefer Equity to their Intereſt. Nor could I ever believe that a Man, who believ'd not that there was a Heaven and Hell, could have Courage, if he wanted Devotion: For either he thinks upon his Danger, and then no Man is ſo bold as to venture upon Hell and Damnation, or to dare meet a God whom he has diſobliged, and to whom he has preferred a Whore, a Glaſs of Wine, or a little Plunder; or elſe he goes on without conſidering the Danger, and then his Forwardneſs is rather Raſhneſs than true Courage: Nor can theſe for whom he is employ'd, be ſecure of his Courage, ſeeing they are not ſure but that Thoughts of Eternity may ſurprize him amidſt his Exploits. Whereas, how fairly may he venture, who knows that Death can only tranſmit him to a better Life, and ſend him into the Boſom of that kind God whom he has ſo faithfully ſerved. From all which I conclude, That Devotion is the Way to Preferment and Happineſs, even in this Life: And if pious Men be not preferred, it is becauſe Men are not perſuaded of the Sincerity of their Devotion: And yet how many have been advanced even upon a Shew of Religion? But after a ſerious Reflection upon our own Experience, we will find, that few, who are believ'd to be impious, do proſper in this Life; nor is that Wit, whereby they undervalue Piety, able to keep them from ſtarving; and when they fall, all are aſham'd to pity or aſſiſt them.

IF after a Life full of ſuch empty Pleaſures as Sin can give, ſuch as undervalue Religion could allow themſelves what manner of Death they pleas'd, ſomething might be pleaded by them in favours of their own Way: But ſince it is certain, that all muſt die; and that then all thoſe Pleaſures we have enjoyed unlawfully, can only give us a ſad Proſpect from our Death-beds, make us ſorry we have enjoy'd them, and ſorry we ſhould leave them; I think Men do unwiſely to follow that Courſe, of which they muſt repent, and *of which*, as the Scripture ſays, *we muſt be aſhamed.* The repenting of them ſhews, that they have been againſt our Intereſt, and the being aſhamed of them ſhows, that they have been againſt our Honour. And what wiſe and brave Man will do what is ſo? I entreat you conſider one of thoſe braveſt *Hectors* lying on his Death-bed; and if he be not diſtracted, you will find him pale and trembling, curſing his Comrades and Whores, and terrified at their Sight. Nay ſo conſcious are Men, that this is even natural for all who have liv'd ſo, that thoſe falſe Friends dare not ordinarily come to ſee him: Whereas ſuch as he deſpis'd formerly, becauſe of their Piety, will venture to make Viſits then, without being invited, and ſeldom fail to be welcome. Then it is, that, if he look backward, he ſees a contagious Life, and a multitude of ghoſtly Sins preſſing him at the Heels: If forward, an endleſs Eternity full of Terrors, Devils, Darkneſs, Fire and Brimſtone: If above him, an angry God, at whoſe Preſence, even when He is not angry, *the Mountains tremble*, who *is a conſuming Fire to the Workers of Iniquity*, and before whom the very Devils tremble: If under him, a Lake open'd, from which Clouds of ſulphurious Smoke are made yet more terrible by Howlings and Screeches of tortur'd Spirits: If within him, a Conſcience which ſeems to revenge all the former Neglect was put upon it, and all its former Repulſes: If without him, an Houſe full of weeping and amaz'd Friends. Sure to abide this, muſt require that we ſhould have a larger and more laſting Sallary than Sin can give: And I am confident, that any Man who were under it, would redeem himſelf from it, by a Reſignation of all the Pleaſures on Earth. What Satisfaction do all our Joys yield us, when we are tortur'd by Pangs of the Gravel or Gout? But alas! theſe are but dead Pains, to thoſe which the Conſcience enlivens; thoſe hideous Landskips of Horror, where every Figure ſeems to groan out Terrors and Deſtruction.

BUT if we will divert ourſelves a little from theſe ſad Objects, let us view a pious Man, (to whom God has promis'd, That he will make his Bed in his Sickneſs) breathing out that Soul which is the Image of God, into the Boſom of Him whom it reſembles; there that Conſcience, which he has oblig'd by his Obedience, does very faithfully renew to him, at once, all the Joys he taſted ſeparately in the many Thouſand Acts of his former Devotion; the Bleſſings of ſuch as were kept alive from ſtarving; the Smiles of the relieved Orphans, and the tender Acknowledgments of the oppreſſed Innocent by him protected: From this, as from *Piſgah*, he ſees the promis'd Land, Heaven open'd as to St. *Stephen*, Angels rejoycing at the Welcome of a new Saint, and he feels a new Life ſhot through his diſtreſs'd Veins, the firſt Breathings of Immortality, and the Soul learning, as it were, to ſwim in thoſe vaſt Oceans of Pleaſures: He looks back with Joy upon his former Life, as a Storm which he has eſcap't; he leaves his Body as Men do a Priſon, and his Friends as Men do their Attendants, when they mount a triumphal Chariot. Thus aſſiſted by him who made the Three Children ſing in the fiery Furnace, and the Martyrs raviſh'd when they lay roſted upon Coals: He is by Angels, one whereof could deſtroy Kings and does outſhine all their Glory, carried up to endleſs and boundleſs Joys. Theſe being the Thoughts, and this being the Condition of Men, when they are dying, it ſeems that Religion is not only advantagious, but even a natural Exerciſe for the Soul: For ſure it underſtands beſt its own Pleaſures, and its Underſtanding is then moſt opened, when it is neareſt its Separation from that Body, which darkens all its Operations: It begins then to act more lively and nobly, becauſe ſome of its Chains ſeem to be chopt off; and therefore it is, that Men do oftentimes ſpeak more eloquently, yea and prophecy upon Death-bed, which ſhows clearly that the Soul is then illuminated and ripen'd to an extraordinary Perfection.

AFTER Death follows an Eternity, which leads Two very different Ways; the One, to theſe Joys which the Eye hath not ſeen; and, what is yet more, which the Ear hath not heard; and, which is as much as can be, which it hath not entred into the Heart of Man to conſider. And 'tis very probable, That, ſince God deſign'd to create Man to be a Witneſs of His Glory, and to taſte His Goodneſs, that He would bring him to Heaven, where theſe are in their Perfection. Whilſt we are here, we ſee but His Footſtool; but there we ſhall ſee His Throne: Here we ſee Him but in a Glaſs, but there we ſhall ſee Him Face to Face. There muſt be ſure great Pleaſure where the Son of God is the Sun, and there muſt be infinite Joy where God Himſelf is fully diſcovered; that God whom none could ſee here and live; and whom when *Moſes* ſaw, though at a Diſtance, yet the Children of *Iſrael* could not look even on His Face; to ſee Him whom Thouſand of Thouſands of theſe Angels worſhip, one of whom the greateſt Monarch durſt not behold for one Moment. O! what Happineſs ſhall it be to be freed from all Poſſibility of Sickneſs and of Want; to underſtand every Thing we could wiſh to know, and to poſſeſs every Thing we could wiſh; to have not only our Deſires fully ſatisfy'd, but vaſtly enlarged, to the End they may hold the more

Joys, which it was not lawful to St. Paul to utter, becauſe they might enflame too much the Godly with a Deſire to leave their Poſts here; and upon ſeeing a Glimpſe whereof, even with mortal Eyes, the bleſſed Apoſtles were put in an Extaſy to ſay, *Maſter, it is good for us to be here.* Tell me you Gallants, you Epicures, you Atheiſts, which of you would not court a rich Man, from whom you were to expect an Eſtate? Who would not dote upon a Miſtreſs, who ſhould be able to maintain for ever the Flames ſhe kindles, and keep herſelf from fading and you from dying? Who would not endure every Thing upon perfect Aſſurance to be Heir of a Kingdom, where there could be no Rebellion nor Jealouſy, where Pleaſures were ſtill to be freſh, and Treaſures conſtantly full; where the firſt could not fade, nor the laſt be exhauſted? And yet either we muſt believe the Scripture to be a mere Fable; or elſe Religion will give us, in Heaven, far greater Things than all theſe: For the Heart of Man can conceive, what far exceeds all this. Is it not Diſtraction then, not to chooſe a Way of living which has ſuch pleaſant Objects, ſuch vaſt Hopes? And if it were but a Deluſion; yet ſure that is the moſt innocent and pleaſant of all Deluſions, and far more raviſhing than all theſe little Follies which charm us; it exceeds far the Hopes of being a little puppit Favourite to a Prince, of whom there can be no Aſſurance, either againſt Diſgrace or Sickneſs: To hope to enjoy a Miſtreſs, which theſe kind of Men loath immediately; of hoping to attain to an Eſtate, which may be forfeited the next Day. But who dares retire one Hour, and ſeriouſly ſay, Theſe are but May-be's? (and whether they be true or not, I'm ſure none of us dare not but believe them) And if we do believe them, can we have a pleaſant Life whilſt thoſe great Intereſts are unſecure? We would call him a Fool, who would ſuffer a great Eſtate, which is in great Hazard, to be unſecured; and yet to truſt our All to a May-be, to a ſick Hour, or a laſt Groan, is a real Diſtraction, even according to our own Principles. So that all theſe great Wits, who contemn Devotion, are at laſt reduc'd to confeſs, That either they cannot command their own Spirits, and this is Weakneſs; or that they think fit to make ſure the Preſent. And ſince in all Things this is accounted Madneſs, when it may prejudge a greater Expectation, I know not why it ſhould be accounted Wit here.

IT is ſomewhat leſs noble, to preſs Devotion from the Fear of Hell; yet ſince Pleaſure is the great Rival of God Almighty in our Hearts, and ſince it is natural for Men to fear Pain, I would willingly know, who would not abandon greater Joys than any Sin can give, if he were but to ly for 20 Years for it under a Fever, or other Sickneſs, in a ſtinking Priſon deſpiſ'd by all his Acquaintances. How does fear of Health reclaim debauch'd Men at ſome Times? How does fear of Death make us court ſuch as can inflict it when they pleaſe? But oh! to ly in Flames, to be choakt with Brimſtone, to be terrified by Devils to all Eternity, where one Thouſand Years do begin another Thouſand, and theſe tranſmit us to the infinite Thouſands which follow theſe: This is a Reaſon of being ſerious, which every Man muſt yield to, or be diſtracted. And this remembers me of a Gentleman, who call'd for his Son when he was dying, and ask'd him, *Son, love you me? Yes,* ſaid the Child, *above all Things. Hold then your Finger to the Candle for me,* ſaid the Father: Which the Son refuſing, as a Thing impoſſible to be endur'd, the dying old Man ſaid, with a deep Groan, *Oh Son! how ſhall I then endure to be burnt for ever, for having gain'd you an Eſtate unjuſtly?* Alas! that this Story is not ſeriouſly apply'd by all ſuch whom it concerns. What Perſon is ſo diſſolute, as not to bluſh and tremble to think, that all his ſecret Thoughts ſhould be reveal'd to all the World? A Lady's Whoredom, a Gentleman's Infidelity, a Stateſman's Cheat, and a Thouſand ſuch others; to hear all theſe aſſerted ſo, as that it ſhould be impoſſible either to deny or defend them; and yet we can be no Chriſtians if we do not believe, that at the Laſt Day all our Secrets, which we are ſo aſhamed of here, ſhall be diſclos'd before Men and Angels. O what a great Reſtraint ſhould even our Intereſt lay upon us here!

THE greateſt Objections which our corrupt Nature forms againſt Devotion are, That it debars us from the free Exerciſe of our Pleaſures, and that it ties us to a moroſe and melancholy Submiſſion, yea and a Love to Croſſes and Afflictions; in both which we muſt violently wreſtle againſt our Nature, and force our Inclinations.

TO the Firſt of which I anſwer, That Devotion does not debar us from Pleaſures, but refines them. What Advantage can it be to the Almighty, to vex or diſpleaſe us? And how can this ſuit with the Notions He commands us to have of His innate Goodneſs and Love to us? Can we, in Reaſon, think that He who created this World, to be an Inſtance of His Goodneſs; who has furniſhed it with Variety of Flowers, Fruits, Herbs, Trees, Fowls and Fiſhes, and who has enriched our Souls with ſuch various Faculties, able to afford us innumerable Scenes of inward Joys, and who has promiſ'd us ſuch infinite Pleaſures to all Eternity; ſhould yet deny us a Share of Pleaſure and Satisfaction here? His Deſign in creating us was to ennamour us of Himſelf, and nothing can oblige us, which denies us fit and convenient Satisfactions. For clearing whereof, I ſhall only repreſent theſe Conſiderations.

Firſt, If we enquire into the true Nature of Pleaſures we will find, that only to be true Pleaſure, which is fitted to gratify our Reaſon, or correſponds with the genuin and true Exerciſe of our Bodies; and Devotion debars us from neither of theſe: He who made us, knew our Frame, and what was fit for that Nature which He had beſtowed upon us: He underſtood the Frailty of our Bodies; and therefore commanded us not to over-lade them with Exceſs of any Kind, tho' the Things ſeem pleaſant: And what more has He done here, than we do ourſelves, when we conſider what we do? What wiſe Man eats Fruit till he ſurfeit, or drinks Wine till he be drunk; tho' both may, at the Time, exceedingly pleaſe his diſorderly Appetites? And who does not blame even ſuch as are too much addicted to Learning or Miſtreſſes, tho' theſe be in themſelves the choiceſt of natural Pleaſures?

A Second Conſideration is, That we weary even of the greateſt Pleaſures, when they become too familiar. The Edge of our Satisfaction does blunt itſelf with too much Uſe; and our Senſes weary, like ourſelves, under too much Employment: And therefore God Almighty, who deſign'd that we ſhould not want Pleaſures, and that we ſhould not loath them, has wiſely, and kindly too, reſtrain'd thoſe Appetites which He knew to be too violent, and has commanded our Pleaſures might be moderate, to the End they might alſo be laſting. And is not His Wiſdom counterfeited, even by ſuch as complain of it? Do not wiſe Men ſpeak little, that they may ſeem to ſpeak wiſely? Do not great Men appear rarely in publick, that they may be the more admired? And Miſtreſſes appear coy, that they may be long'd for? Phyſicians adminiſtrate Medicins ſeldom, that they may prove the more effectual; and Men change even thoſe Diſhes they love, that they may not loath them: Nor could that *Manna*, which was a Bread ſent from Heaven itſelf, pleaſe long, becauſe it was frequently beſtowed.

A Third Conſideration is, That the Objects of our ſenſual Joys, being mortal and momentary, God has been kind to us, in reſtraining us from doting too much upon them. He is accounted, even by Men, unwiſe and unhappy, who enamours himſelf of her who is preſently to be executed, or will be certainly forced away: And who will not prefer a conſtant, tho' leſſer, to a greater but ſhorter Pleaſure? Much more then ſhould Devotion be preferred to all the Pleaſures of Sin, which laſt but for a Moment. It was this which perſuaded the wiſeſt and beſt Philoſophers, to place Vertue in a middle and moderate Uſe of Pleaſures, and to curb as much the Exceſs of Joys and other Paſſions, as Devotion does: And if we thought them wiſe, nay and obey'd them too in this, tho' they had little to recompenſe the Want of what they took from us; how much more ought we to admire and value Religion, which proceeds upon more infallible Principles, and rewards us with much more ſatisfying Delights?

The Fourth Conſideration is, That God did only reſtrain us in the Uſe of ſuch Pleaſures as might preclude us from more laſting Joys; as might alienate our Minds from, or leſſen our Inclinations for Devotion. He, as our wiſe and kind Father, will not ſuffer us to ſit down with Fools or Children, and miſpend, upon wicked and roguiſh Extravagancies or Toys, (at beſt) that Time which may raiſe us to a Throne, when well employed. He, as our Phyſician, will not ſuffer us to ruin the Health of our Souls, by drinking up Poiſon, tho' it ſeem ſweet: And as our Tutor, He will not ſuffer us to go abroad to Places and Societies which are infectious. Can a Maſter be called a Tyrant, becauſe he will not ſuffer his Servant, whom he ſends upon an important Buſineſs, to trifle away his Time with debauch'd and profligate Perſons? Or a Judge be call'd ſevere, becauſe he interdicts and impriſons a Bankrupt-Creditor, who is like to miſpend, or has miſpent that great Stock with which he ſhould pay his Debts? And yet we, unjuſt and impertinent Mortals, will repine at Almighty God, becauſe He, having ſent us to this World to work out the Work of our *Salvation with Fear and Trembling*, and to ſerve not only Him, but His Children and Favourites here, will reſtrain us from gauding and toying after unprofitable Divertiſements, which have nothing to recommend them to us, but becauſe they are choſen for Joys, and believ'd to be ſuch by our corrupt and extravagant Fancies.

Devotion likewiſe may ſeem unpleaſant at firſt, not becauſe it is ſo in itſelf, but becauſe it is unknown to us. Is Temperance unpleaſant in itſelf, becauſe a Drunkard does at firſt think ſo? Let not this diſcourage us; but let us rather conclude, That there is much Pleaſure to be expected at laſt from Devotion, becauſe it does at firſt require ſuch hard Obedience from us; the nobleſt Things are bought with the greateſt Price. And upon the other Hand we ſee, That Fools and Children do always cry when they are pull'd from their old Acquaintances, tho' they have the Plague, and tho' themſelves are only called away, to be placed in a far happier Condition.

Amongſt thoſe Mortifications which Religion commands, and which ſeem ſo ſevere that they deſerve particular Anſwers, the Firſt is, That we ſhould undervalue, diſeſteem, and humble ourſelves. The Second is, That we ſhould *bleſs them who curſe us, and do good to them who perſecute us.*

As to the Firſt of theſe, we muſt conſider, that it was moſt reaſonable, that He who created us out of nothing, to ſerve and admire Himſelf, ſhould not allow us to adore and ſerve ourſelves: And to forbid us Self-Love, was no harder than to forbid us Idolatry. Are our Maſters unjuſt, becauſe they will not allow us to think better of ourſelves than of them? Or, are our Princes ſevere, becauſe they will not ſuffer their Subjects to form Laws to themſelves, and obey none but theſe? But yet our infinite Lord and Maker hath commanded this, not only becauſe it is fit for His Glory, but becauſe alſo it is fit for our Intereſt, and for the Intereſt of the Common-wealth. 'Tis fit for us, that we neither admire nor dote too much upon ourſelves, becauſe being really but ſilly Creatures, whom every Blaſt or Rogue can kill, and who underſtand not the meaneſt Things which we ſee daily; as, why Graſs is green, or the Adamant draws the Iron; it were Want of Wit, it were Oſtentation and Vanity in us, to admire a Thing that is ſo ſilly: And as we would think a Perſon unworthy of our Friendſhip or Eſteem, who admired or valued a Fool or an Idiot; ſo God might deny us His Favour, if He found us ſo ridiculous, as to be fond of, or to value ſo ſilly a Creature as ourſelves are.

This Self-Love is likewiſe unfit for us, becauſe it oppoſes itſelf to all the Deſigns of our Devotion, and theſe great Deſigns which God has of making us infinitely and eternally happy: For Devotion requires, that we ſhould not repine at the Diſpenſations of the Almighty; and nothing can ſo much diſpoſe us to this, as to believe that we deſerve the worſt of Puniſhments: It commands us to bear Reproaches and Revilings; and nothing can contribute ſo much to this, as Self-Diſeſteem: And he has moſt Time and Inclination to admire God, who employs leaſt Time in humouring and admiring himſelf: He will not be troubled at the Want of Greatneſs, who thinks he does deſerve Nothing; nor will he be concerned in being undervalu'd, who thinks he deſerves to be ſo. And nothing can contribute more to our Quiet and Contentment, than to think meanly of ourſelves. If unworthy Man loves thoſe Servants, and thinks them the beſt, who are moſt deny'd to their own Intereſts, and who ſuffer their own Inclinations to be loſt and confounded in the greater Intereſt of thoſe whom they ſerve; Why ſhould not we allow the ſame much more to our Glorious Sovereign, who is *Lord of Lords,* and *King of Kings,* in whom *we live and have our Being, He who hath made us, and not we ourſelves?* That this Self-Love is moſt unfit for the Common-wealth wherein Men live, is clear, becauſe it occaſions Animoſities and Quarrels, each Man being thereby princípl'd to diſobey his Superiors, and to endeavour to raiſe himſelf above them; by this we are engag'd to think Princes unjuſt, when they beſtow Employments upon any ſave us; and by this we are engag'd to force ourſelves upon Employments, which it were unfit for the Common-wealth that we ſhould enjoy.

We muſt alſo conſider, that this undervaluing of ourſelves is commanded not ſimply, but in reſpect of our infinite God, before whom all this World is but as *a Drop in the Bucket,* or as *Duſt in the Balance.* And if all this Earth be but a Point, in reſpect of the Heavens, what muſt any particular Man be, in reſpect of Him who made thoſe Heavens with a Word of His Mouth? And when we conſider the many Thouſand Injuries we daily do to Him, who is our Father, our Benefactor, our Prince, and our Maſter, how we prefer a little Money to His Service, our own Favourites to His Children, and our own Paſſions to His Precepts; how ſhould we ſtand confounded and aſham'd, ſince we would run out of the World, and hide ourſelves in a Deſart, if we had ſold the Intereſt of our Prince, betrayed our Maſter, or crucified our Brother? And yet all theſe, and greater Injuries than thoſe, we do the Almighty, to whom we are tied by much ſtricter Relations. And to encourage us to this Humility, our glorious Maker hath humbled Himſelf more than He deſires of us; for He hath deſcended ſo far from His infinite State of Glory, as to converſe with poor crawling Man, to call us Friends, and make us His Heirs, and Co-heirs with His glorious Son, who *thought it no Robbery to be called equal to the Father,* became a Servant, and was repute a Malefactor for us. So that in effect this Humility is, in both, rather Love than Lowneſs; and we can do nothing that is mean, following ſo ſublime a Copy; nor does God require more Self-Reſignation than we pay to a frail, unſtable, or changeable Prince.

Thus then, tho', in reſpect of God, devout Men are, with *Paul, the chief of Sinners;* yet in reſpect of others who are flagitious, they have Reaſon with *David* to ſay, *Thou haſt put Gladneſs in my Heart, more than in the Time that their Corn and their Wine increaſed.* And tho' *Abraham* call'd himſelf a *Worm,* upon Sight of his Maker; yet God was pleas'd to ſay, that He could do nothing againſt *Sodom,* without ſhewing it firſt to His Friend *Abraham;* and that infinite God was pleas'd to deſire Leave from *Moſes,* that He might puniſh the rebellious *Iſraelites:* Sure they, when they walk with God, as *Enoch* did, and repoſe, like the beloved Apoſtle, upon the Boſom of their belov'd Maſter, muſt think Kings and Governours, who court the World for Applauſe, or drudge up and down for Treaſures, to be but mean and ſilly Creatures, ty'd like Slaves to the Oar, or wallowing like Swine in the Puddle.

And if thoſe who have, for ſome Time, convers'd with their wiſe and magnificent Prince, pity ſuch as in the City are Porters, and bear heavy Burdens for Bread, or ſuch as digg under Ground in the Country for a Livelihood; much more may theſe who are illuminated with admirable Rays of Grace, and who have their Souls both raiſed and purify'd by an Union with that admirable Eſſence, pity thoſe who are only pleas'd with their own Follies; becauſe, like Clowns or Barbarians, they are us'd to no better. And therefore, with holy *Cyprian*, I may conclude, That *eſt aliquid ſublimiter humile, & humiliter ſublime in Religione Chriſtiana, quod alibi reperiri non poteſt.*

The other ſeeming Difficulty in Devotion, of doing good to thoſe who do ill to us, and of praying for our Enemies, can only ſeem hard to ſuch as are not generous; and Religion does in this make us not only better, but more Gentlemen than formerly: For if Vertue obliged us to forgive our Enemies, and if that was boaſted of amongſt *Pagans*, as a Generoſity worthy of ancient *Rome* and the *Grecian* Hero's; it became Religion to riſe yet higher. And ſure, if to forgive Enemies be noble, it muſt be nobler to oblige them, elſe we do good but by Halves; and our Bounty has ſtill ſome Lameneſs and Reſerve. This Command was likewiſe an Effect not of the Severity, but of the Prudence of God; for by it we ſecur'd to ourſelves the ſame Terms from ſuch as we injured, as we exacted from thoſe who had injured us; and this cured amongſt Men the old Wounds of Prejudice and Malice ſo perfectly, that no Cicatrice did remain. Till this Reſolution be put on of doing Good, the Remembrance of having received Evil, can never be put off; and Jealouſies may diſquiet us, tho' Malice does not. By this alſo God aſſured us, not only by His Promiſe, but by His Practice, that we might expect not only Forgiveneſs from Him for our Tranſgreſſions, but Aſſiſtance in our Difficulties, tho' we had offended Him frequently and inſolently. Nor can we now but be ſecure, that ſince He thinks we, frail and paſſionate Creatures, ſhould do good to thoſe who have offended us, but that He (who is a God infinitely Gracious, and whoſe Clemency exceeds as far our's as Heaven is high above the Earth,) will pardon and oblige us, tho' we have offended Him, and will *forgive us our Sins, if we forgive them who ſin againſt us.*

That Devotion obliges us to a Life ſubject to Afflictions, is but the Objection of ſuch as are neither gallant nor devout. *Afflictions* are in the Stile of Devotion, what *Difficulties* were to the *Pagans*; and they were thought baſe and low Spirits, who did not long for theſe. As for Inſtance, we think it Affliction to die for our Religion; and yet they gloried in dying for their Country. Who will acknowledge, that he will rather loſe his Miſtreſs than hazard his Eſtate or Perſon for her? And yet ſhe is but mortal, and ſubject to Alterations, not only in her Beauty, but in her Love. Why then would we not rather hazard all for our glorious Maker, whoſe Love is unchangable, and whoſe Excellencies can never periſh? Would we not hate a Subject, as baſe and unworthy, if he deſerted his Prince, who had preferred him both to his Favour and to high Employments? Or a Soldier, who would abandon his General, when Difficulties grew great upon him? And yet we are ſo deſpondent and low, as to ſhun Devotion, becauſe it recommends to us that we ſhould rather ſuffer any Thing, than renounce the Intereſt of our God, to be whoſe Lieutenant is the greateſt Glory of our Prince: That God to whom we owe our Breath and Being, and whoſe Favour is better than Life, and who is the *Captain of our Salvation.* Could the *Heathens* confeſs, that the Gods did not behold a nobler Sight, than a brave Man wreſtling with his adverſe Fortune; and that nothing was pleaſant which was not difficult: And yet ſhall we, who hope ſo much from the Croſs of Chriſt, and who owe ſo much to it, do leſs for Him than they did for their fantaſtick Glory? Can a Soldier think, that his General loves him not, becauſe he puts him on dangerous Exploits? Or a Student, that his Maſter hates him, becauſe he gives him hard Tasks? No; and ſurely God chooſes out the beſt to ſuffer, that the World may ſee that they love Him, and that Religion is worthy to be ſuffer'd for, by the greateſt and pureſt Spirits. And thus God was pleas'd to afflict *Job*, not out of Unkindneſs, but that his Patience might be admired, and that the Devil, who ſaid, that *Job* would not ſuffer for God, might be confuted and aſham'd by the Perſeverance of that patient Saint.

Let us, in the next Place, think, That God ſtands not in need of our Sufferings, as our Country, our Prince, or Friends may do: No, He is raiſed as far above all Hazards, as we are ſubject to them: He can ſend Afflictions, but cannot ſuffer by them: And yet He has ſworn, *That He takes not Delight in the Death of Sinners, but rather that they ſhould repent and live.* We muſt therefore conclude, That either we judge unjuſtly of Afflictions, in thinking theſe to be Afflictions which are not ſo; or elſe, that theſe Afflictions are fit and neceſſary for us.

THAT we ofttimes err in judging of Afflictions, is clear from a Survey of the Actions of Men: He who is ſtopt from executing his Revenge, is ready to cry out, that he is croſſed; and yet, with *David*, he will be ſure to bleſs next Day *Abigail*, who hindred him from killing that *Nabal*, whom his Paſſion would have with Pleaſure murder'd the Night before. Thus little Children repine at their being kept from eating that Fruit which would, in pleaſing, poiſon them; and ſuch as are mad or drunk, would gladly leap over a Precipice, which would end all their Extravagancies, and yet would think themſelves ill us'd for being deny'd the Freedom of their cheated Will. Juſt ſo fares it with us, who, being blinded by our Paſſions, or drunk with the exceſſive Uſe of Pleaſure, are ſubject to judge ill of the Objects of our Pleaſures, and to ſatisfy more our deprav'd Sence, than our illuminated Reaſon.

THAT thoſe Events and Accidents, which we think to be Afflictions, are fit and neceſſary for us, may be certainly concluded, if we once grant, that *not one Hair of our Head can fall to the Ground, without the* Diſpenſation *of our heavenly Father*, and that *Afflictions ſpring not out of the Duſt*, nor is there any *Ill in the City* which He has not cauſed: And that as He is Author of every Diſpenſation, either directly, or by Permiſſion; ſo none of theſe Accidents can fall out, without His Knowledge, or againſt His Will; and yet that He is as kind as He is powerful, and is afflicted with us in all our Afflictions, and will condemn ſuch, at the Laſt Day, as clothed not Him when He was naked, nor fed Him when He was hungry, imputing all the Ills that were done to His Children, as done to Himſelf. How then can we imagine that to be ill, which He thought good; or that to be unfit, which He thought neceſſary? And muſt not this argue in us, either that we think He wants Power, or Kindneſs? And therefore the Chriſtian ſhould reſt ſatisfied in this, that *greater is He who is for us, than he who is for the World*. This Conſolation is only proper to Chriſtianity, and is a ſure Reſolution of all our Difficulties. Do we not laugh at little Children, who think themſelves oppreſs'd, when they are kept at thoſe Exerciſes which are fit to raiſe them to Riches and Honours, in their Common-wealth? And do not we repine at our Friends, when they refuſe to undergo thoſe Cures, or obſerve that Diet, which is neceſſary for the Recovery of their Health? And yet when our Father, which is in Heaven, and the Holy *Jeſus*, who is the Phyſician of our Souls, endeavours to diſcipline or cure us, for our own Advantage, we whin and murmur, and, like *Balaam*, we are angry when our Aſs will not go forward, not knowing that it ſees an Angel in the Way, which will kill both us and it.

FOR further Illuſtration of this Principle, be pleas'd to conſider, that Religion leſſens, or rectifies much the Value we have of Things which may be loſt; and ſo their Loſs leaves off to be an Affliction. Religion teaches us not to care for to Morrow, and to be ſure that God will not ſuffer us to want: And therefore if we be Chriſtians we muſt have learn'd this Leſſon; and if we be exact in it, how can the Loſs of theſe Riches trouble us, as to which we ought to be indifferent? To be diſappointed in our Revenge, or ambitious Ends, can be no Croſs to ſuch as value not Revenge nor Ambition; and the Death of Friends and Relations, being a Tranſmiſſion of them to Glory, they may afflict any others but Chriſtians, who believe that ſuch as live not to be their Heirs, are made Heirs of Glory. From all which I rather conclude, That Religion is ſo far from being to be avoided, becauſe it brings Afflictions, that it ſhould be purſu'd by all Men, as a State that ſecures againſt Afflictions. Nor can I ſee why theſe, who rail againſt Religion, ſhould not be aſhamed, ſince they cannot ſecure their Proſelytes againſt Trouble; but on the contrary teach them how to make their Afflictions more frequent and more ſharp, than naturally they are: For by teaching Men to value Eaſe, and admire unchaſt Amours and fugitive Honours, they tie them to Afflictions, without any Conſolation, and expoſe them to Hazards, without any Aſſurance: Whereas the Religion, which they undervalue, makes few Things neceſſary to our Happineſs, and teaches us to place that Happineſs upon Him, with whom there is *no Variation nor Shadow of Change*, in whom is all *Fulneſs of Joy*, and at whoſe *Right-Hand are Pleaſures for evermore*, and to *lay up our Treaſures in Heaven, where the Moth does not conſume, nor the Theeves break through to ſteal.*

LET us again conſider, what harder Terms Vice impoſes upon us, which hath nothing to excuſe it, but that theſe Difficulties are of our own Choice. Is it not ſtrange, how Drunkenneſs will require more of our Time, and impair more of our Health, than the moſt tedious and ſevere Acts of our Devotion does? Do not Tyrants and Rebels hazard more for their Sin, than almoſt any Saint does for his Religion? And Covetouſneſs forces the poor Merchant to meet more Dangers in his ſtormy Voyages at Sea, and long Pilgrimages by Land, than thoſe Dangers which we admire in the primitive Chriſtians. I confeſs that, in the firſt Ages of Chriſtianity, our Saviour foretold what hard and ſharp Perſecutions Chriſtians ſhould ſuffer, Emperors being *Pagans*, and Chriſtianity not being got above the Opinion which the World had, that it was a Cheat: But now the Caſe is altered, and Devotion does ofttimes defend even againſt wicked and flagitious Perſons. Who rob Monaſteries or Miniſters? Nay, who would rob ſuch as they thought were devout? He who has promis'd to curb the Peſtilence, and reſtrain Lyons, will certainly, by the Inſtinct of a natural Conſcience, bridle the Malice of Men. Whereas, how can it be imagined, that thoſe can want Afflictions, who has the Almighty for their Enemy, eſpecially ſince He has promis'd, that they *ſhall not live out half their Days*, and that they ſhall be cut down like Graſs before their Time? But which is more, when a pious Man ſuffers, he is ſuſtained in all his Afflictions by an inward Conſolation; which, like Light, diſſipates all the Darkneſs of Afflictions; the End for which he ſuffers does likewiſe ſweeten all that he ſuffers. And ſince the Conqueſt of an Eſtate does ſoften all the Pains we take, and the Conqueſt of an earthly Kingdom or Province, does allure thoſe great Men, whom we admire, to ſuffer all the Troubles and Anxieties of War; Why ſhould not, much more, the Expectation of conquering and gaining an everlaſting Kingdom, ſweeten to us thoſe Adverſities which may burden us here? Nor do I believe that Saint *Paul* ſuffer'd more for Religion, than *Hannibal* did for Fame, and his periſhing and ungrateful *Carthage*. *In all your Afflictions*, ſays our Saviour, *I am afflicted with you*: And when the Three Children were thrown into the fiery Furnace, not only were they ſecure, but there was ſeen *one walking with them in the Likeneſs of the Son of God*. And how could holy *Steven* be much troubled, when the Showers of Stones, which were poured upon him, did not hide from his Eyes a full Proſpect of Heaven; when he did ſee an admirable Diſplay of thoſe Joys which he was ſhortly to poſſeſs, and *the Son of God*, for whom he ſuffer'd, *ſitting on the Right Hand of His Father in Glory?* And ſince Death, which is to others the moſt terrible of all Terrors, is to them but a gentle Paſſage from this to a ſure Poſſeſſion of everlaſting Joys; who can be troubled at the Afflictions which attend the Chriſtian Religion? And thus *our light Affliction, which laſts but for a Moment, worketh for us a far more exceeding and eternal Weight of Glory*, 2 *Cor.* 4. 17. And they paſs thro' many Tribulations to the Kingdom of God, imitating in this their Lord and Maſter the holy *Jeſus, who for the Joy that was ſet before Him, endur'd the Croſs, deſpiſing the Shame, and is ſet down at the right Hand of the Throne of God, Heb.* 12. 2.

THE training Men to Afflictions was likewiſe fit, not only for themſelves, in hardning and ſtrengthning them; but this was alſo fit for the Common-wealth, and the general Good of Men. This hard Breeding enabl'd Subjects to do great Things for their Country, Servants for their Maſters, and Parents for their Children: This teaches Soldiers not to repine at the ſevere Commands of their Officers, nor Patients at the ſevere Precepts of their Phyſicians. Did not the *Lacædemonians* teach their Children, to endure being beat almoſt to Death, without repining? And grew not *Rome* famous by the cruel Diſcipline of their Camp? And if not to ſuffer were an Happineſs which every Man ſhould purſue, how miſerable ſhould the World become? For Princes, Maſters, and Parents, might expect ſmall Obedience; and Friends and Relations would be uſeleſs Names, from whom we could expect no Aſſiſtance, but when we needed none.

HAVING thus ſtated the Difference betwixt ſuch as are devout and ſuch as are not; let us conſider which of the Two deſerve to be thought the greateſt Wits, and to which of the Two the World is moſt obliged. Sure theſe deſerve to be thought the greateſt and ſublimeſt Wits, by Courtiers, who deſign the greateſt Things, and effectuate beſt theſe Things which they deſign, and who can ſooneſt and fareſt inſinuate themſelves into the Kindneſs of that Prince whom they ſerve: And according to theſe Meaſures, the devout Perſon has the greateſt Advantage; for what Deſign is ſo noble, as to be Heir of an everlaſting Kingdom, and of *an incorruptible Crown, which fadeth not away?* And what Prince is ſo ſublime, as He in *whoſe Hands the Hearts of Kings are, like the Rivers of Waters?* Which of the Two are thought, by Stateſmen, the wiſeſt, he who being ſent upon an Employment, ſhows ſome quibbling Wit, tells pretty recreating Tales, and pleaſes himſelf with Ladies Muſick and Entertainments; or he who purſues cloſely his Deſign, and gains it too, and upon his Return is admired and preferr'd by his Maſter who employ'd him? This is truly the Paralel betwixt our friſking wanton Wits and Epicures, and thoſe who, for ſome Time, ſubdue their own Paſſions, and employ all their Wit and Time, in pleaſing their great and kind Maſter, in whoſe Service they have, even for the Time, greater Satisfaction, than ſuch as are Slaves to their Sences, and project nothing beyond a preſent World.

IF Soldiers be choos'd for Judges, ſure they will eſteem thoſe the moſt gallant and generous, and the wiſeſt too, who ly not fooling and dallying in their Quarters, till the Enemy cut their Throats; but who prefer the Conqueſt of a Crown, or the overcoming their Enemies, to thoſe childiſh and effeminate Meaſures, of Self-pleaſure. If learn'd Men were to be Arbiters of this Difference, they would conclude, he were a mere Fool who, when he might know exactly as much as Nature could admit or Curioſity could deſire, would notwithſtanding ſlight all thoſe happy Opportunities for that Pleaſure, which they would abhor the next Hour after Enjoyment, and which they will hate as much in their own Poſſeſſion, as they admired it whilſt it was poſſeſs'd by others. And ſuch, ſure, as are to be ſav'd, will, in that happy Reſurrection, riſe up with Souls enlarg'd to receive, and purified to underſtand, thoſe glorious Emaniations, and thoſe profound Depths of Knowledge, which are to be ſeen and found in Him, who is the Author and Object too of all true Knowledge. We now glory in being able to overturn one another's Knowledge, and we do not pretend to know, but to demonſtrate that others know nothing; and we are ignorant of, and quarrel about the very Graſs we tread upon, and are not able to give a ſatisfactory Account of the Way how we hear, ſee, or walk; but there we ſhall, at one Glance, diſcover all the Natures of the Snow, Clouds, and Winds, through which we paſs, and ſhall in one Moment of that Eternity, over-reach the whole Age of the learn'deſt old Men here below; and having exhauſted, in a very ſhort Space, all that is to be known elſewhere, we ſhall fix our Thoughts for ever and ever upon our bleſſed Maker, in whom all theſe Things lay in their Idea's before the World was created, and whoſe wonderful Excellencies ſhall afford us new Objects hourly, without being exhauſted, and ſincere Knowledge without all Wearineſs. And even in this World, ſuch as are devout cannot but be moſt knowing and judicious, becauſe their Souls are leaſt clouded with Paſſion, and leaſt diſtracted with Cares; which Two are the great Impediments of all Knowledge. And therefore the *Pſalmiſt* does confidently aſſert, *Pſal.* 19. 8. That *the Commandment of the Lord is pure, enlightning the Eyes.* And *Pſal.* 111. and 10. *The Fear of the Lord is the Beginning of Wiſdom: A good Underſtanding have all they who keep His Commandments.* And *David* confeſſes to God, *Thou through Thy Commandments haſt made me wiſer than mine Enemies.*

To conclude this Paralel, I ſhall only deſire the indifferent Reader to conſider a devout Man, ſolacing himſelf when he awakes, in the Darkneſs of the Night, with the ſweet and noble Contemplations of the Love and Greatneſs of his God, and reſting all his Thoughts upon that ſure Foundation; ſecure that he can neither want, nor be confounded, and that even Death can but tranſmit him to Glory; which likewiſe does, in all Dangers or Accidents, eſtabliſh his Heart: Whereas thoſe, who *live without God in this preſent World*, awaking from that Sleep, which Luxury and Exceſs has made unquiet, they are affrighted in their dark Solitude, with the Idea's of a bypaſt Life, unſecure of what may be the Event of all their paſſionate Deſigns, and what may be the Fate of their beloved Conqueſt; this Enemy, whom they have offended, or that Rival which their Extravagance has raiſed, does terrify them: And, on the other Side of Death, they ſee either an uncomfortable Annihilation; or, which is worſe, an eternal Throng and Succeſſion of Torments.

If we enquire, Whether the devout Man, or he who is not ſo, deſerves beſt of Mankind, or the Common-wealth? We will find, that Devotion is the ſureſt Intereſt of the Common-wealth, and thoſe the beſt Subjects who ſtudy to be devout. Devotion teaches Men to be obedient *to all ſuperior Powers, for Conſcience ſake*; to ſuffer, rather than to rebel: It makes an Oath a ſure Pledge to the Prince; and the Chriſtian, ſwearing his Allegiance, lays his Soul in pawn for his peaceable Behaviour. As to our Neighbour, it teaches us to be firſt *pure*, then *peaceable, gentle, and eaſy to be entreated*; *full of Mercy and good Fruits, without Partiality and without Hypocriſy*, James 1. 17. And the Apoſtle *Paul* adviſes thus the *Philippians*, *Whatſoever Things are true, whatſoever Things are honeſt, whatſoever Things are juſt, whatſoever Things are pure, whatſoever Things are lovely, whatſoever Things are of good Report*; *if there be any Vertue, if there be any Praiſe, think on theſe Things.*

Since then either the World muſt admire and follow ſuch as are devout, or ſuch as are not; let us conſider what an excellent Place this Earth would be, if Religion were admired and practiſed: For then Princes would not oppreſs Subjects, nor they rebel againſt their Princes; none ſhould fear or feel Unjuſtice; Charity ſhould baniſh away all Poverty, and Meekneſs all Cruelty from the Earth; every Man ſhould be happy in his own Wife, and not covet his Neighbour's; Anxiety ſhould be ſwallowed up by Hope, and Revenge by Chriſtian Love. Should we not then admire and love that State, and thoſe Men who teach what tends ſo much to make us happy, and hate thoſe Wits and Bravo's, who want their Prince's Crown, only becauſe they cannot get it; and their Neighbour's Wife, becauſe ſhe will not yield to their Importunities? Should not (if they prevailed) every Man be jealous, that his Neighbour would cut his Throat, or cheat him, amidſt all his Kindneſſes? Judges might bribe, if without being diſcovered; and a gentle and lent Poiſon might always divorce Husband and Wife, or open a ſpeedy Way for the Son to the Father's long'd for Poſſeſſion. Nor can the Law ſecure againſt all this, as they pretend; for many may kill, poiſon, cheat, whore, bribe, and and oppreſs, when either the Party injur'd cannot prove, or dares not complain. And what a pitiful Security would even Law be, if Devotion did not hinder great Men to cruſh Law by their Power, or rich Men to pervert it by their Bribes. O unhappy Wits! who eſtabliſh a Doctrine, by which yourſelves can neither be happy nor ſecure; and whom all Mankind ſhould abominate, becauſe your Precepts and Practices are inconſiſtent with their Safety, Quiet, and ſolid Pleaſures.

# THE

# Religious Stoic:

## Or, A Short

# DISCOURSE

## ON THESE

# *SEVERAL SUBJECTS.*

*VIZ.*

Of Atheiſm. Superſtition. World's Creation. Eternity, Providence, Theology. Strictneſs of Churches. Of the Scriptures. Of the Moral and Judicial Law. Of Monſters. Of Man and his Creation. Of the Immortality of the Soul. Of Faith and Reaſon. Of the Fall of Angels; and what their Sin was. Of Man's Fall. Of the Stile of *Geneſis*. Why Man fell. A Refutation of the *Millinaries*, &c.

WITH

*A Friendly Addreſs to the* Fanatics, *of all Sects and Sorts.*

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*—Ye Men of* Galilee, *why ſtand ye gazing up into Heaven?* ACTS I. xi.

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## The STOIC's Friendy Addreſs to the FANATICS of all Sects and Sorts.

*THE mad-cap Zealots of this bigot Age, intending to mount Heaven,* Elias-*like, in Zeal's fiery Chariot, do, like fooliſh* Phaeton, *not only fall themſelves from their flaming Seat, but, by their furious over-driving, envelop the World in unquenchable Combuſtions; and when they have ſet the whole Globe on a Blaze, this they term a* new Light. *It is remarkable in Scripture, that* Jehu, *who drove furiouſly, and called up* Jehonadab *to ſee what Zeal he had for the Houſe of God; was even at that Inſtant, doing it more Wrong than ever was done to it by unconcerned* Gallio, *who ſlantingly car'd for none of theſe Things. And that none of all the Apoſtolic Conclave deſired*

*deſired ever Fire might rain from above upon Miſbelievers, except the Sons of* Zebedee*; who immediately thereafter arrived at that Pitch of Vanity, as to deſire to ſit in Heaven upon Chriſt's right and left Hand. And that* Peter, *who was the Firſt who drew a Sword in his Maſter's Quarrel, was likewiſe the Firſt who denied him. Fiery Zeal blows ſoon up ſuch combuſtible Matter in the Sons of* Zebedee*; and that Flaſh being ſpent and evaporated, a Fall follows, as befel* Peter. *As that Body is hardly curable, which entertains ſuch ill-ſuited Neighbours as a cold Stomach and an hot Liver; ſo, the Body of the Viſible Church may be now concluded to be in a very diſtemper'd Condition, when its Charity waxeth cold, and it's Zeal hot, beyond what is due to either; and thoſe feveriſh Fits of unnatural Zeal, wherewith the Church is troubled in its old and cold Age, betokens too much, that it draws near its laſt Period.*

*THE Inconſiderableneſs likewiſe of our Differences, and Inconſiderateneſs wherewith they are purſued, induces me to believe, that the Zeal now* A-la-mode, *is not that Holy Fire which is kindl'd by a Coal from the Altar; but is that* Ignis fatuus, *or Wild-fire, which is but a Meteor piec'd up of malignant Vapours, and is obſerved to frequent Church-yards oftner than other Places.*

*I AM none of thoſe who acknowledge no* Temples, *beſides thoſe of their own Heads. And I am of Opinion, that ſuch as think that they have a Church within their own Breaſts, ſhould likewiſe believe their Heads are Steeples, and ſo ſhould provide them with Bells. I believe that there is a Church militant, which, like the Ark, muſt lodge, in its Bowels, all ſuch as are to be ſav'd from the Flood of Condemnation: But, to chalk out its bordering Lines, is beyond the Geography of my Religion. He was infallible who compar'd* God's Spirit to the Wind that bloweth where it liſteth; we hear the Sound of it, but know not whence it comes, or whither it goeth. *And the Name graven upon the white Stone, none knows but he who hath it.* Eli *concluded* Hannah *to be drunk, when ſhe was pouring out her Soul before her Maker: And* Elias *believed, that the Church, in his Days, was ſtinted to his own Perſon; and yet God told him, that there were* 7000 *in* Iſrael, *who had not bow'd their Knees to* Baal*: Why then ſhould any private Chriſtian determine magiſterially, that wherein the greateſt of Prophets erred?*

*THE Reed wherewith the Temple was to be meaſur'd,* Rev. 11. 2. *was only entruſted to an Angel; and yet he had not in Commiſſion,* to meaſure the Court that was without, becauſe it was given to the Gentiles. *And albeit,* Rev. 7. *the Number of the* Jews *who were ſaved is determined; yet the Number of* Gentiles *is left indefinite, and ſaid to be numberleſs.*

*THERE is nothing more ordinary, than for each Nation to confine the Church within themſelves. And in that Nation again, one Corner will have themſelves the* Sanctum Sanctorum *of that only Temple; albeit our Saviour in His Goſpel aſſures us, that Men ſhall come from all Corners of the World, and ſit down with* Abraham, Iſaac, *and* Jacob. *And* John *in his* Revelation *tells us, that Multitudes of all Nations, Kindreds and Families, were ſeen following the Lamb. Upon this ſame Block do thoſe likewiſe ſtumble, who put the Bolt of their Uncharitableneſs upon the Gates of Heaven, to debar whole Profeſſions, ſuch as Lawyers and Phyſicians, from entring in thereat; notwithſtanding that the above-cited Place tells us, that there were only* 1200 *of the Tribe of* Levi, *the Prieſt-choſen; and the like Number was pricked in the Tribe of* Judah, *the Lawgiver.* Aaron *the Prieſt did mold the Golden Calf, and not* Moſes *the Judge; and* Korah *and* Dathan *were* Levites, *and yet mutiny'd againſt their Magiſtrates.*

*I SAY not this to diſparage that Holy Function; for none ſhall wiſh* Aaron's *Rod to flouriſh more than my ſelf; and ordinarily, thoſe who love not to touch the Lord's Anointed, will likewiſe be ſure to do His Prophets no Harm: But, I ſay it to take off an Aſperſion which hath ſtained too long, and too unjuſtly, thoſe of my own Profeſſion. Is not the Church our common Mother? Albeit, I confeſs, ſhe is likewiſe their Nurſe, in a more particular Way; and ſince there is Heavenly* Manna *enough to aliment us all, why ſhould Chriſtians deny to admit their Brethren to an equal Partage?*

*IT grieves me ſore to ſee my Mother, the Church, tortur'd, like* Rebecca, *by carrying ſtruggling Twins in her pain'd Bowels. And ſeeing all Chriſtians are but Pilgrims here, I admire that thoſe Pilgrims ſhould leave off to journey, and ſtand ſkirmiſhing and fighting with all ſuch as will not travel their Road. And albeit we acknowledge, that the Spirit of God takes Pains, and is ſufficient for leading all Men in the Way wherein they ſhould walk; yet we muſt compel them, as if either He needed our Help, or we reſolved to ſhare with Him the Glory of their Converſion. Thus God (who loves us all infinitely better than any one of us doth another) leaves us, upon our own Hazard, a Freedom in our Choice, albeit we poor Miſcreants compel one another, denying to our Fellow-creatures that Freedom which He allows all the Creation. I wiſh we would conſider how each Man eats, drinks, cares for his Family, and performs all common Duties, rationally enough without any Compulſion; and yet, in the Affairs of Religion, wherein doubt-*

*doubtleſs Man is led by a far more infallible Aſſiſtance, there are many Slips committed daily and groſly, notwithſtanding all Pains taken and Force uſed by one Man towards another. Thus it fares with us as with Patients, whom when the Phyſician ſtints to a narrow Diet, then they loath even that Food which their unreïned Appetite would never have rejected. And this makes me apt to believe, that if Laws and Lawgivers did not make Heretics vain, by taking too much Notice of their Extravagancies, the World ſhould be no more troubl'd with theſe, than they are with the Chimera's of* Alchymiſts *and* Philoſophers. *And it fares with them, as with Tops, which, how long they are ſcourged, keep foot and run pleaſantly, but fall how ſoon they are neglected and left to themſelves.*

*IN order to which, it was wittily obſerv'd by our great King* James *the Sixth, that the Puritans of his Age ſtrove with him, and yet ceded at firſt, in a Difference between them and the Shoemakers of* Edinburgh: *For not only pleaſes it their Humour to contend where they gain Honour and can loſe none, but likewiſe, by conteſting with Monarchs, they magnify to the People their pious Courage; aſſuring the World, that ſuch Attempts require a particular Aſſiſtance from Heaven; and when their Jangling hath extorted ſome Conceſſions from the Magiſtrate, (as ordinarily it doth) then they preſs that Succeſs as an infallible Mark of the* Jure-divinoſhip *of their Quarrel. Albeit, I confeſs, that when theſe not only recede from the Canonized Creed of the Church, but likewiſe incroach upon the Laws of the State, then, as of all others, they are the moſt dangerous, ſo, of all others, they ſhould be moſt ſeverely puniſhed.*

*OPINION, kept within its own proper Bounds, is a pure Act of the Mind: And ſo it would appear, that to puniſh the Body for that which is a Guilt of the Soul, is as unjuſt as to puniſh one Relation for another. And this Blood-thirſty Zeal, which hath reigned in our Age, ſuppoſes our moſt merciful God to be of the ſame Temper with thoſe Pagan Deities, who deſir'd to have their Altars gor'd with Blood; and being Devils themſelves, delighted in the Deſtruction of Men: Whereas the Almighty, who* delights not in the Death of a Sinner, but rather that he ſhould repent and live, *hath left no Warrant upon holy Record, for perſecuting ſuch as diſſent from us: But even then when He commands that the Prophets, who tempt others to Idolatry, ſhould be ſlain; yet ſpeaks He nothing of puniſhing of thoſe who are ſeduc'd by them. And why ſhould we ſhew ſo much Violence in thoſe Things, whereof we can ſhew no certain Evidence? as ordinarily we cannot in circumfundamental Debates. Are we not ready to condemn to day, as Fanatic, what Yeſterday was judged* Jure-divino? *And do not even thoſe who perſecuted others for their Opinions, admire why they ſhould be, upon that Score, perſecuted themſelves? So that (Victory depending upon Event) we legitimate the Perſecutions to be us'd by others againſt ourſelves, by the Perſecutions us'd by ourſelves againſt others. Our Saviour forbids us to pluck up the Tares, leſt the Wheat be pulled up with it; and how can the moſt pious Perſecutors know, that the Saints are not deſtroy'd with the Sinners?*

*'TIS remarkable, that our Saviour diſarm'd zealous* Peter, *even when he was ſerving Him in Perſon, in His greateſt Straits, and againſt the moſt profligate of His Enemies, the* Jews: *And that to prevent the irregular Zeal, even of the firſt and beſt of Chriſtians, the bleſſed Apoſtles, their divine Maſter thought it fit to arm them, not with Swords, but with Scrips; and to root out of their Hearts all Thoughts of Violence, did oft inculcate to them, that His Kingdom was not of this World; convincing them by an excellent Argument, That He had no need of Arms or Armies; for elſe He could have commanded Thouſands of Angels. Did ever God command the* Jews *to war againſt any neighbouring Nation becauſe they were* Pagans? *(a Quarrel which would have laſted till all the World had been conquered.) Or, did our Saviour leave in Legacy to His Servants, that they ſhould force others to turn Proſelites? which doubtleſs He had done, if He had reſolved to allow ſuch a rude Mean of Converſion. All which makes me admire, why, in our late Troubles, Men really pious, and naturally ſober, could have been ſo tranſported, as to deſtroy whom they could not convince; and to perſuade thoſe who were convinced, that Religion obliged them to deſtroy others.*

*MY Heart bleeds when I conſider how Scaffolds were died with Chriſtian Blood, and the Fields cover'd with the Carcaſſes of murther'd Chriſtians; and 'tis probable, that there were more damn'd by unprepar'd Deaths, in the Fields, than were ſav'd by peeping Sermons in incendiary Churches: And in this I admire the Clemency of our Royal Maſter, who, albeit his Cauſe was more juſt than theirs, albeit he might have convinc'd them by obtruding to them their own Practices; yet, hath rather choſen to command with his Sceptre than his Sword. But, if the Glory of God were the Mark at which theſe do level, why beſtow they not their Zeal, rather in converting ſuch as ſcarce know or acknowledge that there is a God? And why are they more enraged againſt thoſe who agree with them in moſt Things, than theſe who diſſent from them in all? Take not Chriſtians more Pains to refute one another, than to convince* Gentiles? *And ſtand not ſome Epiſcopiſts and Presbyterians at greater Diſtance, than either do with* Turks and Pagans? *And to evidence, that rather Humour than Piety occaſions our Difference, we may eaſily perceive, that the meaner the Subject is, the Heat is always the greater.*

*IF I had ever known ſo much as one whoſe Faith had been the Trophy of a Debate, I ſhould allow of Debates in Matters of Religion: But ſeeing Men cannot be convinc'd by Miracles, it were ridiculous to preſs Converſion by Arguments. All the Divines in* Europe *could not preſs the beſt founded of their controverted and polemic Truths, with ſo much Scripture, or ſo many Miracles, as our bleſſed Saviour did His own Divinity, (which is the Foundation of all Truths:) And yet the* Jews, *and almoſt all the World beſides, ſlighted this infallible Doctrine. And to evidence that there is a Seaſon of Grace, independent from Arguments, did not many Thouſands turn Proſelytes at* Peter's *Sermon, whom all our Saviour's Homilies and Miracles could not perſuade? If one ſhould ſay, that the Teſtimony of a few Fiſhermen ſhould not be believed in a Matter of ſo great Conſequence, as is the Salvation of the whole World; eſpecially when they did depone as Witneſſes, in a Matter wherein both their Honour and Livelihood was concerned; might not this ſtagger ſome mean Chriſtians? And yet I believe theſe Truths ſo much the more, becauſe ſuch as theſe were its firſt Aſſerters; for certainly it is one of the greateſt of Miracles, that ſo few, and ſo illiterate Perſons were able to convince the whole World. Thus we ſee, that one may account that a Miracle, which another looks upon as a Folly; and yet none but* God's *Spirit can decide the Controverſy. Matters of Religion and Faith, reſembling ſome curious Pictures, and Optick Priſms, which ſeem to change Shapes and Colours, according to the ſeveral Stances from which the Aſpicient views them.*

*THE Balance of our Judgments hath catched ſuch a Bruiſe by* Adam's *Fall, that ſcarce can we, by them, know the Weight of any Argument. But, which is worſe, there is as great a Defect in our partial Weighing as in the Scales themſelves: For, when we take either the* pro *or* con *of any Controverſy into our Patronage, we throw always in Arguments into that Scale wherein our own* Opinion *lies; without ever taking Leiſure to conclude what may be alledged for the antipode Propoſition: And then, when we receive an Anſwer, our Invention is buſy'd, not in pondering how much Conviction it hath in it, but by what Slight it may be anſwered; and thus either Paſſion, Intereſt, or frequent Meditation, are ſtill the Weights which caſt the Balance.*

*THIS fiery Zeal hath likewiſe made another Pimple flaſh out in the Face of the Fanatic Church, and that is, a Conceit that the Saints have the only Right to all God's Creatures, the Wicked being only Uſurpers, and not Maſters of them: But I have heard this Opinion (ſo beaſtly is it) confuted by* Balaam's *Aſs; who could tell its Maſter,* Am not I thine own Aſs? *When* Aaron *and the People did Covenant without* Moſes, *then every Man did bring his Ear-rings to make up the Golden Calf. And we have lived in an Age, wherein we have ſeen our Countrymen, like the* Chaldeans, *take the Furniture both of the Temple, and of the King's Houſe, and carry them away to their* Babylon *of Confuſions; and in an Age, wherein ſober Men were forc'd to lend Money, to buy for their own Arms the heavy Shackles of Slavery;*

Tantum Religio potuit ſuadere malorum.

*RELIGION doubtleſs aims at Two great Deſigns; one is like the Firſt Table, to perſuade us to adore God Almighty; another is to perſuade us, like to the Second Table, to love our Neighbour, and to be a Mean to ſettle all theſe Jealouſies, and compeſce all theſe Animoſities which Intereſt might occaſion: And this appears by the* Doxology *jubilied by the Angels at our Saviour's Birth;* Glory to God, and Peace and Good-will towards Men. *And therefore, as every private Chriſtian ſhould be tolerated by his Fellow-Subjects, to worſhip God inwardly according to his Conſcience; ſo all ſhould conſpire in that exterior Uniformity of Worſhip, which the Laws of his Country enjoin. The firſt Remark which God made of us after the Creation, was,* that it was not fit for Man to be alone; *there was only one Ark amongſt the* Jews *by God's own Appointment. And ſeeing the Goſpel terms the Church Chriſt's Spouſe, it were abſurd to think that He will divorce from her upon every Error or Eſcape; eſpecially ſeeing His bleſſed Mouth hath told us, that under the Goſpel it is not lawful to divorce upon all Occaſions; and if He will not for theſe deny her to be His Spouſe, much leſs ſhould we deny her to be our Mother. May not one, who is convinced in his Judgment that Monarchy is the beſt of Governments, live happily in* Venice *or* Holland? *And that Traveller were abſurd, who would rather ſquabble with thoſe amongſt whom he ſojourns, than obſerve thoſe Rites and Solemnities which are required by the Laws of the Places where he lives? What is once ſtatuted by a Law, we all conſent to, in chuſing Commiſſioners to repreſent us in theſe Parliaments where the Laws are made; and ſo if they ordain us to be decimated, or to leave the Nation if we conform not; we cannot ſay, when that Law is put to Execution, that we are oppreſs'd; no more than we would complain, if one did remove us legally from thoſe Lands which he purchaſed from our Truſtee, whom we had empower'd to ſell it.*

*AS* David *ſaid to* Saul, 1 Sam. 26. 20. Why went the King out to catch a Flea? *So may I ſay to our great Divines,* Why contravert they about Shadows? *Is it fit that Chriſtians, who find it too great a Task to govern their private Souls, ſhould be ſo much concern'd how the Church is governed by others? Wherefore, ſeeing many have been ſav'd who were moſt inexpert in theſe Queſtions; and that fooliſh Zeal, Paſſion, and too much Curioſity therein, hath damned many; I may conclude, that to pry into theſe, is neither neceſſary, becauſe of the Firſt, nor expedient, becauſe of the Laſt.*

*SINCE Diſcretion open'd my Eyes, I have always judged it neceſſary for a Chriſtian to look oftner to his* Practice of Piety, *than to* Confeſſion of Faith; *and to fear more the Crookedneſs of his* Will, *than the Blindneſs of his* Judgment; *delighting more to walk on from Grace to Grace,* working out the Work of his own Salvation with Fear and Trembling; *than to* ſtand ſtill *with the* Galileans, *curiouſly* gazing up to Heaven. True Religion and undefiled, is to viſit the Widow and the Fatherleſs; *and the Ditty drawn up againſt the damned Spirits ſhall be,* That when our Saviour's poor ones were hungry, they did not feed them; when they were naked, they did not clothe them; *without mentioning any Thing of their Unbelief in Matters of Controverſy, or Government. And therefore, I hope, that theſe to whom I addreſs my ſelf in this Diſcourſe, will rather believe me to be their Friend, becauſe of their Piety, than their Enemy, becauſe of their Errors.*

# THE Virtuoſo, or Stoic.

## CHAP. I.

### *Of Atheiſm.*

ALBEIT Man be but a Statue of Duſt kneaded with Tears, mov'd by the hid Engines of his reſtleſs Paſſions; a Clod of Earth, which the ſhorteſt Fever can burn to Aſhes, and the leaſt Shower of Rheums waſh away to nothing; yet makes he as much Noiſe in the World, as if both the Globes (thoſe glorious Twins) had been unwomb'd from that formleſs *Chaos,* by the Midwifry of his Wit; he ſpeaks Thunder, looks Lightnings, breathes Storms, and, by the Eloquence of his own Vanity, perſuades himſelf that his Commands are able to unhinge the Poles. From which boundleſs Pride, I confidently conclude, that if a natural Inſtinct, or as the Stoics term it, *προς τον ϑεον,* had not irreſiſtibly bow'd his Faith to aſſent to a Deity, he had never, neither upon Deſign, nor in compliance to Cuſtom (as Atheiſts alledge) ſuffer'd to creep into his Creed, that there was one greater than himſelf, who could rein his Affections, and bound their Affects, according to the Dictates of His irreſiſtible Will.

AND albeit Regiments of Arguments, levy'd both from the ſtately Fabric of Heaven's arched Pend, and from the inimitable Embroidery of Earth's flowry Boul, be requiſite for conquering the Infidelity of others, and for rendering them Tributaries to that All-forming Eſſence: Yet, doth my Faith render up the Arms of its depraved Reaſon, and turn Proſelyte to this divine Truth, upon the ſole Sight of one of theſe dying Atheiſts; who, upon any Surprizal, do, with Amazement, throw up their Eyes to Heaven, as if they ſent their Looks in Embaſſage to beg Aſſiſtance from thence; and cry, *God ſave me,* as if theſe beaſtly Souls, when attacked unexpectedly, knew whence their Health were to be expected: Like to other ſick Brutes, who when aſſaulted by Sickneſs, are, by the Hand of that ſame Storge and Inſtinct, led to ſome Herb or Flower, which is an Apothecary's Shop appointed by Nature for them.

Neither think I thoſe Arguments which are twiſted together of Three Propoſitions, ſo ſtrong as theſe Inſtincts are; where Truth, like the Sun, ſeems to dart home its Light in one unperceivable Act; whereas in theſe, purblind Nature may be miſtaken, not only judging of the Truth of either of the Three Parts, but likewiſe of their Connexion and Alliance. I know that that Miſcreant, who began his Hell upon Earth, by being burnt at *Tholouſe* for Theoric Atheiſm, did, upon his firſt Approach to the Fire, cry, *O God*: Whereupon being tax'd by the aſſiſting Jeſuit, anſwered, That theſe and ſuch like Expreſſions were the Offspring of Cuſtom: But poor Soul he might have conſider'd, that ſeeing he had crept from his Cradle into that Error, and had run his Glaſs to its laſt Sand, in propagating that helliſh Conceit; that therefore this Expreſſion was rather a Confeſſion than an Eſcape; rather a Product of a rational Soul, than of depraved Cuſtom; for as it was in it ſelf a divine Truth, ſo it was in him contrary to a ſettled Habit.

There is another Cabal of Atheiſts, who think that this Belief was at firſt but the quaint *Legerdemain* of ſome ſtrongly-pated Stateſman; who to overawe the Capriciouſneſs of a giddy Multitude, did forge this Opinion of a Rewarder of all Human Actions: And to enforce this, do inſtance *Numa Pompilius*, and *Mahomet*, whoſe palpable Cheats grew up in their Succeſſors into Religions; and whoſe Inventions were received with as much Bigotry, by the wiſeſt of Men, as is that Deity which is now the Object of our Adorations. Wherefore (ſay they) ſeeing the Rational Soul hath failed ſo oft, and ſo abſurdly in its Diſcoveries, how, or why ſhould we ſubmit our ſelves ſlaviſhly to its Determinations? For that which doth at ſome Times err, can never at any Time be concluded infallible.

To theſe I anſwer, That albeit, as to the particular Way of Worſhip, the World is oft-times deluded: And albeit, even as to their Apprehenſions of this incomprehenſible Eſſence, Multitudes be ſometimes miſled, yet theſe ſtaggering Fancies fix this great Truth, *That there is a Supreme, who muſt be Adored:* For if this innate Inſtinct did not co-operate with theſe Impoſtures, in gaining an Aſſent to their fictitious Religions and Hierarchies, it were impoſſible for any human Authority to eſtabliſh Principles ſo remote from Reaſon, and to ſubjugate by theſe, even the mildeſt Tempers. But I take the Root from which theſe Errors do ſpring, to be, that the Twilight of darken'd Reaſon glimpſing to Man that *Impreſſa* of the Divine Image, which though much decayed, yet reſts ſtill upon his Soul; and not being able, becauſe of the Faintneſs of his Light, and the Decay of that Divine *Impreſſa*, to diſcern exactly what that Deity is, with whoſe Image it is ſigneted, believes implicitely, with a profound Reſpect, any who hath the Confidence to obtrude any Knowledge of it upon them: Concluding in the Conclave of their own Thoughts, that none durſt contemn ſo far that omnipotent Thunder-darter, as to vend their own Fancies for ſacred Oracles. And albeit theſe hoodwink'd Nations did erect a *πανϑεον* in their own Hearts, wherein all theſe Vice-gods were worſhipped, yet were all theſe but Repreſentations of the true God. For His Omnipotency and Power was adored in their *Mars*; his Omniſcience in their *Apollo*, &c. And it is very probable that the *Heathens* admir'd ſo each Attribute of God Almighty, that they thought each deſerved diſtinct Altars; ſo that their Errors had their Riſe from rather too much than too little Reſpect; and that as the ſame Ocean receives ſeveral Names from the ſeveral Shores it waſhes; ſo, according to the ſeveral Operations of the Moſt High, did theſe deluded *Pagans* eſtabliſh ſeveral Deities. But that all theſe did ultimately terminate in one, is clear from the Inſcription of that *Athenian* Altar, *To the Unknown God*; from the Deſignation of *συμϐωμοι*, from their common Feaſts or *ϑεοξενια*; from the adjunct of *Delphicus* given to *Apollo*, which in *Greek* ſignifies *Unus*; as *Macrobius* obſerves: From their Altars erected, *Diiſque Deabuſque omnibus*; and from the general Invocation of all the Deities jointly ſubjoined to all their particular Sacrifices. So that the great and all-comprehending *Idea*, wherein he is repreſented, as in one big Mirror to us, was by them broke in pieces; and in each of theſe Pieces taken alone did they ſee a Deity, tho' much abridged; whereas all theſe Pieces, when ſet together, did repreſent but One, and each Piece did then ſhew but a Part. But to evidence that our Belief of a Deity is not a State and Traditional Impoſture, I would willingly know, if ever the ſkilfulleſt of Satan's Emiſſaries was able to induce the World to believe that there was no God; which, doubtleſs, might have at ſome Occaſions contributed much to ſome Men's politic Deſigns, and which that Rebel would have attempted, if either God had not reſtrain'd him, or himſelf had not known it impreſſable. And it is moſt remarkable, that the firſt Promoters of that divine Doctrine were Perſons, who, both by Precept and Practice, decried Ambition, and declined State-Employments; and ſo it were abſurd to think that they invented theſe, in Subordination to State-projects.

There is alſo much Force in that Argument, wherein, from the Nature of Prophecying, is concluded the *Being* of a God: For to forſee, is, doubtleſs, a Way of ſeeing far above the Reach of human Nature; Man not being able to conclude but that, What is poſſible upon both Parts, may come to paſs upon either of its Parts. And hence it was, that the *Heathens* themſelves term'd this Prediction *Divination*, as if it could not be but Divine. As alſo, if there were not a God, but that this were a Fiction, it would follow, that Error and Deluſion (ſuch as this *ex hypotheſi*) were able, and actually did, of all other Things, frame a Man's Soul moſt to Virtue; and that the Beſt of Men (ſuch as the Adorers of a Deity) were both the greateſt Cheats and Blockheads. All which are Abſurdities to be hiſs'd at by all who are Maſters of the meaneſt Portion of human Reaſon.

There lurketh much curious Contemplation in pondering, how that albeit the Parents of all *Heatheniſh* Religions, have been incomparably the chiefeſt Wits in their Times; for elſe they could not have impreſs'd the Spirits of their Diſciples with ſuch abſtract Principles: Yet all their Models ſeem repugnant to common Reaſon; and they have choſe to teach Principles which ſeem ridiculous.

Thus the Fictions related by the Poets of their Gods, the Rites us'd by the *Romans*, and the Fopperies of the *Alcoran*, are Abſurdities unworthy of a rational Belief; if Man were not acted by an innate Principle, to place the Myſteries of Religion above his Reaſon.

By which we ſee, that the Imputation caſt upon the Scriptures of their Contrariety to Reaſon, chocks likewiſe the Principles of all Nations: And certainly, if there were nothing reveal'd to us in Religion, but what the ſhort Line of our Reaſon might fathom, the Omnipotency of God, and the Weakneſs of our own Reaſon, ſhould remain ſtill unknown. And ſeeing our Reaſon is only ſuitable to our Nature; certainly if that infinite Eſſence and its Myſteries, might be comprehended by that ſame Reaſon which meaſureth Things finite, we might conclude God to be finite likewiſe: And is it not Impudence in us, who know not the Ebbing and Flowing of the Sea, nor the Reaſon why the *Adamant* draweth the Iron, to repine becauſe we cannot comprehend the Eſſence of God Almighty? And then vainly to conclude, That becauſe we cannot graſp within the ſhort Arms of our Underſtanding, the vaſt Bulk of the Deity, that there is no Deity? A Concluſion as abſurd, as if one ſhould ſay, than when the nimble Wings of an Arrow tranſport it above our Sight, it did leave off to be, when it left off to be perceived. And I am of opinion, that Myſteriouſneſs ſuits rarely well with divine Truths; the fineſt Things uſing always to be beſt wrapt up. Thus if we liſten to our hid Inclinations, we will find a pleaſing Veneration in reſerved Silence; and our Curioſity will ſwiftly follow, what by its Retiredneſs fleeth from us: Silent Groves, whoſe Buſh-top Trees lay their Heads together, as in a Conſpiracy, to reſiſt the Sun's Entry, and powder its Light with Sables, creates a Veneration in us. And as the *Heathens* did chooſe Groves, ſo did the Primitive Chriſtians light their Devotions with Torches and Candles; intimating thereby, that umbrag'd Silence was an excellent Shrine for ſincere Devotions: And in this Senſe, it may be, the Word of God is ſaid to be a Lantern to our Steps; and the ſeven Churches are compar'd to ſeven Candleſticks. Did not our Saviour teach his Diſciples in Parables? And was not the Ark vail'd from the Eyes of the People? The *Pagans* diſpens'd their Divinity in Hieroglyphics; and amongſt human Writers, the moſt Myſterious carry ſtill the Laurels: And why ſhould we vainly wiſh to comprehend the Nature of the Deity, ſeeing *Moſes*, God's Intimate and Minion, could not have that Allowance? And God Himſelf, when for our neceſſary Inſtruction He would diſcover ſomething of Himſelf to us, is forc'd *per* ἀνθρωποπαθείαν (as Divines ſpeak) to diſcover Himſelf in a Stile borrowed from human Frailty, and to expreſs His infinite Affections by our diſorder'd Paſſions.

I believe that *Socrates*, Nature's greateſt Diſciple, and the Deity's *Protomartyr*, was a Proſelyte of the ſame Faith which we profeſs, and had his large Soul illuminated by that *Sun of Righteouſneſs*, whoſe refulgent Rays are now the bright Torches of the Chriſtian Church. Neither is my Belief in this ſtagger'd by the Silence of his con-tempory Writers, as to this Particular; ſeeing theſe, not being of the ſame Perſuaſion with him, but being convinc'd of his Moral Worth, did deſcribe his Opinions ſuitably to their own Apprehenſion. Thus did thoſe *Pagan* Hiſtorians admire the great Saviour of Mankind, only for His Moral Accompliſhments, without reaching theſe Divine Principles by which He was acted. The *Stoics* likewiſe were, in all Probability, a Tribe of *John* Baptiſt's; and God having reſolv'd to purge the Univerſe of its Original Unrighteouſneſs, by that bleſſed *Manna* which came down from Heaven to give Life to the World, did, by their Doctrine of Abſtemiouſneſs, as by a ſpare Diet, prepare its Body for receiving that divine Doſe. And certainly, if Men had disbanded that execrable Troop of Luſts, againſt which theſe preached, and had liſt'ned (as the *Stoic*'s Book of Diſcipline injoined) to their own private Conſciences, and had, by Retiredneſs, abſtracted themſelves from the Reach of Temptations, it had facilitated much their Converſion:

For if the young Lawyer, who came to conſult Chriſt how to draw up his Security of Heaven, and of his Portion there, had believ'd their Oracle, which decry'd Riches as the unneceſſary Baggage of Man's Life, and the Mud which clogg'd the Wings of the Soul's Contemplation, and kept it from ſoaring its natural Pitch, he had never refus'd our Saviour's Yoke, becauſe he was commanded to ſell all, and to give it to the Poor. Thus likewiſe, if the Rich Glutton had dieted himſelf according to the ſcant Preſcript of their Allowance, his ſcorched Tongue had not ſtood in need of a Drop of Water to allay its Thirſt. Neither had *Nicodemus* needed to have mantled himſelf in the Darkneſs of the Night, when he came to our Saviour, out of fear leſt he ſhould have been diſcovered; ſeeing their Doctrine might have taught him, that *Fear* was a Paſſion unworthy to be lodg'd in the Soul of Man: And that there is nothing here, which a Man either ſhould, or needeth to fear.

But albeit neither *Inſtinct* nor *Faith* were able to convince us infallibly of this Truth; yet is it both more ſatisfying, and more ſafe to embrace this Opinion, than its Contrary: More ſatisfying, becauſe Man's *ſummum bonum* here, being lodg'd in the Tranquillity of his Spirit; that which can beſt plain and ſmooth the rugged and uneven Face of his frequent and inevitable Misfortunes, muſt be doubtleſs the moſt careſſable of Opinions. Wherefore, ſeeing nothing can ſtrengthen ſo much Man's Frailty, nothing check ſo ſoon his Deſpair, nothing feed ſo much his Hope, nor animate ſo much his Courage, as to believe that there is a God, who beareth the heavieſt End of all our Croſſes upon the Shoulders of His *Love*; who is able to turn, or arreſt the giddy Wheel of Fortune by the ſtrong Hand of His Omnipotency; and who twiſteth the Laurels of unimaginable Joys for the Heads of thoſe who fight under His Banners. If a Man leaned not his weary Soul upon this divine Reſt, he were not only an Enemy to Nature, but even to his own Happineſs. What Rocks of Danger could Men eſcape, if blind Fortune did ſit at the Helm. And if vertuous Perſons complain, as Affairs are preſently ſtated, that their Merits are not weighed with Indifferency enough in the Scales of Juſtice; What might be expected, if Hazard got the Balance to manage? And thoſe who leave their native Countries, when they perceive that the Law beginneth to render its Oracles in an unconſtant Stile, and with a trembling Voice, behoved to leave the World, if this Anarchy were by Atheiſm eſtabliſhed? For as a wiſe *Stoic* well obſerved, ὀυκ εϛι ζῆν εν τῷ κόσμῳ κένω θεὸν, και κένω προνοίας. *It were impoſſible to live in a World void of God, and void of Providence.*

It is likewiſe moſt ſafe; for if there be a Deity, doubtleſs theſe obdur'd Atheiſts, whoſe Obſtinacy hath conjur'd their Conſciences to a conſtrain'd Silence, and bribed theſe infallible Witneſſes, to depone what ſuited beſt with their wild Reſolutions, or rather neglected reſolutely their ſincere Depoſitions: Then certainly, the juſt Flames of that God's Indignation, whom they have diſclamed, will heat for them a Furnace in Hell, beyond what the other damn'd Spirits ſhall meet with in their Torture. Whereas albeit there be no Tribunal, from which ſuch a Thunderbolt-Sentence may be darted, nor no ſupreme Judge by whom our Actions ſhall be canvas'd; then thoſe who have paid their Adorations at His Altars, ſhall be in no Danger. Wherefore, ſeeing it ſhould be the Task of a *Virtuoſo*, to turn out all ſuch Thoughts as may raiſe a Mutiny in his Breaſt; it were a fooliſh Toy in him to entertain Atheiſm, which is a Nurſery of Diſquietneſs; for whoſe breaſt could enjoy a Calm, whilſt a Concernment of ſo much Weight as his Eternal Portion, did hinge from the weak Thread of a mere *may-be*, and of ſuch a *may-be* as marches ſo near with a *will-not-be?*

But if ye would know, what diſquieting Vapours Atheiſm ſends up to the Brain, when it is once drunk in: Go to the Horror-creating Beds of a dying Atheiſt, whoſe roring Voice might awake the moſt lethargy Conſcience that ever the Devil lull'd aſleep: There ye ſhall know by the Urinal of his Eyes, and the Water ſtanding therein, what Convulſion-Fits his Soul ſuffers; and ſhall learn from his own Mouth, how grievouſly his diſeaſed Soul is ſtretched upon the Rack of Deſpair: Then it is that the voluminous Regiſters of his Conſcience, which did ly formerly claſped in ſome unſearch'd Corner of his Memory, are laid open before him; and the Devil, who hitherto gave him the leſſening End of the Proſpect, to ſurvey his Sins in, turns now its magnifying End to this fearful Eye. It ſhould be then the grand Deſign of a Philoſopher, to order his own Breaſt aright, before he go abroad to view the Works of the Creation; leſt if he leaves its Door unbolted, the Devil ſteal from him his richeſt Jewel, whilſt he ſweats to enrich his Contemplation with what is of far leſs Conſequence.

CHAP. II.

# CHAP. II.

## *Of Superſtition.*

IT is not wild Fancy to think, that *Atheiſm* hath been the Product of *Superſtition*: For certainly, many who were by Humour *Gallio's*, finding that Religion exacted from Men ſuch inhuman Homage to its Recognizance, as was the ſacrificing Children among the *Heathens*, wearing Pilgrimages, and hectick Lents amongſt Chriſtians, did reſolve rather to deny than to adore ſuch Deities. Thus *Lucretius* revolted upon *Agamemnon's* ſacrificing his Daughter *Iphigenia* for the *Grecian* Safety, crying out,

*Tantum Religio potuit ſuadere malorum.*

And thus *Petronius Arbiter*, a Monk of the ſame Cell,

*Primus in orbe deos fecit timor.*
——*Fulmina cœlo*
*Cum caderent*————

And to prevent this, our Saviour doth oft inculcate, that *His Yoke is eaſy, and His Burden is light.* And doubtleſs, as the ſtraighteſt Line is always the ſhorteſt; ſo the moſt rational Deſigns are always eaſilieſt effectuated; and as *Seneca* hath excellently obſerved, *Licet Deus non eſſet, tamen non peccarem ob peccati vilitatem.* There is ſomething of Meanneſs in the gallanteſt and moſt alluring Sin. And this is moſt energetically expreſs'd in Scripture, whilſt it is ſaid *that the Wicked weary themſelves by their Sins.* A Principle, which not only the Magiſterial Authority of God's Spirit, but our Experience likewiſe places above the Reach of all Scruples: For are not the Inquietudes, the Cheats, and palliated Parricides, and Sacrileges brooded by Ambition, the Churliſhneſs and Cloſehandedneſs parented by Avarice, Effects unworthy to be father'd upon any Rational Soul; and at which we ſhould ſcarlet our Cheeks with Bluſhes, as well as enpale them through Fear, and ſhould ſtand as much in awe of our Conſciences, as moſt do of a Deity? Yet, it may be we are in a Miſtake, whilſt we place Superſtition in the Exceſs of ſuch Adorations, as are either commanded or indifferent: For ſeeing the Object of our Adoration, God Almighty, is, in Himſelf infinite, we can never exceed either in our Reſpects to Him, or in the Expreſſions of them, Exceſs being only admiſſible, where the Object is finite, and where we attribute more than is due, which can never be here. Thus if Kneeling be lawful at any Occaſion, I hardly ſee why it is not lawful to kneel at all Occaſions. And if theſe exterior Rites and Ceremonies (ſome whereof are allowed in all Churches) be judg'd requiſite, for expreſſing our Vaſſalage and Subordination to God our Maker, either they are altogether unwarrantable, or elſe we ſhould proportion them (as far as in us lies) to that infinite Object. And ſeeing the Angels are ſaid to cover their Faces with their Wings before Him, the Patriarchs to fall upon their Face and Worſhip; and our adorable Saviour, in that Conflict wherein He repreſented Sinful Man, is, by *Matthew*, remarked to have fallen upon His Face; by *Mark*, to have fallen upon the Ground, and by *Luke* to have kneeled: What is crawling Man, that he ſhould account ſuch Geſtures fond Superſtition! It would appear then, that Superſtition conſiſts in Man's worſhipping God by Means unlawful; ſuch as are Children-Sacrifices, and ſuch like; whereby His Divine Attributes are miſrepreſented, and tainted with Cruelty or Tyranny; and not in an Exceſs, in ſuch Expreſſions of our Reſpect as are in themſelves lawful. And if there be any Strength in that Argument, wherein we enforce the Being of God, from the harmonious Conſent and Aſſent of all Nations; certainly, by that ſame Argument, we may eſtabliſh the Decency, if not the Neceſſity of Ceremonies. For, what Nation bows to Altars, without profound and external Submiſſions? And, who lodges upon the Surface of our Globe, who pays not, as the *Reddendo* of their Charter to thoſe Gods whom they Worſhip, Ceremonial Adorations, wrapt up in moſt ſubmiſſive Rites?

# CHAP. III.

## *Of the World's Creation.*

THAT God made all Things for His Glory, is an Expreſſion, which, I think, looks not well at the Teſt of Reaſon, and ſeems to have no Warrant but unwary Cuſtom: For beyond all Queſtion, His Glory was ſo Brim-full formerly, that it neither needed, nor could receive any conſiderable Acceſſion from this ſmall Drop. And beſides this, the innate Apprehenſion we have of doing any Thing for one's Glory, dyes this Expreſſion with ſome Guilt: Yet, I confeſs, we may warrantably ſay, that when perverſe Man calls His Power in Queſtion, or controverts his Being *only wiſe*; that then, God, for our Inſtruction, and the Vindication of His own glorious Attributes, doth many Things for His own Glory. And in this Senſe, the Scripture ſaith, that *God will puniſh the Wicked, and deliver His People, for His own Glory*. And wherever it is ſaid, that God doth, or createth any Thing for His own Glory, it is doubtleſs in this Senſe; in which Man (who is made after His Image) may act for his own Glory without any Vanity; albeit to act for his own Glory, in the firſt Senſe, were in him Criminal. It is then more probable, that God being infinitely good, and all Good being *ſui communicativum*, that His Deſign in creating the World, was to communicate and diſplay His Goodneſs: And upon this *Baſe* probably, hath *Ariſtotle* reared up his Error, of *the World's Exiſtency from all Eternity*; for, ſeeing God was *ab æterno*, infinitely Good, and that *Good* is ſtill communicative; he did (it may be) conclude, that *ab æterno*, God did communicate His Goodneſs; which could only be to Creatures. And therefore it was neceſſary that there ſhould have been a World: And ſome Philoſophers have averr'd, that the World flowed from God *per emanationem, ab æterno*, as Beams are lanced out from the Body of the Sun. Albeit, I be none of *Ariſtotle*'s Partizans, nor hold my Philoſophy of him, as my Superior; yet I cannot but think, that God hath communicated His Goodneſs to Worlds prior to ours, which ſeems but a Conceit of 5682 Years ſtanding. But I am not ſo arrogant, as to determine the Time of the firſt World's Birth, nor how many Cadets it hath had; reſolving to leave its Date blank, to be filled up by ſome arrogant Pretender. Neither ſhould I accuſe mine own Thoughts of Hereſy, for concluding, that probably there are at preſent Thouſands of Worlds co-exiſting with ours; whereof ſome, it may be, are govern'd by Maxims, if not contrary, yet at leaſt different from theſe which are our Canons. All which Worlds, albeit they were actually ſubſiſting, would ly in the Boſom of the large imaginary Spaces, but like ſo many ſmall Balls in the Corner of a large Tennis-Court. I ſhall not, for confirming this Opinion, cite, with an ignorant *French* Curate, the Parable of the Lepers; where it is ſaid, *Nonne ſunt decem mundi?* Becauſe I know that it was wittily anſwered, *Sed ubi ſunt reliqui novem?*

# CHAP. IV.

## *Of Eternity.*

THAT Eternity is all preſent, and that, in it, there is neither Preterit, nor Future, is but a Conceit, and a needleſs Myſtery impoſed upon our Belief, which is really more Myſterious than the Trinity. Who knows but it is founded upon an Expreſſion in *Cicero*, wherein Eternity is call'd *æternum inſtans?* For how then can it be ſaid, that God was before the World? For *was* is preterit, and before the World there was, as themſelves alledge, no Time; and ſo there was a *was* in Eternity. Is not God call'd by Himſelf *Alpha* and *Omega*, Firſt and Laſt, the one whereof is preterit, and the other future? And it is ſaid, *Rev.* 16. 5. *O glorious God, who art, and waſt, and ſhalt be.* And if it be anſwered, That this is only fitted to our Capacities; certainly, that is all is craved: For doubtleſs there is no ſuch real Thing, as theſe three Meaſures of Time, even in Things finite and created; for they owe their Being only to our Conceit, as well in the one as in the other. And when God deſcrib'd Himſelf by His Name JAH, *I am*, it was not meant, that no Meaſure of Time could be attributed to Him, but the preſent; but rather, that what He was, was to Man incomprehenſible. And that all we could know of

Him, was, that He exiſted; and by that Expreſſion, that all Things to Him are preſent, was meant, that by His Knowledge *intuitive*, (as Divines term it) He comprehends all Things which were to be, as if they were really preſent; and this is ſpoke, not of His Being, but of His Knowledge. Neither can it be concluded, that if *was*, or *ſhall be*, may be attributed to God, then He muſt be mutable, and that *was* denotes Mutation; for, as I ſaid formerly, theſe are but Terms, not really exiſting, and ſo cannot import any real Mutation.

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# CHAP. V.

## *Of Providence.*

HOW God employs His uncontrolable Sceptre, after what Faſhion He governs this lower World, and in what Characters He writes His Eternal Decrees, hath been the arrogant Study of ſome mad-cap Pedants, who talk as Magiſterially of His Decrees, as if they were of His Cabinet-Council. And albeit to deter ſuch bold Intruders, He deſtroy'd Thouſands of His ancient People, becauſe they looked into His Ark; yet ſuch is the Petulancy of ſome later Wits, that they muſt needs look into His unſearchable Boſom, and there marſhal all His Decrees, and conceit they underſtand His Way of working: And thus, in diſputing of Objects infinitely remov'd by their Abſtruſeneſs from their Senſe, they ſhew themſelves more ridiculous, than thoſe who would diſpute concerning the Qualities of an Object, before it come ſo near as that they may know of what *Species* it is: For ſeeing it is a Maxim, That there is nothing in our Underſtanding, which hath not paſs'd to it thro' our Senſes; and that the Things of God are immaterial, and ſo fall not under the Cognizance of our Senſes; it muſt be Folly to think, that any human Scrutiny can find out Myſteries that are ſo unſearchable, except they be imparted to them by immediate Revelation; a Kind of Correſpondence which, I conceive, few now-a-days hold with Heaven. Yet, I confeſs, it is as hard to confute the Fictions, as it is impoſſible for them to come by the Knowledge of them. But as this Study is unattainable, ſo it is unprofitable; for ſeeing God's Art of governing the World, and His Decrees of ſaving or damning its Citizens, is a Trade we ſhall never be able to practiſe; Why ſhould we have ſuch an Itch to underſtand it? It ſhould be enough to us to be ſaved, albeit we know not how, or by what manner of Decrees; except we be of the ſame Metal with that fooliſh Patient, who would not be cured, becauſe the Phyſician would not ſhew him how the Cure was to be compoſed, and what were its Ingredients. And is it not the *Zenith* and Top-branch of Madneſs for us to pry into God's unſearchable Decrees, who know not how our Neighbour's Calf is formed in its Dam's Belly?

IT was a narrow Omnipotency, which ſome mean-ſpirited *Heathens* allowed their *Jupiter*, when they conceited that he wanted Leiſure to diſpoſe of Trifles.

> *Non licet exiguis rebus adeſſe* Jovi.

For if the Twinkling of an Eye, were not Time ſufficient for God to diſpoſe of all the Affairs of this World, then there might be a greater Power than His; and the Power to diſpoſe ſo ſuddenly, were wanting to His Omnipotency; and ſo He were not infinite, and conſequently no God.

NEITHER was the Rodomontade of *Alphonſus*, King of *Portugal*, more impious than this; when he alledged, That if God had made uſe of his Advice in framing the World, he had helped many Things in it, which he now could juſtly tax of Error.

THESE Two Extremes are the Two Poles, whereon the Globe of Atheiſm turns itſelf; ſome out of an impious Humility, complementing God out of His Authority, by denying that He diſpoſes of the meaner Size of Buſineſs; and others detracting from His Providence, in attributing His Operations to *Chance* and *Fate*, or branding them with Injuſtice or Imprudence.

THERE are among the School-men, Two Opinions which diſpute Victory with (almoſt) equal Forces: The one whereof will have God the ſole Agent, and to make uſe of Secondary

Cauſes only, as of Ciphers. Theſe ſay, that it is not Fire which burns, but that God burns *ad præſentiam Ignis*; nor Water which cools, but that God cools *ad præſentiam Aquæ*: Which is, in my Opinion, the ſame Thing as to ſay, That God juggled with Man; and, as Charmers do, preſented Ingredients, but wrought by hid Means.

IN too near an Affinity with this, is the Doctrine of Predeſtination, as ſome teach it; wherein they will have Man to play the mere Spectator in his own Salvation: And albeit there be a free and full Tender of Mercy made to loſt Man, yet will not allow him any Power to embrace or reject it; judging this one of the neceſſary Appanages of God's Omnipotency, that He doth ſave or condemn *ex mero beneplacito*; never conſidering, that the Queſtion is not, what God can do, but what He doth: And that it derogates nothing from His Omnipotency, that He will not damn poor Sinners; who, according to their Doctrine, cannot be blam'd for their Obſtinacy, becauſe it was never free to them to do otherwiſe. And how (I pray you) could the Sluggard in the Parable have been puniſh'd for not improving his Talent, and laying it up in a Napkin, if God had, by His Decree, caſt an inſolvable Knot upon that Napkin, wherein it was laid up?

THE other Opinion will have Secondary Cauſes the ſole Agents; and teaches, that God, in the firſt moulding of each Creature, did dote it with innate Qualities, ſufficient to act every Thing requiſite for its Subſiſtance; but, in ſign of its Subjection to its Maker, reſerv'd to Himſelf, as His Prerogative-Royal, a Power to bend and bow theſe Inclinations upon extraordinary Occaſions, for the Good of the Univerſe, or when His infallible Omnipotence ſhould think Expedient. Thus when that All-ſeeing Eye of the World, the Sun, was firſt turned off the Frame, it had in Commiſſion to ſow its Influences over the World without any Retardment; yet was its Motion arreſted, and turn'd back by an extraordinary Warrant, in the Days of *Joſhua* and *Zedekiah*. Thus they make the Creatures reſemble a Watch, which after it is once completed, goes by its own Springs and Wheels, without the Artiſt's extraordinary Aſſiſtance. Yet when either its Motion becomes irregular, or when the Owner finds it fit, it is unpieced, or hath its Index put forward or backward at his Pleaſure. And this laſt ſeems to ſuit beſt with the Principles, both of Chriſtianity and Stoiciſm. With Chriſtianity, becauſe it gives a Check to Preſumption, and ſuffers not Man to think himſelf the ſole Arbiter of his own Condition; becauſe God can eaſily quaſh theſe *Babylon*-like Fancies, which his topleſs Ambition is ſtill a building; and to his Deſpair, becauſe a Lift from the ſtrong Arm of Providence, may heave him up above all his Difficulties.

THIS correſponds beſt likewiſe with Stoiciſm, becauſe it pulls the Hands of a Sluggard from his Boſom, and ſets them at Work to prepare for himſelf, and not to repoſe his unreaſonable Hopes upon Divine Providence; which only keeps thoſe from ſinking, who endeavour to ſwim. This likewiſe takes from Man all Excuſe of ſinning; not ſuffering him to lay over his Vitiouſneſs upon Providence; a Shift too ordinary amongſt ſuch as miſunderſtand the raſhleſs Doctrine of the Reformed Churches.

THIS Opinion makes us likewiſe underſtand, what the *Heathens* meant by *Fortune*, which they term'd *giddy*; what the Stoics meant by *Fate*, which they confeſs'd to be *irreſiſtible*; and in what Senſe Philoſophers concluded, that each Man could hammer out his own Fortune. As to the *Pagan*'s *Fortune*, it cannot be thought, that ſeeing it was by themſelves confeſs'd to be *blind*, that they could truſt it with the Reins of the admirably manag'd World. And ſeeing they confeſs'd, that it was always ſtaggering and unconſtant, it cannot be thought that they could aſcribe to it all the curious and juſt Events, which they themſelves admired hourly. Wherefore it is probable, that the Philoſophers having, through the Proſpect of Nature, and by an uninterrupted Experience, obſerv'd, that Man (who acted from a Freedom of Spirit unreſtrained either by Providence or Star-Influences, as to his ordinary Operations) was of a volative and capricious Humour; therefore they conclude, that the State of Human Affairs, which was framed and unframed at his ill-fix'd Pleaſure, behov'd neceſſarily to be moſt ſubject to Changes. And that ſeeing the Victories of *Cæſar* depended upon the Inclinations of his Soldiers, who by abandoning him, would fetch his Proſperity away with them, they had Reaſon therefore to term Fortune frail, and expos'd to Hazard.

THUS the Advancement of the reſtleſs Courtier is uncertain, becauſe it hinges from the Humour of his Prince, whoſe Spirit hath ſome Allay of Unconſtancy, as well as hath that of the fearful Subject, who trembles under his Sceptre. And thus the Oyl-conſuming Student can promiſe himſelf no Applauſe, becauſe the Paralytic Hand of the Multitudes Fancies, holds the Scales wherein his Abilities are weighed.

IN fine, *Fortune* was nothing to thoſe Ancients, but the unbody'd Freedom of Man's Will, conſidered abſtractly from all particular Perſons, and the innate Qualities of all other Creatures (which, becauſe they are mortal, muſt therefore be changable) than which nothing is more inconſtant, nothing more blind.

THE other Branch of Divine Providence, which conſiſts in the Supreme Authority, whereby God makes all human Inclinations run ſometimes againſt the Byaſs of their ſpecifick Nature, was by them termed *Fate*. And this in their Mythology, they fabl'd to be an *Adamant* Chain, which they faſtned to the Foot of *Jupiter*'s Chair; meaning by its Adamantine Nature, that it was hard to be broke, like the *Adamant*; and by faſt'ning it to *Jupiter*'s Chair, that it was the Product of the Almighty's Power. Thus *Fortune* and *Fate* were to them, but the Right and Left Hand of Chriſtian Providence.

THESE embodied *Angels*, the *Stoics*, finding that *Fortune's* Megrim could not be cured, nor *Fate's* Decrees reſcinded; and yet reſolving, in ſpight of all external Accidents, to ſecure to themſelves a Calmneſs of Spirit; did place their Happineſs in the Contempt of all theſe Follies, whoſe Bloſſoms *Fortune* could not blaſt; and ſought for Happineſs in an Acquieſcence to all which Providence did unalterably decree: So that neither Fortune nor Fate could ſtand in the Way of their Happineſs, becauſe they ſlighted the one, and ſubmitted to the other.

AND in this Senſe, each Man in their Schools was admitted to be Maſter of Work to his own Fortune; and that, without diſparaging the Omnipotent Power of the great Fortune-maker, in Submiſſion to whom their Happineſs was placed.

ALBEIT the Knowledge and Acknowledgment of a God, be the *Baſis* of true Stoiciſm, and a firmer one than any the *Heathens* could pretend to: Yet that Knowledge of Him, which by the Curioſity of School-men, and the Bigotry of Tub-preachers, is now formed in a Body of Divinity, is of all others the leaſt neceſſary, and the moſt dangerous. And whereas we did ſee God but in a Glaſs formerly, that Glaſs is now ſo miſted and ſoil'd by each Pedant's flegmatic Breath, that it is hard to ſee Him at all, but impoſſible to ſee Him there. And to extend a little that Myſterious Analogy; we are ſaid to behold God here, as in a Glaſs; and as Objects are beſt perceived in the ſmootheſt Mirrors; ſo the plaineſt Deſcriptions of Him, are ſtill the trueſt: For when He is ſeen by Atheiſts in the Globe-Glaſs of their Infidelity, He appears leſs than really He is; when beheld by the *Pagans* in the Multiplying Glaſs of Paganiſm, He appears many; and when He is looked upon in the Magnifying Glaſs of Superſtition, tho' He appear but one, yet He is miſrepreſented, becauſe He is repreſented as more terrible than He deſires to appear; and ordinarily the better cut Glaſſes are, in the more Artificial, the worſe the Face, as by them repreſented.

# CHAP. VI.

## *Of Theory.*

THAT Firſt Curſe which did ſow all the World with Briars and Thorns, did, of all other Things, fall moſt heavily upon the Soul of Man: Which becauſe it was Chief in the Tranſgreſſion, ought in Reaſon to have been moſt tortured in the Puniſhment. And now his diſquieted Spirit, is daily pierc'd with the Prickles of Thorny Diſputes and Debates; which, as like Briars, they produce no Fruit fit for alimenting that noble Half of a Man, which is his Rational Soul; ſo do they, like Thorns, pierce his tender Conſcience, and ſo ſcrew his Torments to their higheſt Pin. The Thoughts of God, and of Settlement in Him, which like Balm ſhould cure thoſe Sores, is become that Hemlock which occaſions his Diſtractions, and poiſons his Meditations. For albeit the Heroes of the Primitive Church, did give Milk in abundance to Infant-Chriſtians; yet many of their Succeſſors have mixt it ſo with the tart Vinegar of Contention, that the Milk begins now to curdle, and ſo is become loathſome to the Appetite of tender Believers. For moſt of Churchmen being idle, and conceiving, that if they taught only the Holy Scriptures, their Vocation might by Laics be undervalued as eaſy; and that they would be deny'd that Applauſe which was due to Quaintneſs of Wit, eſpecially in a ſettl'd Church, wherein Churchmen could not draw Reverence from the People by Oracles, as did the *Heathen* Prieſts; nor by Prophecies and Miracles, as did the Servants of the Moſt High, under the Old and New Teſtaments; did therefore, according to their private Inclinations, frame each to himſelf a new Kind of Divinity. The more Pragmatic Sort, and thoſe whoſe Humour was edged with Choler, invented Polemic or controverted Divinity: And ſo by an Inteſtine and Civil War of Opinions, rais'd within the Bowels of Religion, did waſte and pillage that Holy *Canaan*, which formerly flow'd with the Milk of ſincere Doctrine, and the Honey of Divine Conſolations. And then that precious Blood, which formerly purpled only *Pagan* Scaffolds, dyed now the Swords of Fellow-believers; who to propagate their private Judgment, buried Churches under their Rubbiſh, fed the Birds of Heaven with the Carcaſes of Pious and Reverend Churchmen; and by the mad Hands of bigot Opiniaſtry, broke to Pieces all the Sacred Bonds of Natural and Civil Duties: And thus they rais'd the Devil of Contention, whom they could not lay again; and made this Itch of diſputing, turn the Scab of the Church.

OTHERS again, in whoſe Brains ſullen Melancholy form'd Phantoms and Ideas, invented Scholaſtic Theology; and theſe in abſtract Cells erected a Mint-houſe, for coining the Droſs of their own Contemplations into wonderful bombaſt Notions; and to make them go current in the ſuffering Church, gave them the *Impreſſa* of Theology.

A THIRD Sort, not able to ſoar their Pitch in the Sky of Invention, reſolv'd to ſet up a Correſpondence with Heaven: And this they call'd Enthuſiaſtic, or inſpir'd Theology. And their Cabbins were Poſt-houſes, where one might know what was reſolv'd lately in the Conclave of Heaven, whether the King or Parliament was to wear the Laurels, and what ſhould be the Iſſue of our pious Rebellions. Theſe could likewiſe caſt the Horoſcope of our Salvation; and invented a Species of Phyſiognomy, whereby they could tell, if the Marks of Grace dwelt upon a Face; and if one had the Tracts of an Elect of God. After this Faſhion did they propheſy their own Fancies, and call that *Providence* only which made for them.

THERE wants not ſome likewiſe, who out of a well-meaning Deſire, to make the Lamp of Truth dart its Rays with the clearer Splendor, ſnuff it ſo nearly, that they extinguiſh it quite, and leave us nothing but the Stink of its Snuff; like ſome curious Phyſicians, who purge ſo frequently, that they deſtroy the Body entruſted to their Cure. We in this Iſland have met with ſome of theſe *Charletans*, who, I'm confident, purged oftner both Church and State, than *Luke*, the beloved Phyſician, would have preſcribed, if we had had the good Fortune to have been his Patients.

THE talleſt Wit is not able to reach Heaven, albeit (I know) many disjoint their Wits in ſtretching them too high in the Enquiry of its Myſteries. Neither impute I our ſhort-coming in the Knowledge of theſe Myſteries, ſolely to their Obſtruſeneſs; but I believe our Meditations are more clouded in relation to theſe, than really they need to be, becauſe of their innate Frailty: For we ſee, that ſome, who are Maſters of much Reaſon in Things human, betray much Folly in their Devotions: Wherefore I'm induc'd to believe, that it fares with the Soul in this, as uſually it doth with the Body, whoſe Pulls are proportionably the weaker, as the Thing graſp'd after is placed above its true Reach. And ſo theſe arrogant Pretenders pull but faintly, becauſe they raiſe their Meditations too high on their Tip-toes; whereby they are diſabl'd from employing all their natural Vigour, in pulling at theſe weighty and ſublime Truths, which they catch not by that Corner which is neareſt, as meaner Wits do, (and ſo are more ſucceſsful) but endeavour a Fetch at what in Divinity is higheſt; by which Effort their Endeavours are fainter than thoſe whoſe Spirit is of a leſſer Size. And theſe *Coloſſus*-Wits become the greateſt Heretics, as thoſe ordinarily are moſt burnt, whoſe Fingers oftneſt ſtir up Fires; and as Chirurgions have more Cuts and Wounds, than any other Mechanics, who handle not ſo oft theſe wounding Tools. It is not fit that mortal Man ſhould wreſtle too much with theſe Myſteries, leſt his Reaſon, like *Jacob*, be forc'd to come off halting.

NOTHING hath more buſied my Thoughts than to find a Reaſon why the *Heathens*, who were as aſſiduous and zealous too in the Worſhip of their Gods, as we Chriſtians, did never frequent Sermons, nor knew no ſuch Part of Divine Service; whereof, probably, the Reaſon was, becauſe their Governors (whoſe Commands amongſt them were the ſole *Jure-divinoſhip* of all Eccleſiaſtic Rites) fear'd that Churchmen, if they had been licens'd to harangue to the People, would have influenc'd too much that groſs Body; which was the Reaſon likewiſe, why in the Primitive Church (as one of their Hiſtorians obſerves) *ex formula populo prædicabant, tantum antiquas timebat* δημογογȣς; they preached only approv'd Sermons. So much did Antiquity fear theſe Leaders of the People; a Practice, as is reported, lately renew'd by the Duke of *Ruſſia*: And this ſeemeth alſo to have been the Reaſon, why all Liturgies have prick'd Texts for their Preachers, leſt if they had been left a Freedom in their Choice, they had choſe ſuch as might in the Letter, have ſuited beſt with ſuch ſeditious Libels as are now obtruded upon the People, in lieu of pious Homilies, at remarkable or feſtival Occaſions. Yet I think, that our late Doctors, who can find all Doctrine in any Text, would eaſily have eluded that Canonic Deſign. If we ſhould parallel the Homilies, which thoſe renown'd Fathers have left as Legacies to Poſterity, with theſe which our Age runs after, we would find, that the firſt were pointed Leſſons of Mortification; which, like *Moſes* Rod, could draw Guſhes of Tears from the rocky Hearts of the moſt obdur'd Sinners: Whereas many of theſe are but State-gazettes, wherein People are inform'd, what are the Reſolves of the Civil Magiſtrate: And whereas their firſt Inſtitution made them Ambaſſadors of Glad-tidings betwixt God and His People, they have made themſelves Heralds to denounce Wars betwixt God's Vice-gerent and his Subjects. Thus *Peter's* Succeſſors will oft-times, like himſelf, rather draw the Sword, than watch for their Maſter. And ſince our Saviour hath diſarm'd them, as He did *Peter*, and fill'd their Hands with the Keys, thoſe who offend them are ſure to get over the Head with theſe. I confeſs, God hath not left His Church without ſome ſkilful Pilots, to lead in His Servants with Security to the Harbour of Salvation: To whom this Diſcourſe and its Author ſhall pay all Reſpects.

# CHAP. VII.

## *Of the Strictneſs of Churches.*

MOST of all Chriſtians do, like coy Maids, lace their Bodies ſo ſtrait, that they bring on them a Conſumption; and will have the Gates of Heaven to have been only made for themſelves: And as this Nigardlineſs hath poſſeſs'd Churches, from that Root hath ſtem'd the Churliſhneſs of ſome private Chriſtians, who will allow God but a moſt inconſiderable Number of thoſe whom He hath admitted to make up His viſible Church. Thus ſome Paſtors will only admit Two or Three to be Gueſts at the Lord's Table, allowing no wedding Garment, but what is of their own ſpinning: And others, with their uncharitable Hands, blur the Names of all their Acquaintances out of the Book of Life, as if they were Keepers of His Regiſters and Rolls; and will only have Seats kept in the Church triumphant, for Three or Four Siſters, who are ſo frugal of their Devotions, as to ſpare them at Home, to the end they may be liberal in publick. But both theſe ſhould conſider, that the New *Jeruſalem* is ſaid to have more Gates than one; that *John*, in his *Revelation*, tells us, that *numberleſs Numbers were ſeen following the Lamb*; and that it is not probable, that the wiſe Framer of the World made ſuch a ſpacious Dwelling as Heaven, to be inhabited by ſo inconſiderable a Number: Whereas Hell (Hell in the Geography of believ'd Tradition) is only the ſmall Kernel of this ſmall Shell *the Earth*. I know that *many are called, and few choſen*; and that *the Way is ſtrait, and few enter in at it*. But we ſhould conſider, that theſe Choſen are ſaid to be few, in reſpect only of thoſe many who are called: Which is moſt certain; for Ten Parts of Eleven are *Pagans* or *Mahometans* (and all are called); of that Eleventh Part, many are malicious Heretics; and amongſt the Reſidue, many are flagitious and publick Sinners. So that albeit the greateſt Part of the regular Members of the viſible Church were ſav'd; yet the Number would be ſmall, in Compariſon of theſe others. The Body of the viſible Church muſt, like all other Bodies, be compounded of contrary Elements. And albeit I am not of opinion, that this Body ſhould be ſuffer'd to ſwell with Humours; yet I would not wiſh, that it ſhould be macerated with Purgations. Its Nails, tho' but excrementitious Parts, ſhould not be ſo nearly pared, as that the Body may bleed; yet they ſhould be ſo par'd, as that Chriſtians may not ſcratch one another: They ſhould feed not upon Blood, but Milk; and they are unmannerly Gueſts, who will not ſuffer others to ſit at their Maſter's Table with them.

IT pleaſes my Humour to contemplate, how that albeit all Religions war againſt one another; yet are all of them govern'd by the ſame Principles; and even by thoſe Principles, in effect, which they ſeem to abominate. Thus albeit the Ceſſation of Miracles be cry'd down by many; yet do the moſt bigot relate, what Miracles have been wrought by the Founders of their Hierarchies, and what Prophecies they have oraculouſly pronounced. And ſeeing all confeſs, that God in our Days breaks the Proſperous upon the ſame Wheel, on whoſe Top they did but lately triumph, making *Fortune* adopt the Oppreſſed in their Vice; Why ſhould we talk ſo much of the ceaſing of Miracles? For doubtleſs theſe Effects are in Policy as contrary to Nature, as are the ſwimming of Iron, or ſweetning of Rivers; or rather more: Seeing in the firſt, Man's Will is forc'd, (without which ſuch Revolutions could not be effectuated) whereas in the laſt, dull and ſenſual Qualities are only wreſted; which, as they are not ſo excellent, ſo doubtleſs are not able to make ſuch Reſiſtance as the Soul of Man. Yea, I ſhould rather think, that the World being become old, muſt doubtleſs be more dim-ſighted (as all old Things are) than formerly; and therefore God doth now preſent greater Objects of Admiration to our Eyes, than He did formerly: For Man is become ſo Atheiſtical, that if God did not preſs his Meditation with ſuch infallible Teſtimonies of the Being of an irreſiſtible Power, he would doubtleſs ſhake off all Reſolutions of ſubmitting. Thus we ſee, that in all the Tract of *John's* Revelations, Miracles grow ſtill more frequent the nearer the World draweth to its Grave; and like all other Bodies, the weaker it becomes, the more ſubject it is to all Alterations, and the leſs is Nature able to reſiſt. And it would appear, that if Miracles were requiſite at firſt for the Eſtabliſhment of Religion, even when no older Religion was to cede it, and to make an *Exit* at its Entry; much more ſhould Miracles be neceſſary, for fixing any Religion againſt the receiv'd Conſtitutions of a previouſly ſettled Church. But to proſecute my firſt Deſign; it is remarkable, that albeit Infallibility be not by all conceded to any Militant Church, yet it is aſſum'd by all: Neither is there any Church under the Sun, which would not fix the Name of Heretic, and account him (almoſt) reprobate, who would refuſe to acknowledge the leaſt Rational of their Principles: And thus theſe Churchmen pull up the Ladders from the Reach of others, after they have by them ſcal'd the Walls of Preferment themſelves. That Churchmen ſhould immerſe themſelves in Things Civil, is thought excentric to their Sphere, even *in ordine ad Spiritualia:* And yet even the *Capuchins*, who are the greateſt Pretenders to abſtract Chriſtianity and Mortification, do, of all others, dipth moſt in Things Civil. The *Fanatics* inveigh againſt Presbyterian Gowns. The *Presbyterian* tears the Epiſcopal Lawn Sleeves, and thinks them the Whore of *Babel's* Shirt. The *Epiſcopiſt* flouts at the Popiſh Robes, as the Livery of the Beaſt. The *Antinomian* emancipates his Diſciples from all Obedience to the Law. The *Proteſtant* enjoins good Works, and ſuch as are commanded, but place no Merit in them. The *Roman Catholic* thinks he merits in his Obedience. The *Fanatic* believes the Lord's Supper but a Ceremony, tho' taken with very little outward Reſpect. The *Presbyterian* allows it, but will not kneel. The *Epiſcopiſt* kneels, but will not adore it. The *Catholic* mixeth Adoration with his kneeling. And thus moſt of all Religions are made up of the ſame Elements, albeit their Aſymbolic Qualities predomine in ſome more than in others. And if that Maxim hold, that *majus & minus non variant ſpeciem*, we may pronounce all of them to be one Religion.

THE Church, like the River *Nilus*, can hardly condeſcend where its Head lies; and as all condeſcend that the Church is a Multitude of Chriſtians, ſo join all their Opinions, and you ſhall find that they will have it to have, like the Multitude, many Heads. But in this, as in all Articles not abſolutely neceſſary for being ſaved, I make the Laws of my Country to be my Creed: And that a clear Deciſion herein is not abſolutely neceſſary for Salvation, is clear from this, that many poor Clowns ſhall be ſaved, whoſe Conſcience is not able to teach their Judgments how to decide this Controverſy, wherein ſo many Heads have been confounded, ſo many have been loſt, and ſo many have been ſhrewdly knock'd againſt one another; from which flinty Colliſions much Fire, but little Light, hath ever burſt forth.

GOD, by His Omniſcience, foreſeeing that it was too dazling a Sight for the pur-blind Eyes of Man's Soul, to behold Him invironed with the Rays of Divine Majeſty, did beſtow upon us Three Mirrors, wherein we might contemplate Him, (as we uſe to look upon the Sun in a Tub of Water, not daring to eye his native Splendor): The One was the Mirror of the Law; the Second is the Works of the Creation; and the Third is the Soul of Man, which He Himſelf hath told us, is framed after His own glorious Image.

AS for the Firſt Mirror, the Law; God knowing that *Inſtinct*, or as we term it, *a natural Conſcience*, were complete Digeſts of all that Man was to obſerve, he did make that Mirror very little, a Volume of only Two Pages; but that Mirror is of late ſo muller'd about, by marginal Notes and Commentators, that the Mirror itſelf is almoſt over-ſpread by them: And it is very obſervable, that in the holy Regiſters the Law is ſtill abridged; but we never ſee it enlarged: For albeit the fundamental Laws of both Tables were packed up in narrow Bounds; yet our Saviour ſums them up in theſe Two, *Fear the Lord thy God with all thy Heart*, and *Love thy Neighbour as thy ſelf.* And the Apoſtle *Paul*, in his Divine Epiſtles, profeſſes, that he deſires to *know only Chriſt, and Him crucified.* So that I'm confident, that if our Saviour were to preach in Perſon once more to the World, He would inveigh againſt our Caſuiſts, as much as He did againſt the *Jewiſh* Talmudiſts; for the one, as well as the other, are equally guilty of burdening the Shoulders of weak Chriſtians, with the unneceſſary Traſh of human Inventions. For I remember to have ſeen a late Caſuiſt diſpute contentiouſly amongſt his other Caſes, Whether Tobacco, taken in the Morning, did break a commanded Faſt, or not? To which, after a feveriſh Conflict, his Wiſdom, forſooth, returns this oraculous Anſwer; *That if Tobacco be taken at the Noſe, it breaks not the Faſt; but if it be taken at the Mouth, then it breaks the Faſt.* Which, becauſe I made a Collaſterion betwixt the Caſuiſts and the Talmudiſts, I ſhall only mention, out of the Talmud, (which was the *Jews* Comment upon the Law) a Caſe exactly parallel to this; wherein is decided, That if a Man carry a Burden on the Sabbath-day upon both Shoulders, then he is guilty of Breach of Sabbath; but that he is not guilty, if he carry it upon one Shoulder. As to my own private Judgment, (which I ſubmit to my Spiritual Tutors) I think, that ſeeing the Conſcience of Man is the ſame Faculty with the Judgment, when converſant about Spiritual Employments, (as the Word συνείδησις, which imports a Knowledge reflexive upon a Man's own ſelf, doth abundantly evidence) that therefore, as there are Judgments of different Tempers, ſo there are likewiſe Conſciences of different Frames; and which vary as much among themſelves, as natural Conſtitutions do. And therefore, as the ſame Doſe would prove noxious to one Conſtitution, wherein another would find his Health; ſo in one and the ſame Act, that Reſolution may be ſaving to one Conſcience, which may condemn another: For ſeeing God hath kindled a Torch in each Man's Breaſt, by whoſe Flame he may ſee what Path he ſhould beat; in which Senſe it is ſaid, *Prov. 20. 27. That the Underſtanding of Man is the Candle of the Lord*; and can that Light miſlead? And ſeeing Man muſt be anſwerable according to what it preſcribes to him, doubtleſs it is fitter that he ſhould hearken to the reiterated Dictates of his Conſcience, than to the Reſolution of any School-Caſuiſt; and that for the ſame Reaſon, that it is more rational to obey the Law itſelf, than the wiſeſt Lawyer, who may either be deceiv'd himſelf, or have a Deſign to deceive others. For if God hath endu'd Man with every Thing neceſſary for *working out the Work of his own Salvation with Fear and Trembling*, He hath doubtleſs beſtowed upon him an internal Touchſtone, by whoſe Teſt he may diſcern betwixt Good and Evil; ſeeing to command Man to walk uprightly, and not to beſtow on him Eyes to ſee the Road, were to command a blind Man to walk, and to puniſh him if he went aſtray. And as the Compoſure of Man's Body would be imperfect and manck, if he wanted a Palate to diſcern betwixt the Taſte of what is wholſome, or what is putrid; ſo if the Soul of Man were not able to know its own Duty, and by the Palate of a natural Conſcience, to difference betwixt lawful and unlawful; certainly the Soul might be thought to be but ill appointed. Thus Beaſts are, by an intrinſic Principle, taught their Duty, and do accordingly ſhun or follow what is convenient for them, without conſulting any Thing from without. And ſhall Man be leſs perſpicacious, or more defective than theſe? As alſo ſeeing Man is oft-times, by Thouſands of Occaſions, removed far from the Aſſiſtance of Chair or Pulpit-informers; and in that his Retiredneſs hath moſt of theſe Caſes to be reſolved; it were abſurd to think, that he then wants Sufficiency of Help for their Reſolution. And it is moſt obſervable in Scripture, that Men are oft check'd for quenching the Spirit, but never for not conſulting Caſuiſts. I know it may be thought, that when the Soul of Man rages at ſome Time in a Fever of Luſt, Revenge, or ſome ſuch Sin, that then the Conſcience may rave; yet I dare ſay, that albeit the Soul, out of an inordinate Deſire to enjoy its own Pleaſures, may ſet its Invention at Work, to palliate the Sinfulneſs of what it deſires; yet by ſome ſecret Knell, the Conſcience ſounds ſtill its Reproof. And I dare ſay, that never Man erred without a Check from his Conſcience; nor that few have ſinned, after an Approbation obtain'd from his Conſcience of what he was about: And when we aſſent to theſe Doctors, is it not becauſe our Conſciences, or our Judgments (which are the ſame) aſſent to what they inform? Which evidences, that our Conſciences are more to be believ'd than they; by that Rule, *Propter quod unumquodque eſt tale*, &c. But to convince us of the Folly of our Addreſſes to theſe Doctors, it may, and often doth fall out, that that may be a Sin in me, which a Caſuiſt pronounces to be none: As if my Breaſt did ſuggeſt to me, that it were a Sin to buy Church-Lands; if thereafter I did buy them, it were doubtleſs a Sin, albeit my Doctors, following the Canons of their particular Church, aſſured me, that the Sale of Church-Lands were no Sin in itſelf. I am confident then, that this Caſuiſt-Divinity hath taken its Riſe from the Deſire Churchmen had to know the Myſtery of each Man's Breaſt, and to the end nothing of Import might be undertaken without conſulting their Cell; perſuading Men, that *in ordine ad ſpiritualia*, their Conſciences, and conſequently their Salvation may be intereſted in every Civil Affair. And to confirm this, it is moſt us'd by *Jeſuits* and Innovators, who deſire to know all Intrigues, and ſubvert all States; whereas the Primitive Church knew no ſuch Divinity, neither have its Doctors left any ſuch Volumes.

It may be urged, that ſeeing the Conſcience is but a reflex Act of Judgment, that as the Judgment is an unſure Guide, the Conſcience cannot pretend to be infallible; and that the one, as well as the other, is tutor'd by the fallacious Principles of *Senſe* and *Cuſtom*. And I myſelf have ſeen my Landlady, in *France*, as much troubled in Conſcience for giving us Fleſh to eat in Lent, as if ſhe had caſt out the Fleſh of a Chriſtian to be devour'd by Dogs: And ſo Atheiſm may attribute to Cuſtom theſe Inclinations, whereby we are acted on to believe a Deity; and may tell us, that the *Mahometans* find themſelves as much prickt in Conſcience, for tranſgreſſing their Prophet's Canons, as we for offending againſt the Moral Law. And thus the adoring of a Deity might have at firſt been brooded in the Council-Chamber of a Stateſman's Head; and yet might have been at that Time, by the Vulgar, and thereafter by the wiſeſt Pates, worſhipped with profound Reſpects: Yet, if we pry narrowly into this Conceit, we ſhall find in it ſomething of Inſtinct, previous to all Forgeries poſſible. For what was it (I pray you) which encouraged, or ſuggeſted to theſe Politicians, that ſuch a Thing as the Deity might be diſſembl'd to their People? For their impoſing that Cheat, preſuppos'd ſome pre-exiſting Notion of it. Or, how entred that Fancy firſt in their wild Heads? Or, how could ſo many contemporary, yet far diſtant, Legiſlators fall upon the ſame Thoughts, eſpecially it being ſo remote from *Senſe*; and for framing of which *Idea*, their Experience could never furniſh a Pattern? Conſcience then muſt be ſomething elſe, than the Fumes of Melancholy, or Capricio's of Fancy; for elſe roaring Gallants, who are little troubled, or can eaſily conquer all other Fancies, would not be ſo haunted by theſe pricking Pangs; which if they were not infallibly Divine, behov'd to be merely ridiculous, and to want all Support from Reaſon or Experience.

THERE is another File of Caſes of Conſcience, which is a Cadet of that ſame Family; and theſe are ſuch Caſes as were the Brood of theſe late Times, which like Inſects and unclean Creatures, may be ſaid *generari ex putri materia*: An Inſtance whereof was the famous Siſter, who asked, if ſhe was oblig'd to execute her Cat for killing a Mouſe upon the Sabbath. This was a Theology taught by old doting Wives, and ſtudied by State-Expectants, who to gain Applauſe, and in Hopes to mount Preferment's Sadle, made uſe of this gilded Stirrup. I ſhall not inveigh againſt this Foppery, ſeeing it hath not poſſeſs'd Men's Conceit ſo long, as to have preſcrib'd the Title of Divinity; but like a Meteor, which becauſe it is fix'd to no Orb, and is but a Maſs of inflam'd Vapours, doth therefore diſappear immediately, how ſoon its Subſtance flaſhes out; and its Aſhes are now entomb'd in the ſame Clay with its Brother Twain, that pious *Nonſenſe*, wherein God Almighty was treated with in Familiar, and not in Superior.

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# CHAP. VIII.

## *Of the Scriptures.*

AS God did light the Candle of a private Conſcience, in each private Breaſt; ſo hath He hung up the Lamp of the Scriptures in the Body of His Church: And theſe we may call the Conſcience of the Church, whilſt militant. Which ſome, by the Breath of their Vanity, and Storms of their Paſſion, endeavour to blow out; whilſt others make no other Uſe of its Light, than to ſhew them where to find a Jeſt. And within the Arms of this Diviſion, ly folded all the prophane Race of Mankind. As to theſe firſt (who ſhould be firſt, becauſe they are Satan's Firſt-born, and ſo deſerve a double Portion of this Reproof) they contend, that the Scriptures are written in a mean and low Stile; are in ſome Places too Myſterious, in others too Obſcure; contain many Things incredible, many Repetitions, and many Contradictions. But theſe Miſcreants ſhould conſider, that much of the Scripture's native Splendor is impaired by its Tranſlators, who fearing to fall within the Verge of the Curſes, pronounced againſt ſuch as ſhould pare from, or add to, any Thing contained in that Divine Book, were, and are willing, that their Tranſlation ſhould want rather the Luſtre, than the Meaning of the Original. As alſo of all Tongues, I believe the *Hebrew* admits leaſt of a Tranſlation, eſpecially into *Northern* Languages: For as thoſe Nations differ leaſt in their Expreſſions, who becauſe of their Commerce or Contiguity, have the moſt frequent Converſe; ſo doubtleſs the *Jews* and we, by this Rule, ſhould in Language hold the leaſt Correſpondence. And becauſe there is no pure Fountain of this Tongue left, beſides the Bible, it muſt be hard to underſtand its Expreſſions, wherein the Tranſlators can find little or no Help from the Variety and Collation of Authors. And ſeeing this Book was penn'd indifferently for all Ages, Nations, and Sexes, it was fit that its Stile ſhould have been condeſcending: For thoſe who are tall, can pull the Fruit which hangs low; whereas thoſe who are low, cannot pull what perches high. And it is very obſervable, that where the Fruit is greateſt and ripeſt, there the Branch whereon it hangs bows loweſt. When God appeared to *Elijah*, 1 *Kings* 19. there came firſt a terrible Wind, thereafter a great Earthquake, and then Fire; and yet God was in none of theſe, but ſpoke in the ſhrill ſmall Voice. His Divine Providence hath ſo ordered it, that our Conviction cannot be aſcrib'd to the Fard of Eloquence, nor the Slight of Logic, but merely to the Truth of what is therein repreſented: Our Saviour will, with Clay and Spittle, illuminate our Eyes, as He did thoſe of the other blind Man in the Goſpel. And ſuch is the Strength of His Divine Arm, that He can vanquiſh Satan, Miſbelief, and Ignorance, with any Weapon. And as we think the Sun's Circumference but little, becauſe it is ſituated ſo far above us; ſo we conclude theſe Truths and Excellencies but mean, becauſe they are plac'd above our frail Reach; and will blame the Scriptures, when the Fault lurks in our ſelves. That great Phyſician will cure us, like an Artiſt, with Simples ſpecific for our Diſeaſe; and not like a *Charletan*, with perfumed and gilded Nothings. It is not alway the beſt Metal, which carries the moſt pleaſing *Impreſſa*; nor doth the painted Candle caſt the cleareſt Light. There are many Things in Scripture, which becauſe of our Frailty, appear (like a Staff in the Waters) to to be crooked, albeit they be ſtraight. Why *Abraham* ſhould have kill'd his Son *Iſaac*, or the *Iſraelites* have borrowed, and not reſtored the *Egyptian* Ear-rings, ſtaggers not my Belief; for theſe belong'd to God, and neither to *Abraham*, nor the *Egyptians*; and ſo God might have given Order to any He pleas'd to receive them: And thoſe who obey'd, were no more guilty than ſuch are, who by Order from the Maſter, receive what he did formerly lend to others. And as to its Repetitions, they differ, no doubt, from one another, albeit we (who think all Things removed, tho' by a little Diſtance from us, of one Shape) judge ill, in judging otherwiſe. And as an excellent Perſon hath well obſerved, God hath appointed theſe reiterated Expreſſions to be as ſo many Witneſſes, to convince Heretics and others, who ſhould call the Meaning of any one Place in Queſtion, or wreſt it by what precedes or follows it.

As to thoſe others, in whom the Wine of God's Conſolations (by being winded in the crack'd Veſſels of their Heads) turns into the tart Vinegar of prophane Satyrs, I condole their Condition: For that Stomach muſt be very corrupt, wherein the beſt of Aliment putrities moſt; and probably, that indigeſted Milk being converted into excrementitious Bile and Humours, may caſt them in a Fever, which ſhall never cool to all Eternity. I pity likewiſe thoſe, who out of an inadvertent (and as they think, ſinleſs) Humour, jeſt with theſe Divine Truths; like fooliſh Children, who love rather to ſport with their Meat than eat it. Theſe albeit they intend not to prophane Scripture, yet they vilify it: And we may ſay of the Bible, as of taking of God's Name in our Mouths, which muſt not only not be done upon Deſign, to blaſpheme and defame Him; but muſt not be taken but upon Neceſſity, and like the Shew-bread, muſt be uſed only when we are in Straights. I have been too guilty of this laſt Sin my ſelf; and therefore, leſt I ſhould make no Attonement, I have rather reſolv'd to appear before the World, in the Duſt and Sackcloth of this ſilly Diſcourſe, a Penance really to me very great.

When I conſider, how various and innumerable are the Actions of Men, and that in all theſe they need particular Inſtructions from above the Poles; I admire why there are ſo many Paſſages in Scripture, from which our Neceſſity may expect no Aſſiſtance. And therefore leſt I ſhould think, that in Scripture there is any Waſte of Words, I am induc'd to believe, that there run many hid Allegories from *Geneſis* to *John*'s *Revelations*; wherein the Myſtical Senſe deſerves likewiſe the Name of God's Word. Might we not have admir'd, why the Story of *Hagar* and her Baſtard, is there voluminouſly deſcribed, and what the Church or private Devotion was concern'd therein, if *Paul*, *Gal.* 4. 24. had not diſcover'd the Myſtery to us? By which Things, another Thing is meant: For theſe Two Mothers are the Two Teſtaments; the one which is *Agar* of Mount *Sinai*, which gendereth unto Bondage, &c. I might here relate many excellent Alluſions to prove this; but I ſhall ſatisfy my ſelf with one, which I did read in one Doctor *Everot*; who preaching upon *Joſhua* 15. 16. *Then* Caleb *ſaid, He who ſmiteth* Kirjath-ſepher *and taketh it, even to him will I give* Achſah *my Daughter to Wife. And* Othniel *took it*, &c. ſaith, That *Caleb* ſignifies, a *good Heart*; Kirjath-ſepher, the *City of the Letter*; *Achſah*, the *Viſion*; *Othniel*, *God's Opportunity*. And ſo the Myſtical Senſe runs; A good Heart ſaith, that whoever will take in (and ſmite, as *Moſes* did, the Rock) the Letter of the Word, ſhall have the Viſion which lurks under it, diſcovered, and given to him. And God's own Time is the only Mean for accompliſhing this: As alſo it is moſt remarkable, that City which was called *Kirjath-ſepher* before it was taken in, or, *the City of the Letter*, was, after it was conquer'd, called *Debir*, which ſignifies *an Oracle*; ſo that the Word, or Letter, is no Oracle, till it be once, as it were, taken in and overcome. Since the reading of which Sermon, I believe, that one may profit more by an *Hebrew Lexicon*, than by a Thouſand *Engliſh* Lectures.

Those who detract from Scripture, by attributing the Production of Miracles to natural Cauſes, do not much diſparage the Power of God, but (tho' againſt their depraved Intention) cry rather up His Omnipotency: For certainly, if theſe Miracles were produced by ſecondary Cauſes, then doubtleſs that productive Faculty was beſtowed upon them by the Almighty; and if He can make the Creatures produce ſuch ſtrange Effects, much more is He able to effectuate them Himſelf; as it is more difficult for a great Maſter, to form curious and admirable Characters, when he leads a Scholar's Hand, than when he writes them with his own: For ſuch Help may be called, *reſiſting Aſſiſtance.* I cannot likewiſe but blame many of our Preachers, who rather break than open Holy Texts; and rather make new Meanings, ſuiting with their private Deſigns, than tell the Meaning of the Spirit. Who would not have laugh'd, to hear a Presbyterian obſerve, from the firſt Chapter of *Geneſis,* firſt Verſe, That whilſt *Moſes* relates what God made, He ſpeaks nothing of *Biſhops*; by which it was evident (ſaid *Don Quixot*'s Chaplain) that Biſhops were not of Divine Inſtitution: A Conceit as ridiculous as that of a Prieſt, who hearing *Maria* ſpoken of for to ſignify *Seas,* did brag that he had found the *Virgin Mary* named in the Old Teſtament. Albeit I think Preaching no Part of Divine Worſhip, Hearing being no Adoration; yet, I love to go to Church, were it but to ſee a Multitude met together, to confeſs that there is a God: But when I go to hear, I care not whom, knowing that Chriſt elected Fiſhermen to preach down Infidelity, when it was in the Ruff of its Pride: And that *Paul* (the moſt ſignal Trophy of our Chriſtian Faith) was ſent for Confirmation, not to *Peter,* or *James* at *Jeruſalem,* but *Ananias* one of the meaneſt among the Diſciples. And ſeeing our Salvation, by preaching, is a Miracle; it is ſtill ſo much the greater, by how much weaker the Inſtruments are. When the Pulpit was a Mount *Sinai,* from which the Law was thundered, or a Mount of *Olives,* whereon our Saviour's Glorious Transformation was to be ſeen, then were Sermons to be honoured; but ſince it is become a Mount *Calvar,* whereon our Bleſſed Saviour ſuffers daily by ſcandalous Railings, Sermons are become unſavoury for the moſt part. I hate to ſee that Divine Place made either a Bar, whereat ſecular Quarrels are with Paſſion pleaded; or a Stage, whereon Revenge is by Satyrs ſatisfied; or a School-chair, from which unintelligible Queſtions are myſteriouſly debated: But amongſt all theſe Innovations introduced by our Infant-Divines, I hate none more than that of giving Reaſons for proving the *Doctrine,* which being Scripture itſelf, can be prov'd by nothing that is more certain. As for Inſtance; when the Doctrine is, *that God loved us freely,* how can this be prov'd more convincingly than thus, *my Text ſays it?* And that is *idem per idem,* a moſt unlogical Kind of Probation. When I then go to Church, I ſhould love to ſpend my Time in Praiſes and Prayers; which as they are the only Parts of Adoration, ſo are they the natural Employments of the Church, either Militant or Triumphant: Yet it diſpleaſes me to hear our young Pulpiteers ſcreech and cry, like *Baal*'s Prieſts, as if God were no nearer them than the viſible Heavens.

# CHAP. IX.

## *Of the Moral Law.*

IT honours much our Employment, that God Almighty was the firſt and great Lawgiver; and that our Bleſſed Saviour ſtiles Himſelf our Advocate. And it is an amazing Wonder, that we are tied only by Ten Laws; whereof Seven were enacted doubtleſs for our Advantage, and reſpect more immediately the Security of the Creature, than the Honour of the Creator; and are ſuch Reſtraints, as Men behoved to have laid upon one another, and which Nature lays upon us all. And albeit I laugh at the *Jewiſh Cabala,* which ſays, that the Moral Law was written Two Thouſand Years before *Moſes,* in black Letters at the back of a clear burning Fire; yet I cannot approve *Tertullian*'s Wit, who endeavours to find all theſe Ten in the Prohibition made to *Adam.* There are indeed ſome Sins, which ſcarce a Conſequence can bring within the Verge of theſe Commandments. As for Inſtance, Drunkenneſs: Yet theſe are ſuch as are ſo deſtructive to our Nature, that there needs no Law be made againſt them. So that the Prieſt hit wittily, to whom that Sin being confeſſed, enjoined as a Penance, their being drunk a ſecond Time: Which makes me conclude, that if Drunkenneſs were to be ranged under any of theſe Laws, it would fall moſt naturally under that, *Thou ſhalt not kill.* Albeit the Fourth Commandment ſeems to reſpect only the Honour of God, and that the Creature ſeems to be noways better'd by it; yet our more ſerious Obſervation will diſcover, that all belabouring Creatures, as it were, expect an Eaſe the Seventh Day more than any other. Whether it be, that Nature is by Cuſtom framed to that Expectation, I cannot tell: But we ſee that God chus'd that Number to be the Year of Jubilee amongſt His own People, and that it is the Period of all the ſeveral Conſiſtencies in our Life, Infancy, Puberty, *&c.* And for this Reaſon Phyſicians obſerve, that the Child born in the Seventh Month, is ſtronger than that which is born in the Eighth; becauſe in the Seventh it is come to a Knot, by paſſing whereof, in the Eighth it is in a State of Imperfection: But what the Myſtery of this holy Clymacteric is, I refer till we come to that Sabbath of Reſt, whereat we ordinarily arrive after Seven Times Nine Years hath ſnowed upon us.

We may think, that if God had intended, that one and the ſame Day of the Week ſhould have been appropriated to have been a Sabbath, He had deſigned each Day by a ſpecial Term, and had commanded, that a Day of ſuch a Deſignation ſhould have been ſequeſtrated for a Sabbath; and that by deſigning only the Seventh Day, He did leave a Liberty to employ any Day of the Seven for that Uſe. Yet it is remarkable, that *Moſes* nor the *Jewiſh* Church durſt not attempt the Change of their New-year's Day; but that the Almighty was pleas'd to beſtow a peculiar Sanction upon that Alteration: For, *Exod.* 12. 2. He commands, That the Month wherein the *Iſraelites* came from *Egypt*, ſhould be by them reputed the firſt Month of their Year. Wherefore ſeeing each Nation chalks out a diverſe Sabbath, it would appear, that there is ſomething of Humour in it, as well as of Religion. The *Venerous Mahometan* chooſeth *Friday*, or *dies Veneris*; the *dull Jew*, dull *Saturn*'s *Day*; the *warlike Parthians*, Tueſday, or *Mars*'s *Day*; the *cheery Europeans*, Sunday. And albeit the Chriſtians are influenced only by Inſpiration; yet I'm confident, that the *Heathens* did follow that for Religion, which ſuited beſt with their natural Temper. But this is a Meditation, which ſhould travel no where beyond a Man's private Breaſt, leſt it meet with Enmity, and beget Scandal.

It would puzzle a *Heathen* much to hear, that he who breaks one of theſe Laws, is guilty of the Breach of all: But it troubles not me, ſeeing all thoſe Laws are made to ſhew our Obedience; and the Breach of any One of them, ſhews our Contempt of Him who is the Author of all. And it may be, this was typified in *Moſes*'s breaking both Tables with one paſſionate Fling, after he came down from the Mount: For if this breaking of them had not been pre-deſign'd for ſome hid End, doubtleſs he had been reprov'd for his Negligence. However, we may from this learn the deſperate Nature of Paſſion, which made *Moſes*, who was the meekeſt Man upon Earth, break all the Laws of God in one Act. It might be alſo argued, That ſeeing all the Laws of the Second Table were enacted for, and reſpect ultimately the Advantage of Man, that where Man is not wronged, there the Law cannot be broke. And thus, if a married Man ſhould have Liberty from his Wife to take another Woman, this could be no more reputed Adultery, than it could be reputed Theft to take what belongs to our Neighbour, himſelf conſenting; and that for this Cauſe, *Jacob*'s begetting Children with his Wife's Maids, is not in Scripture reproved as Adultery, becauſe they were given to him by herſelf, for that Effect: But ſeeing the Practice of all the World condemns this Concluſion, far be it from me to expreſs it farther: Yet this is but a Sophiſm; for ſeeing our Bodies are the Temples of the Holy Ghoſt, we can no more beſtow them upon ſuch Uſes, than a Church-Warden can give the Uſe of the Church to Taverners.

# CHAP. X.

## *Of the Judicial Law.*

ALBEIT the Judicial Law (which may be juſtly call'd the Judicious Law) is commonly reputed to be but the Municipal Law of the *Jews*; yet ſeeing it was delivered in almoſt one Context with that Law which was thunder'd from Mount *Sinai* with ſo much Pomp, and is ingroſs'd in the Books of Holy Truth, and ſeems nearlier related to Reaſon, than any other Law; I admire, why it ſhould not be religiouſly obſerved by all Nations; eſpecially ſeeing, as it is the exacteſt Picture of Juſtice that ever was drawn; ſo it hath this of a Picture in it, that it ſeems to look directly upon all who behold it; albeit they be placed (amongſt themſelves) in directly oppoſite Situations and Stances. Thus this Law ſuits even with contrary Tempers, and the unequal Complexions of all Nations. I know that the Ceremonial Law is likewiſe inſerted amongſt the other holy Canons, and yet binds not us who live under the Juriſdiction of the Goſpel: But the Reaſon of this ſeems to be, becauſe theſe did immediately concern the *Jewiſh* Church, and were converſant about theſe holy Things. And ſo ſeeing the Old Teſtament is a Deſcription of their Hierarchy, and of God's Way of working in thoſe Times, I wonder not to ſee the Ceremonies

nies amidſt other ſacred Truths, and yet not obſerved, ſeeing they are expreſly abrogated. But if the Judicial Law, which reſpected not the Hierarchy of that Church, was obligatory only whilſt the *Jewiſh* State was in Being; I admire why the Spirit of God took ſo much Pains, firſt to pen it, and then to deliver it ſo Canon-like to Poſterity. And ſince it is a Principle of Law and Reaſon, that Laws muſt ſtill ſtand in Vigor till they be expreſly abrogated, and muſt not be derogated from by Conſequences or Preſumptions; I admire why this Law, which God hath enervated by no expreſs Text, ſhould be now look'd upon as Statutes no wiſe *a-la-mode*. It is true, that our Saviour, when the Woman, convicted of Adultery, was brought to Him, did not, according to that Law, pronounce the Sentence of Death againſt her; whence ſome think, that Churchmen following their Maſter's Example, ſhould not give their Suffrages in criminal Caſes, and have only δικην αναιμακτην, a bloodleſs Juriſdiction; for they are appointed to be Nurſes, not Chyrurgeons. But it is as true, that our Saviour profeſſed in all the Tract of His Life, that He came not to be a Judge in Things Temporal; and His Deſign in that Place, was only to convince them of their own Sins, and not to abſolve her, nor to abrogate the Law: And therefore He deſir'd him who was freeſt from Sin, to caſt the firſt Stone at her. And whereas it is conjectured, that thoſe Words which our Saviour ſtoop'd down to write in the Clay, immediately thereafter was an Abrogation of that Law: This is Geomancy more wild than any Leſſon, which is alledged to have been read in the Myſterious Face of Heaven, and ſhould never be taught but in a Rabbi's Cabalaſtic Gown. And whereas it is alledged, that there are many Precepts in that *Corpus Juris*, which reſpects only the Humour of the *Jews*; I admire why that can be urged; for certainly Theft, Murder, and thoſe other Crimes puniſh'd there, are the ſame Crimes which reign amongſt us; and ſo, why not puniſhable after that ſame Manner? Neither are the Humours of theſe *Jews* more different from ours, than was the *Genius* of the *Romans*; and yet few or no Nations refuſe to caſt their modern Laws in that antique Mold. And it is very probable, that as God did in the Moral Law, teach Man how to be juſt in his own Actions; ſo He would likewiſe inſtruct him by a judicial Law, how to adminiſtrate Juſtice to others.

WHAT can perpetuate a Law more, than that the Authority whereby it is enacted, ſhould be obligatory in all Ages; and the Reaſon whereon it is founded ſhould be eternal? And in what Laws do theſe Two Qualities appear more, or ſo much, as in the Judicial Laws of the *Jews*, where the Eternal Lawgiver was Legiſlator; and the Occaſion productive of them, ſeem'd rational (and neceſſary) to His infallible Omniſcience? And if in any of theſe Statutes our pur-blind Judgments cannot ſee a preſent Conveniency, we ſhould rather impute that to our own Simplicity, than charge it as a Guilt upon His Divine Statutes. And are there not many Municipal Laws in each Country, which have no Hedge about them to keep them untrampled upon by wanton and too curious Wits? but that excellent Maxim, *Omnium quæ fecerunt Majores noſtri non eſt reddenda ratio, ne quæ certa ſunt, incerta redderentur*; a Reaſon muſt not be rendred for all that our Anceſtors have enacted, leſt what is now certain, become then uncertain. Albeit a Law enacted only by human Authority, ſeem unreaſonable or inconvenient; yet it retains its Vigor till it be abrogated by the ſame, or an higher Authority, than that whereby it was firſt ſtatuted: And the Law ſays, That *nihil eſt tam naturale, quam unumquodq; eodem modo diſſolvi quo colligatum eſt*. And ſeeing the Moral and Judicial Laws are twiſted ſo together, and are oft incorporated in one Statute, as *Lev.* 20. 10. *Deut.* 22. 22. where Adultery is forbidden, and the Adulterer is to die the Death; How can we think the one Half of this Law obligatory for ever, and yet neglect its other Half, wherein the Puniſhment is ſpecified, and which appears to have been the Scope of the Divine Lawgiver? For the World needed not ſo much to have been acquainted, that Adultery was a Sin, as that Sin deſerv'd Death; and if we allow our capricious Humour the Liberty to reject what we think inconvenient, we may at laſt arrive at that Pitch of Licentiouſneſs, as to abrogate by our Practice, whatever chocks our preſent Humour.

THERE are many Things much miſtaken in that Law, which makes the Diſſonancy betwixt it and our Law, appear ſo much the greater. As for Inſtance; it is concluded, That by that Law, no Theft was puniſhable by Death; whereof this is given as a Reaſon, becauſe there is no Proportion betwixt the Goods and Life; and *that all that a Man hath will he give for his Life:* Whereas this Argument would prove, that no Guilt but Murder, ſhould be puniſh'd with Death; and ſo this Dart rather flies over, than hits the Mark at which it is levelled. And if this Argument concluded, why ſhould Adultery have been puniſh'd with Death by that Law, ſeeing there ſeems no Proportion betwixt that Guilt and Death? For if *Vita & Fama* be in Law *æquiparat*, by that ſame Law, *Pecunia eſt alter ſanguis*. But if there be no Proportion, betwixt Goods and Life, and if the Puniſhment of Theft, when it is aggrag'd to its greateſt Height, cannot in their Opinion reach ſo far as to be capital; Why was it, that by that Law, nocturnal Thieves might have been kill'd by thoſe who found them? *Exod.* 22. 2. For it appears againſt Reaſon, that more ſhould be permitted to a private and paſſionate Party, than to a diſintereſted Judge. And it is clear by 2 *Sam.* 12. 5. Theft was in ſome Caſes capital: For there *David* vows, *That he who took his Neighbour's one Sheep, and ſpared his own many, ſhould ſurely die*; which being ſpoke by a juſt King to an excellent Prophet, and not reproved, muſt not be thought a Flaſh of Paſſion, but a well-founded Sentence. Were not likewiſe Two Thieves crucify'd by the *Jews*, at the ſame time with our ever-glorious Saviour? Which muſt not be thought a *Romiſh* Execution, ſeeing the Law of the *Romans* allow'd no ſuch Puniſhment for Theft. I judge therefore the Reaſon why Murder and Adultery were puniſh'd with Death, rather than all Thefts, to have been, becauſe Theft may be repair'd by Reſtitution, but Murder and Adultery cannot. And albeit the Judicial Law commands Reſtitution only in the Theft of an Ox or Sheep, (Things of ſmall Moment, and which may be ſtollen to ſatisfy rather Hunger than Luſt); yet I ſee no Limits ſet to Judges, commanding them not to inflict a capital Puniſhment in extraordinary Caſes: For certainly he who ſteals, may, for ought he himſelf knows, be about the committing of Murder, ſeeing to ſteal what ſhould aliment any poor one, is in effect, the ſame thing as to murder him. It is much controverted, if this Law prohibits Self-murder; and I think it doth: For we are commanded to love our Neighbour as ourſelf; and ſo ſince we are commanded not to kill our Neighbour, that ſame Law muſt likewiſe forbid our killing of ourſelves. But the Reaſon probably, why no expreſs Text did forbid that Sin, was, becauſe the Spirit of God knew that the natural Averſion we have againſt Death, would in this do more than ſupply a Law; and that thoſe who would be ſo deſperate, as to neglect the one, would never be ſo pious, as to obey the other: Or elſe God hath been unwilling, by making ſuch a Law, to intimate to the World, that ſuch a Sin might be committed. Yet it ſeems ſtrange, that many are in Scripture related, as *Saul*, and others, to have kill'd themſelves, againſt whom no Check ſtands regiſtred in holy Records. But I ſtop here, intending to beſtow a whole Tract upon the Judicial Law, a Task hitherto too much neglected.

THE Second Mirror, wherein God Almighty is to be ſeen, is that of His Creatures: And in that a *Virtuoſo* may contemplate His infinite Power, as in the other he may ſee His admirable Juſtice. It is very obſervable, that when God, or His Prophets, would prove His Greatneſs, the *Sun, Orion*, and the *Leviathan*, are made uſe of as Arguments. And when the Spirit of God deſcribes the inimitable Knowledge of *Solomon*, beſtowed upon him by God, as an extraordinary Mark of His Favour, He ſays not, that he underſtood the Quirks of Philoſophy, or Notions of Divinity; but it is ſaid, *That he knew all from the Cedar of* Lebanon, *to the Hyſſop that grows upon the Wall.* And in earneſt it is ſtrange, that when Man comes into the Gallery of this World, he ſhould take ſuch Pleaſure in gazing upon theſe ill-drawn Fictions, which have only paſt the Pencil of human Wit, and ſhould not fix his Admiration upon thoſe glorious Creatures, which are the Works of that Great Maſter; in framing whereof, God is content to be ſaid to have ſpent Six Days, to the end that Man might admire the Effects of ſo much Pains; whereas His Omnipotency might, with one *fiat*, have ſummon'd them all to appear, apparelled in theſe gorgeous Dreſſes which now adorns them. And it is as ſtrange, that Man having that huge Volume of the Creation to revolve, wherein is ſuch an infinite Number of curious Tale-douſes to feaſt his Eyes with Curioſity, and to furniſh his ſolid Knowledge, he ſhould notwithſtanding ſpend ſo much Oyl and Sweat, in ſpinning out *Ens rationis, Materia prima, Potentia obedientialis*, and ſuch like unintelligible Traſh, which, like Cobwebs, are but envenom'd Duſt curiouſly wrought. And becauſe the Groſs of Mankind was ſo groſs, as not to underſtand God's Greatneſs by the abſtract *Idea's* which Inſtinct preſented to him; therefore to reach that ſenſual Crowd by the Trunch-manry of Senſe, He hath beſtowed upon them this Mirror, wherein they may ſee how infinite He is in Power, who made *Nothing* ſo fruitful, as to bud forth in this glorious Crop of Creatures, which now inhabit the Surface of Heaven and Earth.

## CHAP. XI.

## *Of Monſters.*

I Admire that ſuch Philoſophers as have had their Faces waſh'd at the Font, can allow of Monſters, and define them to be the Preter-intentional Works of Nature, wherein Nature miſs'd of her Deſign, and was not able to effectuate what ſhe intended: For if *Nature* and *Providence* ſignify the ſame Thing in the Dictionary of Chriſtianity, it were Blaſphemy to think, that *Providence* could not be able to effectuate what it once deſigned. All the Creatures are indeed, but as Clay in the Hand of this great Potter; but it were impious to think, that His Art can be miſtaken in framing any Veſſel: Wherefore I am apter to believe, that all theſe Creatures which the Schools term *Monſters*, are rather the Intentions than Errors of *Nature*; and that as *Nature* doth nothing without Deſign, ſo it doth nothing without Succeſs. And thus I rather admire Nature in theſe, for her cunning Variety, than upbraid her with Inſufficiency and Weakneſs. Neither Term I an Hermaphrodite, Man or Woman, according to the Prevalency of that Sex which predomines in it; no more than I think that the Painter, when he hath delineated curiouſly an exact Mermaid, reſolv'd to draw either a Woman or a Fiſh, and not one diſtinct Creature piec'd up of both. And doubtleſs this Error did at firſt proceed from Man's Vanity; who concluded, that every Frame which anſwer'd not that *Idea* which reſides in him, was the Effect of *Chance*, and not of *Nature*; as if *Nature* had been oblig'd to leave in the Bibliotheque of his Head, the Original of all ſuch Pieces as was to paſs its Preſs.

SEEING God in His Survey of the Creation, called all that He had made *Good*, becauſe they were uſeful, I conclude, that thoſe are the beſt, which are the moſt uſeful. And albeit I condemn Prodigality of Ignorance, in preferring a Diamond to a Capon or Sheep; yet do I not condemn ſuch of Vanity, as ſhine with theſe ſparkling Creatures: For ſince God made nothing, which He did not deſtinate for ſome Uſe, and ſeeing moſt of theſe ſerve for no Uſe elſe, doubtleſs the wearing of them is moſt allowable. Yet can I not allow of thoſe gaudy Compounds, which Men create to themſelves, as if ſomething had been ſtill wanting after the Creation was finiſhed; wherein Man could ſupply God, and Art Nature. The beſtowing of an Hundred Pounds upon a Tulip, or a Thouſand on a Picture, are not to me the mere Rants of Luxury; but are Courſes pre-ordain'd by the Almighty, for returning to poor Artiſans that Money, which Oppreſſion did at firſt moſt unjuſtly ſcrew from their weary Hands. It is our Ignorance of Nature's Myſteries which perſuades us, that ſome, if not moſt, of the Creatures ſerve rather for beautifying the Univerſe, than for ſupplying Neceſſity; an Error which Experience daily confutes: So thoſe Herbs which of old clothed only the uninhabited Mountains, do now deſerve their own Place in Apothecaries Shops. And it is moſt obſervable, that the Scurvy grows no where, but where the Diſeaſe rages, which is cured by it. Seeing God lov'd Variety in the Creation, He cannot hate Curioſity in Man; theſe Two being Correſpondents: And the one without the other would be but as Flowers to the Blind, or as Muſick to the Deaf. I laugh at the fruitleſs Pilgrimages of ſuch as travel to *Joppa* or *China*, to ſatisfy their Curioſity; there being a *Tredeskin*'s Cloſet in each Tulip, and a *Solomon*'s Court in each Lilly of the Field. And ſeeing Men's Tempers are ſo various, it was no Wonder that the Creatures (which were made for his Uſe) ſhould have been proportional to his Humour: But ſeeing Art hath in many Things copied Nature to the Life, I think not the Symmetry nor Variety to be ſeen amongſt the Creatures, ſuch an infallible Argument for proving the Being of God, as is *Inſtinct*, which all the Art of Men and Angels cannot counterfeit: And herein is it, that that grand Magician muſt acknowledge the Finger of his Maker, ſeeing here his own Art fails.

THOSE who expect equal Excellency in all the Parts of this curious Fabrick, do not underſtand wherein its Symmetry conſiſts. All the Strings of an Inſtrument ſound not equally high; and yet they make up the Harmony: The Face of the Earth looks in ſome Places deformed and patch'd; and yet it is there the Mother of rich Mines (as if God intended to beſtow a great Portion where He beſtows an ill Face;) and what we think Deformities, were placed there as Patches; and are no more Blemiſhes, than the Spots are to the Leopards.

I confeſs, that at firſt it puzzl'd much my Enquiry, for what End theſe Mountains were made ſo near Neighbours to the divided Clouds: And I once imagin'd, that theſe were rather the Effects of the Flood, than Creatures at firſt intended; and were but the Rubbiſh and Mud which theſe impetuous Waters had heaped up in a Maſs: But I was thereafter diſſuaded from this Conjecture, by the 8th Chapter of *Prov.* where Wiſdom proving its Antiquity, ſays, That it was with God before the Heavens were prepared, and the Mountains ſettled; by the Scope of which Text it is clear, that the Heavens, Hills, and the reſt of the Creation, are ſaid to bear one Date. It is then more probable, that God foreſeeing that the Luſt of Conqueſt would, like the Needle of the Compaſs, look oft *North*; as is evident by comparing all the Monarchies (firſt the *Aſſyrian*, then *Grecian*, then *Roman*, now *German*,) did therefore bound Ambition, as it were with high Hills, albeit ſince Ambition hath found a Way to climb over them) as if He told them that they ſhould march no farther. Thus it is very obſervable, that the *Northern* Parts of one Kingdom are always more barren than the *Southern* Limits of the Country which lies to the *North* of it. The *North* of *England* more mountainous and barren than the *South* of *Scotland*, albeit it ly nearer the Sun; the *South* of *England* more pleaſant and fertile, than the *North* of *France*; and the *South* of *France*, than the *North* of *Italy*, &c.

We muſt likewiſe conſider, that Nature bruiſed its Face ſo when it fell in *Adam*, that it did then contract many of theſe Blemiſhes which now deform it; and that as it waxes old, its native Beauty is the more deform'd by furrow'd Wrinkles. We cannot judge what it was in Health, by its preſent diſtemper'd Condition, wherein it *groans and travelleth in Pain*, as the Apoſtle tells us. And the Differences betwixt theſe Two States may be known from this, that God, when He completed the Creation, ſaw that all was good; whereas *Solomon* having reviewed it in his Time, ſaw all to be *Vanity, and Vexation of Spirit.*

# CHAP. XII.

## *Of Man, and his Creation.*

THE Third Mirror wherein God is to be admired, is *Man.* This is that noble Creature which God was pleas'd to mould laſt of all others, not willing to bring him home, till by the preceding Creations He had pleniſh'd his Houſe abundantly for him. And albeit in the Creation of all other Creatures it is only ſaid, that *God ſpoke, and it was*: Yet when Man was to be fram'd, the Cabinet Council of Heaven was called; and it is ſaid [*Let Us*;] as if more Art had been to be ſhew'd here, than in all the remanent Fabrick of the terraqueous Globe, and glorious Circles of Heaven. It is likewiſe very obſervable, that albeit all the Fiſhes of the Sea were form'd by one Word, all the Beaſts of the Field by one Act, &c. Yet God was pleas'd to beſtow Two upon the Creation of *Man*; by the firſt, his Body was created out of the Duſt, and thereafter was breathed in his Soul. And albeit tranſient Mention is only made of all other Creations; yet the Hiſtory of Man's Creation is twice repeated, once *Gen.* 1. 27. and again 2. 7. And leſt that foreſeen Deformity, wherewith he was to be beſmeared after his Fall, ſhould make it be queſtion'd, that at his firſt Creation he had receiv'd the *Impreſſa* of God's Image, this is oft repeated. For in the 26. *v. Gen.* 1. it is ſaid, *Let Us make Man in Our Image*; and then again, *and after Our Likeneſs.* And in the 27th *v. So God created Man in His own Image*; and again immediately thereafter, *in the Image of God created He him.* Yet I am confident, that this Image is ſo bedaled in the Mire of Sin, and ſo ſhatter'd by its firſt Fall, and this Divine *Impreſſa* and Print ſo worn out by our old vicious Habits, that if this Genealogy had not been ſo oft inculcated, we could not but have called it in Queſtion, albeit our Vanity be ready enough to believe a Deſcent ſo Royal and Sublime. Wherefore I muſt again admire the Folly of Atheiſts, who, by denying a Deity, cloud their own noble Birth-right.

But albeit Man be made after God's Image, yet that can be no Argument to conclude, that therefore God may be made after Man's Image, or repreſented under His Figure, as the Anthropomorphites fooliſhly contend; no more than if we ſhould conclude, that becauſe a Copy may be taken of an Original, therefore an Original may be taken of a Copy. Neither is this Repreſentation ſalv'd from being Idolatry, by alledging that the Image is not worſhipped, but God, who is repreſented by it: For it hath been well obſerv'd by an Ancient Father, That Idolatry in Scripture is called Adultery. And it is no good Excuſe for an Adultereſs, that ſhe did ly with another becauſe he repreſented her Husband to her, and reſembl'd him as a Copy doth its Original: Yet ſeeing nothing is roomed in our Judgment and Apprehenſion, but what firſt entred by the Wicket of Senſe, it is almoſt impoſſible for Man to conceive the *Idea* of any Thing but veſted with ſome Shape, as each Man's private Reflections will abundantly convince him.

As the boundleſs Ocean keeps and ſhews its well-drawn Images, whilſt it ſtands quiet with a Face poliſh'd like a Chryſtal Cake, but loſes them immediately, how ſoon its proud Waves begin to ſwell and enrage, to ſpit its frothy Foam in the Face of the angry Heavens; ſo whilſt a Stoical Indolency, and Chriſtian Repoſe, ſmooths our reſtleſs Spirits, it is only then that the Soul of Man can be ſaid to retain that glorious Image of God Almighty, with which it was impreſſed at its created Nativity. But when the Waves of Choler begin to roar, or the Winds of Vanity to blow, then that glorious Image is no more to be diſcerned in him, than the Shadows and Repreſentations of In-looking Objects are to be ſeen and diſcerned in the diſquieting Boſom of the troubled Waters.

# CHAP. XIII.

## *Of the Immortality of the Soul.*

THE Stings of a Natural Conſcience, which according to each Man's Actings, create to him either Agues of Fear, or Paradiſes of Joy, do, by theſe omniating Preſages, convince us of the Immortality of the Soul: And ſeeing we ſee its Predictions both in Dreams, in Damps of Melancholy, and ſuch like Enthuſiaſtic Fits, follow'd by ſuitable Events; why may we not likewiſe believe its Predictions, as to its own Immortality; it being the Prudence of a *Virtuoſo* to lay hold of every Mean, which may allay the Rage of his Hereditary Miſfortunes? And to what End would the Soul of Man receive ſuch Impreſſions of Fear and Hope, if by its Mortality it were not to be ſtated in a Condition, wherein its Fears and Hopes were to have ſuitable Rewards or Puniſhments? Moreover, ſeeing God is juſt, He will puniſh and reward; and therefore, ſeeing He puniſhes and rewards not Men according to their Merits or Demerits here, there muſt be doubtleſs a future State wherein that is to be expected. But that which convinces my private Judgment moſt of this Truth, is, that the nobleſt Souls, and the ſharpeſt-ſighted, do, of all others, moſt deſire the State of Separation, and have the weakeſt Attaches to this Life; which muſt doubtleſs proceed from an Aſſurance of Immortality, and that it hath, from the *Piſgah* of its Contemplation, got a View of the Spiritual *Canaan*. For ſeeing the bruitiſheſt of Creatures abhors Annihilation, as the moſt averſable Ill in Nature, doubtleſs the Soul of Man, which is the moſt Divine of all Creatures, would never appete this Separation, if by it, it were to be extinct, and to be no more. And how abſurd were it to believe, that Man's Soul ſhould be made after God's Image, and yet conclude it mortal; a Quality repugnant to any Thing that is Divine? As alſo, how can the Soul be thought to periſh with the Body, ſeeing theſe Accidents which deſtroy the Body, cannot reach it? How can the Heat of a Fever burn, or Rheums drown, that which is not Corporeal, and cannot be touched? And ſeeing Man's leaſt Peccadilio againſt God Almighty, is againſt one who is infinite, were it not abſurd to think, that it could be proportionally puniſhed in the ſwift Glaſs of Man's ſhort Life? than which nothing is more finite, or ſooner finiſhed.

AS the Soul is God's Image, ſo its Products are the Images of his admirable Operations. Do not Mathematicians create Eagles, Doves, and ſuch like *Automata's*? And ſpring not Flowers from the Chymiſts Glaſſes? And thus Art, which is Man's Offspring, doth ape Nature, which is the Workmanſhip of the Almighty: And therefore ſeeing the Soul can, with one Thought, graſp both the Poles, can dart out its Conceits as far as the fartheſt Borders of the imaginary Spaces, create Worlds, and order, and diſorder all that is in this which is already created; it's ſtrange to think it to be either Corporeal or Mortal: For if it were Corporeal and a Maſs of Blood, its Actings wou'd be lent and dull; neither could its Motions be ſo nimble and winged, as are theſe of our agile Spirits. It were impoſſible for our narrow Heads, to inn all theſe innumerable *Ideas* (which are now in them) if theſe were all corporeal; and if theſe be not corporeal, that which produces them muſt be doubtleſs incorporeal, ſeeing *ſimilè generatur a ſimili*; and dull Fleſh and Blood could never produce ſuch Spiritual Emanations.

AS the Soul is God's Image, ſo in this it reſembles Him very much, that we can know nothing of its Nature without its own Aſſiſtance: Like a dark Lantern, or a Spy, it diſcovers every Thing to us, except itſelf. And becauſe it refuſes us the Light of its Candle, whilſt we are in the Queſt of its Myſteries; therefore it is that our Re-ſearches of its Nature are Gropings in the Dark; and ſo ofttimes vain, if not ridiculous. *Avicenna*, *Averroes*, and the Remnant of that *Arabian* Tribe, admiring its prodigious Effects, did attribute our Spiritual Motions to aſſiſting Angels; as if ſuch admirable Notions could not be fathered upon leſs ſublime Cauſes: Which *Cardan* likewiſe thinks, do offer their Aſſiſtance and Light to ſenſitive Creatures, but that the Churliſhneſs of their Nature will not ſuffer them to entertain ſuch pure Eradiations. This diſparages ſo much Humanity, making Man only a Statue, that it were againſt the Soul's Intereſt to admit of any ſuch *Idea's*: For as it tends more to the Artiſt's Praiſe, to cauſe his Products move from hid and internal Springs, than from extrinſic Cauſes; as we ſee in Watches, and ſuch like: So it is more for the Honour of that great Artiſt, and more ſuitable to the Being and Nature of His Creatures, that all its Operations flow from itſelf, than from aſſiſting but exterior Coadjutors; which makes me averſe from *Ariſtotle*'s Opinion, of the Motion of the Spheres by Intelligences. And it were abſurd to think, that Men ſhould be blamed or praiſ'd for thoſe Effects which their

Aſſeſſor-Angels could only be charg'd with. The *Platonics* alledg'd, that all Souls exiſted before their Incarceration in Bodies; in which State of Pre-exiſtence, they were doted with all theſe Spiritual Endowments, which ſhall attend them in the State of Separation; and that at their firſt Alliance with Bodies, their native Knowledge was clouded ἐπιςημης ἀναβολη, *with the putting off Knowledge for a Time*, till by a *Reminiſcentia*, their Intellectuals revived, as by a Reſurrection. And *Origen* added, that theſe Souls were, according to their Eſcapes committed in the State of their Primitive Separation, yoked with better or worſe Bodies; a Shift taken, in all Probability, by him to evite the Apprehenſion of God's being unjuſt, for infuſing innocent Souls into Bodies which would infect them, and by drawing them into inevitable Snares, at laſt condemn them; or at leaſt their Infuſion was the impriſoning thoſe who were not guilty: A Difficulty which ſtraits much ſuch as maintain, that the Soul is not *ex traduce*. What the Hazard of this Opinion may be, my Twilight is not able to diſcover.

It may be, that the *Stoits* miſtake in making the Souls of Men to be but Parcels, decerpt from that univerſal *Anima Mundi* ( by which they doubtleſs meant God Himſelf ) was occaſion'd by a Miſtake of that Text, that *God breathed into Man's Noſtrils, the Breath of Life*; concluding, that as the Breath is a Part of the Body which breathed it; ſo the Soul behov'd to be a Part of that Divine Eſſence: From which by a Second Conſequence, they concluded, that the Soul being a Part of that Divine Being, could not ſuffer nor undergo any Torments; as is aſſerted by *Seneca*, Epiſt. 29. *Cicero*, Tuſc. 5. and defended by their Succeſſors, thoſe primitive Heretics, the *Gnoſtics*, *Maniches*, and *Priſcillianiſts*. But this Baſtard is not worth the foſtering, being an Opinion that God hath Parts, and Man real Divinity; and is doubtleſs a falſe and flattering Teſtimony given by the Soul to itſelf. For ſeeing the Soul is, by Divine Oracles, told us to be made after God's Image, it can be no more called a Part of God, than the Picture ſhould be reputed a Part of the Painter.

*ARISTOTLE*, like the Devil ( who becauſe he knows not what to anſwer, anſwers even in Engines ) tells us, That *Anima* is εντελεχεια, a Term fix'd to exerciſe the empty Brains of curious Pedants, and apter to beget, than explicate Difficulties. Neither believe I, that his Three Souls, which he lodges in Man, to wit, the Rational, Senſitive and Vegetative, do differ more amongſt themſelves, than the Will, Underſtanding and Fancy differ from the Two laſt: So that his Arithmetic might have beſtow'd Five Souls upon Man, as well as Three. But ſeeing he, and many of his Diſciples, believe theſe to be Three, and yet theſe Three to be but One; I admire why they ſhould be ſo nice, as not to believe that pious Myſtery of the Holy Trinity: Whereof in my Opinion, his Trinity of the Soul is as appoſite an Emblem, as was the Conceit of a ſimple Clown, who being ask'd, how he could apprehend the Three Glorious Perſons to be but One? did fold his Garment in three Pleats, and thereafter drew out all Three in One.

As the Heraldry of our Reaſon cannot blazon the Soul's *Impreſſa*; ſo can it not help us to line out its Deſcent: And ſuch would appear to be the Excellency of that noble Creature, that Heaven and Earth ſeem to contend the which ſhall be the Place of its Nativity. Divines ( who are oblig'd to contend for Heaven, becauſe they are its more immediate Penſioners ) will have it to be created and infuſed; whereas Philoſophers ( ambitious to have ſo noble a Compatriot, and willing to gratify Nature, which aliments their ſublime Meditations ) contend that it is *ex traduce*, and is in Generation the Body's other Twin. And albeit it would appear from Scripture, that God accompliſh'd the Creation the firſt Seven Days, and that Nature did then paſs Child-bearing; yet that in my Judgment, muſt be meant of the Creation of whole *Species*, and not of *Individuals*: And to preſs the Soul's not Traduction, I ſhall lend only one Argument, not becauſe it is the beſt, but becauſe it is my own. We ſee, that there where the Soul is confeſs'd to be *ex traduce*, as in Brutes and vegetative Creatures, that Nature, as it were with a Pencil, copies the Young from off the Old. The young Lions are ſtill as rapacious and roaring, as were their Syres from whoſe Loins they deſcended: And the Roſe being pous'd up by the ſalt Nitre which makes it vegetative, ſpreads the ſame Leaves, and appears with the ſame Bluſhes or Paleneſs that beautified its Eye-pleaſing Predeceſſors. The Reaſon of which continual Aſſimulation, proceeds from the Seed's having in its Boſom all theſe Qualities and Shapes, which appear thereafter in its larger Products, whereof they were but a *Map* or *Index*. Whereas Man reſembles never, at leaſt not oft, thoſe who are call'd his Parents: The vitious and tall Father having oft low, but virtuous Children; which ſhows, that the Soul of Man is not deriv'd by Generation, and that the Soul beſtowed upon the Son's Body, is moſt different and aſymbolic to that which lodged in the Father. And this may be farther confirm'd by that excellent Paſſage, *Prov.* 20. 27. where it is ſaid, That the *Underſtanding of Man is the Candle of the Lord*. Our Soul is God's Image, and none can draw that Image but Himſelf; we are the

Stamp of His Divine Nature, and ſo can only be form'd by Himſelf, who is the glorious Seal.

FROM this Divine Principle, that Man's Soul is made after God's Image, I am almoſt induc'd to believe, that *Prophecy* is no miraculous Gift beſtowed upon the Soul at extraordinary Occaſions only, but is a Natural (though the higheſt) Perfection of our Human Nature: For if it be natural for the Stamp, to have impreſs'd upon it all the Traits that dwell upon the Face of the Seal; then it muſt be natural to the Soul, which is God's *Impreſſa*, to have a Faculty of Foreſeeing; ſince that is one of God's Excellencies. Albeit I confeſs, that that Stamp is here infinitely be-dimm'd and worn off; as alſo we know by Experience, that Men upon a Death-bed, when the Soul begins (being detach'd by Sickneſs from the Body's Slavery) to act like itſelf, do foreſee and foretell many remote and improbable Events: And for the ſame Reaſon, I do think Predictions by Dreams, not to be extraordinary Revelations, but rather the Products natural to a rational Soul. And if ſagacious Men can be ſo ſharp-ſighted in this State of Glimmering, as to foreſee many Events which fall out; why may we not ſay, That Man, if he were rehabilitated in the former State of pure Nature, might, without any extraordinary Aſſiſtance, foreſee and propheſy? For there is not ſuch a Diſtance betwixt that Foreſight and Prophecy, as is betwixt the two States of Innocency and Corruption; according to the receiv'd Notions which Men have ſettled to themſelves of that primitive State of Innocency.

FROM the ſame Principle may it likewiſe be deduced, that natural Reaſon cannot but be an excellent Mean for knowing, as far as is poſſible, the glorious Nature of God Almighty. He hath doubtleſs lighted this Candle, that we might by it ſee Himſelf: And how can we better know the Seal, than by looking upon its Impreſſion. And if Religion and its Myſteries cannot be comprehended by Reaſon, I confeſs it is a pretty Jeſt to hear ſuch frequent Reaſonings amongſt Churchmen, in Matters of Religion. And albeit *Faith* and *Reaſon* be look'd upon as *Jacob* and *Eſau*, whereof the Younger only hath the Bleſſing, and are by Divines placed at the two oppoſite Points of the Diameter; yet upon a ſuperficial Enquiry, it would appear by the Laws of his Country, that *Faith* is but ſublimated Reaſon, calcined by that Divine Chymical Fire of Baptiſm; and that the Soul of Man hath lurking in it, all thoſe Virtues and Faculties which we call Theological; ſuch as *Faith*, *Hope* and *Repentance*: For elſe *David* would not have pray'd, *Enlighten, Lord, my Eyes, that I may ſee the Wonders of Thy Law*; but rather, *Lord, beſtow new Eyes upon me.* Neither could the opening of *Lydia*'s Heart have been ſufficient for her Converſion, if theſe pre-exiſting Qualities had not been treaſur'd up there formerly: So that it would appear, that theſe holy Flames lurk under the Aſhes of Corruption, until God, by the Breath of His Spirit (and that Wind which bloweth where it liſteth) ſweep them off. And that God having once made Man perfect in the firſt Creation, doth not, in his Regeneration, ſuperadd any new Faculty (for elſe the Soul had not at firſt been perfect) but only removes all obſtructing Impediments.

## CHAP. XIV.

## *Of Faith and Reaſon.*

I AM always aſham'd, when I hear *Reaſon* called the Step-mother of *Faith*, and proclaim'd Rebel againſt God Almighty, and ſuch declared Traitors as dare harbour it, or appear in its Defence. Theſe are ſuch Fools as they who break their Proſpects, becauſe they bring not home to their Sight the remoteſt Objects; and are as unjuſt as *Jacob* had been, if he had divorc'd from *Leah* becauſe ſhe was tender-ey'd: Whereas we ſhould not put out the Eyes of our Underſtanding, but ſhould beg from God the Eye-ſalve of His Spirit for their Illumination. Nor ſhould we daſh the Proſpect of our Reaſon againſt the rocky Walls of Deſpair; but ſhould rather waſh its Glaſſes with the Tears of unfeigned Repentance.

EVER ſince *Faith* and *Reaſon* have been by Divines ſet by the Ears, the brutiſh Multitude conclude, thoſe who are moſt reaſonable, to be leaſt religious; and the greateſt Spirits, to be the leaſt ſpiritual: A Conceit moſt inconſiſtent with that divine Parable, wherein thoſe who receiv'd the many Talents, improv'd them to the beſt Advantage; whilſt he who had but one, laid it up in a Napkin. And it is moſt improbable, that God would chuſe low Shrubs, and not tall Cedars, for the building of His glorious Temple. And it is remarkable, that God in the Old Law, refus'd to accept the Firſt-born of an Aſs in Sacrifice, but not of any other Creature. And ſome who were content to be called *Atheiſts*, providing they were thought Wits, did take Advantage in this of the *Rabble's* Ignorance, and authorized by their deviliſh Invention, what was at firſt but a Miſtake: And this unriddles to us that Myſtery, why the greateſt Wits are moſt frequently the greateſt Atheiſts.

WHEN I conſider, how the Angels, who have no Bodies, ſinned before Man; and that Brutes, who are all Body, ſin not at all, but follow the pure Dictates of Nature; I am induc'd to believe, that the Body is rather injuſtly blam'd for being, than that really it is, the Occaſion of Sin; and probably the witty Soul hath in this cunningly laid over upon its Fellow, that wherewith itſelf is only to be charged. What Influence can Fleſh or Blood have upon that which is immaterial? No more ſure than the Caſe hath upon the Watch, or the Heavens upon its burgeſſing Angels? And ſee we not, that when the Soul hath bid the Body adieu, it remains a Carcaſs fit nor able for nothing? I believe, that the Body being a Clog to it, may ſlow its Purſuit after Objects, and that it may occaſion indirectly ſome Sins of Omiſſion: For we ſee palpably, that Eating and Drinking dulls our Devotions; but I can never underſtand, how ſuch dumb Orators, as Fleſh and Blood, can perſuade the Soul to commit the leaſt Sin. And thus, albeit our Saviour ſays, that *Fleſh and Blood did not teach* Peter *to give Him His true Epithets*; neither indeed could it: Yet our Saviour imputes not any actual Sin to theſe pithleſs Cauſes. And ſeeing our firſt Sin hath occaſioned all our After-ſinning, certainly that which occaſioned our firſt Sin was the main Source of ſinning; and this was doubtleſs the Soul: For our firſt Sin being an immoderate Deſire of Knowledge, was the Effect and Product of our Spirit, becauſe it was a Spiritual Sin; whereas had it been Gluttony, Luſt, or ſuch like, which ſeems Corporeal, the Body had been more to have been blam'd for it. And in this Conteſt, I am of Opinion, that the Soul wins the Cauſe, becauſe it is the beſt Orator.

## CHAP. XV.

### *Of the Fall of Angels, and what their Sin was.*

WHAT was the Occaſion of the firſt Ill is much debated (and moſt deſervedly) amongſt Moraliſts: For that which was Good, cou'd not produce that which was Evil; ſeeing that which works Miſchief cannot be called Good. Nor can we aſcribe the Efficiency of the firſt Evil to Evil; for then the Queſtion recurs, What was the Cauſe of that Evil? And by this the Suppoſition is likewiſe deſtroy'd, whereby the Evil enquired after is ſuppos'd to be the firſt Evil: But if we enquire, What could produce in the Angels that firſt Sin, whereby they forfeited their Glory? We will find this Diſquiſition moſt myſterious. And it is commonly believed, but by what Revelation I know not, that their Pride cauſed their Fall, and that they catch'd their Bruiſe in climbing; in deſiring to be equal to their Creator, they are become inferior to all their Fellow-Creatures. Yet this ſeems to me moſt ſtrange, that theſe excellent Spirits, whoſe very Subſtance was Light, and who ſurpaſſed far Man in Capacity and Underſtanding, ſhould have ſo erred, as to imagine, that Equality feaſible: A Fancy which the fondeſt of Men could not have entertained. And it were improbable to ſay, that their Error could have ſprouted at firſt from their Underſtanding; and to think it to have been ſo groſs, as that fallen Man doth now admire it: But why may we not rather think, that their firſt Error was rather a Crookedneſs in their Will, than a Blindneſs in their Judgment; and that they fretted to ſee Man, whom they knew to be inferior to themſelves by many Stages, made Lord of all that pleaſant Creation, which they gazed on with a ſtaring Maze. And that this Opinion is more probable, appears, becauſe this Sin was the far more baiting, ſeeing it appear'd with all the Charms wherewith either Pride, Vanity or Avarice, could buſk it; and explicates better to us the Occaſion of all that Enmity with which that Serpent hath always ſince purſu'd ſilly Man. But whether God will ſave juſt as many Believers as there are fallen of the Angels, none can determine; neither can it be rationally deduc'd from that Scripture, *Statuit terminos gentium, juxta numerum Angelorum Dei.* But if it pleaſe God ſo to order it, it will doubtleſs aggrage their Puniſhment, by racking their Diſdain.

The Sin of the Angels was the Sin againſt the Holy Ghoſt.

And ſeeing the Angels have never obtained a Remiſſion for this Crime, it is probable that the Correſpondent of their Sin, is in us the Sin againſt the Holy Ghoſt.

For if their *Lapſe* had been pardonable, ſome one or other of them had, in all Probability, eſcaped; but if this was not that unpardonable Sin, I ſcarce ſee where it ſhall be found. For to ſay, that it is a hating of Good, as *God*, is to make it unpracticable, rather than unpardonable: For all Creatures appete naturally what is Good, and God, as *God*, is Good; ſo that it is impoſſible that He can be hated under that Reduplication.

It may be likewiſe conjectured, That voluntary and deliberate Sacrilege is the Sin againſt the Holy Ghoſt; becauſe *Ananias* and *Saphira*, in withholding from the Church a Part of the Price for which they ſold their Lands, are by *Peter* ſaid to have lied, not to Man, but to the Holy Ghoſt; and his Wife is there ſaid to have tempted the Spirit: But ſeeing both of them reſolv'd to continue in the Church (a Reſolution inconſiſtent with the Sin againſt the Holy Ghoſt) and ſeeing many Sins are more heinous, I cannot interpret this lying to the Holy Ghoſt to be any thing elſe, but a Sin againſt Light, in which moſt Penitents have been involved: Albeit I confeſs, this was a groſs Eſcape, ſeeing it robb'd God of His *Omniſciency*, and ſuppos'd that He was not privy to ſuch human Actings, as have not the Sun for a Witneſs. I do then conclude, That the Sin againſt the Holy Ghoſt may rather be a reſolute Undervaluing of God, and a Scorning to receive a Pardon from Him: And this is that which makes the Angels Fall irrecoverable, and, like the flaming Sword, defends them from their Re-entry into that Paradiſe from which they are exiled. And albeit to ſay, that the Angels Rebellion flows from God's denying them Repentance, may ſuit abundantly well with His unſtainable Juſtice; yet it is hard to reconcile it with His Mercy. And this makes my private Judgment place the Unpardonableneſs of this Sin, not in God's Decree, but in their Obduration and rebellious Impenitency: And the Reaſon why thoſe who commit this Sin are never pardoned, is, becauſe a Pardon is never ſought. That Place of Scripture wherein *Eſau* is ſaid to have ſought the Bleſſing with Tears, and not to have found it, aſtoniſhes me: Yet I believe, that if his Tears had ſtream'd from a Senſe of his Guilt, more than of his Puniſhment, doubtleſs he had not wept in vain; and in that he tear'd, he was no more to be pitied, far leſs pardon'd than a Malefactor, who upon the Scaffold grants ſome few Tears to the Importunity of his Tortures, but ſcorns to acknowledge the Guilt of his Crime; *For Pain, by contracting our Bodies, ſtrains out that liquid Matter, which thereafter globes itſelf in Tears*: There could come no Holy Water from the *Pagan* Font of *Eſau*'s Eyes; and if his Remorſe could have pierced his own Heart, it had eaſily pierced Heaven. Whilſt others admire, I bleſs God, that He hath cloſed up the Knowledge of that unpardonable Sin under His own Privy-ſeal: For ſeeing Satan tempts me to Sin with Hopes of an After-pardon, this Bait is pulled off his Hook by the Fear I ſtand under, that the Sin to which I am tempted, is that Sin which can expect no Pardon. And albeit it be cuſtomary amongſt Men, to beacon and ſet a Mark upon ſuch Shelves and Rocks as deſtroy Paſſengers; yet that is only done where Commerce is allowed, and Sailing neceſſary: But ſeeing all Sin is forbidden, God was not oblig'd to guard us with the Knowledge of that Sin no farther than by prohibiting us not to ſin, but to ſtand in awe.

## CHAP. XVI.

## *Of Man's Fall.*

THAT Firſt Sin whereby our Firſt Parents forfeited their primitive Excellencies, was ſo pitiful a Frailty, that I think we ſhould rather lament, than enquire after it. To think that an Apple had in it the Seeds of all Knowledge, or that it could aſſimilate him to his Creator, and could in an Inſtant ſublimate his Nature, was a Frailty to be admired in one of his Piety and Knowledge. Yet I admire not that the Breach of ſo mean a Precept was puniſh'd with ſuch appearing Rigour, becauſe the eaſier the Command was, the Contempt was proportionally the greater; and the firſt Crimes are by Legiſlators puniſhed, not only for Guilt, but for Example: But I rather admire, what could perſuade the facile World to believe, that *Adam* was created not only innocent, but even ſtor'd with all human Knowledge: For beſides that, we have no Warrant from Scripture for this Alledgance; this his eaſy Eſcape ſpeaketh far otherwiſe.

AND albeit the Scripture tells us, that Man was created perfect; yet that infers not that Man was furniſh'd with all human Knowledge: For his Perfection conſiſted in his adoring of, and depending upon God; wherein we ſee thoſe are exacteſt, whoſe Judgments are leaſt peſter'd with terreſtrial Knowledge, and leaſt diverted with unneceſſary Speculations. And thus it appears, that thoſe Sciences, after which his Poſterity pants, were not intended as noble *Appanages* of that rational Soul, but are rather toyiſh Babies buskt up by fallen Man, whereby he diverts himſelf from reflecting too narrowly upon his native Frailty. And thus Scripture tells us, *That God made Man perfect, but that he ſought out to himſelf many Inventions*; where Perfection and Invention ſeem to be ſtated as Enemies: And it is palpable, that thoſe Sciences which are by us lawrel'd and rewarded, are ſuch as were inconſiſtent with that State of Innocency, ſuch as Law, Theology and Phyſic. And as for the reſt, it is abſurd to think that *Adam*'s Happineſs did conſiſt in the Knowledge of thoſe Things which we our ſelves account either impertinent or ſuperfluous. But that which convinces me moſt of this, is, that we forfeited nothing by *Adam*'s Fall, which Chriſt's Death reſtores not to us. Wherefore ſeeing Chriſt by His own, or His Apoſtles Promiſes, hath not aſſured us of any ſublunary or School-Knowledge; nor hath our Experience taught us, that Sciences are entailed upon the Saints; I almoſt believe, that *Adam* neither poſſeſt theſe before, nor yet loſt them by his Fall. Neither think I St. *Paul* the more imperfect, that he deſir'd to *know nothing but Chriſt, and Him Crucified.* So that the Difference betwixt *Adam* and his Succeſſors, ſtood more in the Straitneſs of his Affections, than in the Depth of his Knowledge. For albeit it be believed, that the Names whereby he baptiz'd the Creatures were full Hiſtories of their Natures, written in Short Hand; yet this is but a Conjecture authorized by no holy Text. It is a more civil Error in the *Jewiſh* Talmudiſts, to think that all the Creatures were brought to *Adam*, to let him ſee that there were none amongſt them fit to be his Companion, nor none ſo beautiful as *Eve*; than it is in their Cabaliſts to obſerve, that the *Hebrew* Word ſignifying *Man*, doth, by a Tranſpoſition of Letters, ſignify likewiſe *Benediction*; and the Word ſignifying *Woman*, makes up *Malediction.* If we ſhould take a Character of *Adam*'s Knowledge from the Scriptures, we ſhall find more Imprudence charged upon him, than upon any of his Succeſſors: For albeit the ſilly Woman was not deceiv'd without the Help of Subtilty; yet *Adam* ſinned upon a bare Suggeſtion, and thereafter was ſo ſimple as to hide himſelf, when God call'd him to an Account; as if a Thicket of Trees could have ſconced him from his All-ſeeing Maker: And when he was accuſed, was ſo ſimple as to think his Wife's Commands ſufficient to exoner him; and ſo abſurd, as to make God Himſelf Sharer with him in his Guilt, *the Woman whom Thou gaveſt me*, &c.

THERE is more Charm in acquiring new Knowledge, than in reflecting upon what we have already gain'd, (as if the *Species* of known Objects did corrupt, by being treaſur'd up in our Brains.) And this induces me to believe, that our Scantneſs of native Knowledge, is rather a Happineſs than a Puniſhment: The Citizens of *London* or *Paris* are not ſo tickled by the Sight of thoſe ſtately Cities, as Strangers who were not born within their Walls; and I may ſay to ſuch, as by ſpelling the Stars deſire to read the Fortunes of others, as our Saviour ſaid to *Peter*, when he was deſirous to know the Horoſcope of the beloved Apoſtle, *What is that to thee*? What can it advantage us to know the Correſpondence kept amongſt the Planets, and to underſtand the whole Anatomy of Nature's *Skeleton*; in gazing upon whoſe Parts, we are oft-times as ridiculous as Children, who love to leaf over talidouce Pictures; for in both, Variety is all the Uſury that can be expected, as the Return of our Time and Pains. And if we pry only into this ſmall Maſs of our preſent Knowledge, we ſhall find that our Knowledge is one of the fertileſt Fountains of our Miſery: For do not ſuch as know that they are ſick, groan more heavily than a Country Clown, who apprehends nothing till Extremity creates in him ſome Senſe? And doubtleſs the Reaſon why Children and Ideots endure more, and drunken Men eſcape more Dangers than others, is, becauſe albeit they cannot provide ſuch apt Remedies, yet they are leſs acquainted with what they feel than we are. Are not thoſe who underſtand that they are affronted, more vex'd than ſuch as are ignorant of theſe Misfortunes? And thoſe who foreſee the Changes and Revolutions which are to befal either their Friends or their Countries, are thereby more ſadly diſeaſed, than he who ſees no farther than his Noſe. Our Saviour wept when He did foreſee, that one Stone of *Jeruſalem* ſhould not be left upon another; and when *Hazael* ask'd *Eliſha* why he wept, he told him, It was becauſe he did foreſee what Miſchief *Hazael* was to do in *Iſrael*. Let us not then complain of the Loſs of *Adam*'s Knowledge, but of his Innocency; we know enough to ſave us, and what is more than that, that is ſuperfluous.

*ADAM* cannot be thought to have been the firſt Sinner, for *Eve* ſinned before him; ſo that albeit it ſeem a Paradox, yet it is moſt probable, that albeit *Adam* had for ever abſtained from eating the *forbidden Fruit*, his Poſterity had been ſtill as miſerable as now they are; ſeeing the Guilt of either of the Parents had been ſufficient to daſh the Innocence of

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the Children. For as the Scripture tells us, *Who can bring a clean Thing out of an unclean?* And *David*, in that Text, which of all others ſpeaks moſt expreſly of Original Sin, lays the Guilt upon her, and confeſſeth only, *That his Mother had conceived him in Sin.*

AS *Adam* was not the firſt Sinner, ſo the eating of the Apple may be juſtly thought not to be the firſt Sin; *Eve* having, before his eating the Apple, repeated moſt falſly the Command. For whereas God did aſſure them, *That in that Day they did eat the Fruit, they ſhould ſurely die: Eve* relates it thus, *Ye ſhall not eat the Fruit, leſt ye die*; repreſenting only that as a Contingent which was moſt certain: And whereas God had only ſaid, *Ye ſhall not eat of the Fruit of the Tree, Eve* ſays, *God ſaid, Ye ſhall not touch it*; which, it may be, furniſhed the Serpent with this Argument to cheat her; Ye ſee God hath deceiv'd you, for the Fruit may be touched without Danger, why may it not be eaten without Hazard? and it is probable that He hath failed in the one, as well as in the other. But to abſtract from this; it cannot be ſaid that the eating of the *forbidden Fruit* was the firſt Sin; for before *Adam* did eat thereof, he behoved both to believe the Serpent and misbelieve his Maker; and thus *Misbelief* was the firſt Sin: For after he had credited the Serpent's Report, he was no longer Innocent; and ſo he did not eat the Apple till after his Fall. What wiſer are thoſe Divines, who debate whether *Adam*'s Falling-ſickneſs and Sin had become hereditary, if our Predeceſſors had come out of his Loins before he ſinned; than thoſe who combated for the largeſt Share of the King of *Spain*'s Gold, if it had been to be divided?

IN the Almighty's Procedure againſt poor *Adam* for this Crime, His infinite Mercy appears to Admiration; and God foreſeeing that Man might ſharpen the Axe of Juſtice too much upon the Whetſtone of private Revenge, ſeems to have in this Proceſs form'd to him an exact Model of Inquiſition. For He arraigns and cries, *Adam, Adam, where art thou?* He ſhews him his Dittary, *Haſt thou eat of the Fruit whereof I commanded thee that thou ſhouldeſt not eat?* He allows him Exculpation, *Who told thee?* and in order thereto, did examine the Woman upon whom *Adam* did transfer the Guilt. And albeit nothing could eſcape His Omniſciency, and that He did ſee *Adam* eat the Apple; yet to teach Judges that they ſhould walk according to what is proved, and not according to what they are themſelves conſcious to, He did not condemn him till firſt He ſhould have a Confeſſion from his own Mouth. And thus, *Gen.* 18. 21. the Lord ſays, *Becauſe the Cry of* Sodom *is great* —— *I will go down and ſee whether they have done altogether according to the Cry of it*, &c. And in the laſt Place, albeit the fatal Decree did bear, *In that Day that thou eateſt thereof, thou ſhalt ſurely die*; yet were his Days prolonged Nine Hundred and Thirty Years after the Sin was committed. It is too curious a Diſquiſition to enquire how God can be ſaid to be merciful, Mercy being the Mitigation of Juſtice; of which His pure Nature cannot be capable, ſeeing whatever He wills is juſt; and ſo He cannot be thought in any Thing which He wills, to recede from Juſtice: And ſo can no more properly be ſaid to be merciful, than one Act can be both the Law, and the Mitigation of the Law. But I will preſs no Point of this Nature, knowing that humble Modeſty is the beſt Theology.

## CHAP. XVII.

### *Of the Stile of* Geneſis.

THE *Vatican* of *Paganiſm* cannot, for the Maleneſs of its Stile, match that matchleſs Book of *Geneſis*, whereof each Sentence ſeems a Quarry of rich Meditations, and each Word a Spell, ſufficient to conjure the Devil of *Delphos*. Might not that excellent Expreſſion, *Let Us make Man after Our Image*, convince any of the Being of a Trinity, who deny Plurality of Gods? It is wonderful, that the Saturn-humor'd *Jew* can, in this Paſſage, miſtake his own Saviour; and it is ſtrange that he ſhould not, from the Triangular Architecture of his own Heart, conclude the Trinity of the Godhead, whoſe Temple it was appointed to be. Albeit I be an Admirer of this Nurſe of Cabaliſm; yet, I approve not the Conceit of thoſe doting Rabbies, who teach that God, from His own Mouth, indited both the Words and Matter of the *Pentateuch*; whereas He furniſhed only to the other Prophets the Matter and Subject unphraſed: For not only did God promiſe that He ſhould put His Words in their Mouths, but likewiſe, they preface thus their own Prophecies, In the Days of ſuch a King, the Word of the Lord came to ſuch a Prophet, ſaying, *&c.* Neither is this Conceit conſiſtent with that high Eſteem which they, even in this intend for their Patron *Moſes*; ſeeing it allows him leſs Truſt from his Divine Maſter, than the other Penmen of Scripture had repoſed in them.

## CHAP. XVIII.

### *Why Man fell.*

THAT Brain hath too little *pia mater*, that is too curious to know, why God, who evidences ſo great a Deſire to ſave poor Man, and is ſo powerful, as that his Salvation needed ever have run the Hazard, if His infinite Wiſdom had ſo decreed, did yet ſuffer him to fall: For if we enter once the Liſt of that Debate, our Reaſon is too weak to bear the Burden of ſo great a Difficulty. And albeit it may be anſwered, that God might have reſtrain'd Man, but that Reſtraint did not ſtand with the Freedom of Man's Will which God had beſtow'd upon him; yet this Anſwer ſtops not the Mouth of the Difficulty. For certainly, if one ſhould detain a mad Man from running over a Precipice, we could not be thereby ſaid to have wrong'd his Liberty: And ſeeing Man is by many Divines allowed a Freedom of Will, albeit he muſt of Neceſſity do what is Evil, and that his Freedom is ſalv'd by a Liberty to chuſe only one of more Evils, it would appear ſtrange why his Liberty might not have conſiſted well enough with a moral Impoſſibility of ſinning, and might not have been abundantly conſerved in his Freedom to chuſe one of more Goods: yet theſe Reaſonings are the calling God to an Account; and ſo impious. For, if God had firſt created Man ſurrounded with our preſent Infirmities, could we have complained? Why then ſhould we now complain, ſeeing we are but fall'n to a better Eſtate than we deſerved; ſeeing we ſtumbl'd not for Want of Light, but becauſe we extinguiſh'd our own Light; and ſeeing our Saviour's dying for us may yet reinſtate us in an happier Eſtate than that from which we are now fall'n.

ALBEIT the Glaſs of my Years hath not yet turned Five and Twenty, yet the Curioſity I have to know the different *Limbo's* of departed Souls, and to view the Card of the Region of Death, would give me Abundance of Courage to encounter this King of Terrors, though I were a *Pagan*: But when I conſider what Joys are prepar'd for them who fear the Almighty, and what Crazineſs attends ſuch as ſleep in *Methuſalem's* Cradle, I pity them who make *Long Life* one of the ofteſt repeated Petitions of their *Pater noſter*; and yet, thoſe ſure are the more advanc'd in Folly, who deſire to have their Names enſhrin'd after Death in the airy Monument of *Fame.* Whereas it is one of the Promiſes made to the Elect, *That they ſhall reſt from their Labours, and their Works ſhall follow them.* Moſt Men's Mouths are ſo foul, that it is a Puniſhment to be much in them: For my own part, I deſire the ſame good Offices from any good Name that I do from my Cloaths; which is to ſkreen me from the Violence of exterior Accidents.

AS thoſe Criminals might be judg'd diſtracted who being condemn'd to die, would ſpend their ſhort Reprieval in diſputing about the Situation and Fabric of their Gibbets: So may I juſtly think thoſe *Literati* mad, who ſpend the ſhort Time allotted them for Repentance, in debating about the Seat of Hell, and the Torments of tortur'd Spirits. To ſatisfy my Curioſity I was once reſolv'd, with the Platonic, to take the Promiſe of ſome dying Friend, that he ſhould return and ſatisfy me in all my private Doubts concerning Hell and Heaven; yet I was juſtly afraid, that he might have return'd me the ſame Anſwer which *Abraham* return'd to *Dives, Have they not* Moſes *and the Prophets; if they hear not them, neither will they be perſuaded though one ſhould riſe from the Dead?*

# CHAP. XIX.

## *A Refutation of the* Millenarians.

THE *Millenar*'s Ephemerides, which aſſure us that Chriſt ſhall reign a Thouſand Years with the Saints on Earth, is as ſenſual an Opinion as that of the *Turks*, who make Heaven a Brothel, wherein we ſhall ſatisfy our Venereous Appetites; for the one ſhews the vain Glory and vindictive Humor of the Saints, as palpably as the other ſhews the Luſt of the *Mahometans*. If Chriſt's Reigning ſo many Years be for convincing the World that he is the real *Meſſiah*, their Hereſy ſhould have antedated His Coming, and His Reign ſhould rather have begun long ſince, when many Ages were to be converted; or at leaſt it ſhould not have been thruſt out upon the Selvage and Border of Time, when very few ſhall remain to be convinc'd: And if in this they intend a diſplaying of Chriſt's Glory, certainly they are miſtaken; for what Honour can it be for a King, to have his Footſtool made his Throne? So that I think, theſe poor Phanatics have taken the Patronage of this Error rather by Neceſſity than Choice, all other Opinions and Conceits being formerly preengag'd to other Authors.

# CHAP. XX.

## *The Author's Cenſure of this Eſſay, and an Account of his Deſign.*

AS I am not able, by the *Jacob's Ladder* of my Merits, to ſcale Heaven; ſo I am leſs able, by the *Jacob*'s *Staff* of my private Ability, to take up the true Altitude of its Myſteries. I have travel'd no further in Theology than a *Sabbath-days* Journey; and therefore, it were Arrogance in me to offer a Map of it to the credulous World: But, if I were worthy to be conſulted in theſe ſpiritual Securities, I ſhould adviſe every private Chriſtian, rather to ſtay ſtill in the Barge of the Church, with the other Diſciples, than by an ill bridled Zeal, to hazard drowning alone with *Peter*, by offering to walk upon the unſtable Surface of his own fleeting and water-weak Fancies, though with a pious Reſolution to meet our Saviour. For, albeit one may be a real Chriſtian, and yet differ from the Church, which ſays, That the Wiſe Men who came to bow before our Saviour's Cradle-throne, were Three Kings, and in ſuch other Opinions as theſe wherein the Fundamentals of Faith, and Quiet of the Church are no ways concerned; yet certainly, he were no wiſe Man himſelf, nor yet ſound Chriſtian, who would not, even in theſe bow the Flag of his private Opinion to the Commands of the Church. The Church is our Mother, and therefore we ſhould wed no Opinion without her Conſent who is our Parent; or if we have raſhly wedded any, it is in the Power of the Church and her Officials to grant us a Divorce. As for my ſelf, my Vanity never prompted me to be Standard-bearer to any, either New Sect, or Old Hereſy; and I pity ſuch as love to live like Pew-keepers in the Houſe of God, buſied in ſeating others, without ever providing a Room for themſelves. If there be any Thing in this Diſcourſe which may offend ſuch as are really pious, it ſhall much grieve me, who above all Men honour them moſt. What I have ſpoken againſt Caſes of Conſcience and the like, ſtrikes not againſt their Chriſtian-Fellowſhip and Correſpondence, but againſt the apiſh Fopperies of pretending Counterfeits. It ſhall always be my Endeavour for the future, rather to drop Tears for my own Sins, and the Sins of others, than yrk for their Converſion: Our Prayers help ſuch as never heard them, whereas thoſe only who read our Diſcourſes, are better'd by them. *Abraham*'s Prayers prevailed more with God (even for *Sodom*) than *Lot*'s reiterated Sermons; and no Wonder that the Succeſs be unequal, ſeeing in the one we have to do with a merciful God; whereas in the other we muſt perſuade a hard-hearted People.

I intend not to purchaſe from Poſterity, the Title of *Reformer*, ſeeing moſt of theſe have fall'n under the ſame Guilt, and have had the ſame Fate with that curious Painter, who having drawn an excellent *Face*, as happily as could have been expected from the ſmootheſt Mirror, did thereafter daſh it afreſh upon the Suggeſtion of each Intrant, till at laſt he reformed it from being any Way like to the Original.

*DIVINITY* differs in this from all other Sciences, that theſe being invented by Mortals, receive growth from Time and Experience; whereas, it being penn'd by the Omniſcient Spirit of God, can receive no Addition without receiving Prejudice. It is moſt remarkable, that our Saviour's Prayers, His Sermons, and the *Creed* delivered to us by His Apoſtles, were roomed up in far narrower Bounds than theſe of our Times, which an Hydropſy of ill concocted Opinions hath ſwell'd beyond their true Dimenſions: Many whereof have either been brooded by *Vanity* or *Intereſt*; or elſe ignorant and violent Defendents being brought to a Bay, by ſuch as impung'd their reſolv'd upon Principles, have been forc'd to aſſert theſe By-blow and Preter-intentional *Tenets*; and having once floored them have thereafter judg'd themſelves concern'd to defend them, in Point of Scholaſtic Honour. Some well-meaning Chriſtians likewiſe, do ſometimes, for Maintenance of what is lawful and pious, think that they may lawfully advance Opinions, which otherwiſe they would never have allowed of; and as in Nature we ſee, that the Colliſion of Two hard Bodies makes them rebound ſo much the farther from one another: So Oppoſition makes both Parties fly into Extremities. Thus I believe that the Debate betwixt *Roman-Catholics* and *Proteſtants*, concerning the Virgin *Mary*, have occaſion'd in ſome amongſt both, Expreſſions, if not Heretical, yet at leaſt Undecent. Thus a great many *Confeſſions of Faith*, become, like *Noah*'s Ark, a Receptacle of clean and unclean: And which is alſo deplorable, they do, like ordinary Dyals, ſerve only for Uſe in that one Meridian for which they are calculated, and by riding Twenty Miles ye make them Heterodox. I ſpeak not this to the Diſparagement of our own Church, (which I reverence in all its Precepts and Practices) but to beget a Bluſhing Conviction in ſuch as have diverted from it; and whoſe Conventicles, compared with our *Jeruſalem*, reſemble only the removed Huts of thoſe who live apart, becauſe they are ſick of the Plague.

I am not at a Maze, to ſee Men ſo tenacious of contrary Principles in Religion; for, Man's Thoughts being vaſt and various, he ſnatches at every offered Suggeſtion; and if by Accident he entertain any of thoſe many, as a Divine Immiſſion, he thereafter thinks it were Blaſphemy to bring that Thought to the Teſt of *Reaſon*, becauſe he hears that *Faith* is above *Reaſon*; or to relinguiſh it, becauſe the common Suffrage of his Country runs it Counter, ſeing he is taught even by them, that the Principles of *Belief* muſt not be choſen by the Poll.

AND ſeeing *Faith* is above *Reaſon*, (albeit as I ſaid formerly, it would ſeem otherwiſe) I wonder not to ſee, even the beſt temper'd Chriſtians, think that which is not their own Religion to be therefore ridiculous.

MY Deſign all alongſt this Diſcourſe butts at this One Principle, *That Speculations in Religion are not ſo neceſſary, and are more dangerous than ſincere Practice.* It is in Religion as in Heraldry, the ſimpler the Bearing be, it is ſo much the purer and the ancienter. I will not ſay that our School-Diſtinctions are the Impreſſions of the Devil's Cloven Foot; but I may ſay, that our Piety and Principles ſcarce ever grow after they begin to fork in ſuch Dichotomies; which, like *Jacob* and *Eſau*, divide and jar as ſoon as they are born, and betwixt whom, the poor Propoſition out of which both did ſpring, is, like a Malefactor, moſt lamentably dragg'd to Pieces. I have endeavoured to demonſtrate, that Dogmaticalneſs and Paralytic Scepticiſm, are but the *Apocrypha* of true Religion; and I believe the one begets the other, as a Toad begets a Cockatrice. For the Sceptic perceiving, that the Magiſterial Dogmatiſt errs (as thoſe muſt err ſomewhere who aſſert too much) even in thoſe Things whereof he affirms he is as ſure as of any Principle in Religion, (which is their ordinary Stile) he finding out their Error in one of their Principles, is thereby emboldned to contravert all. This being the Scope of this Eſſay, I wiſh that thoſe who read, expound it as Divines do Parables, *Quæ non ſunt argumentativa ultra ſuum ſcopum.*

# CHAP. XXI.

## *The Author's Apology.*

I Doubt not but ſome will think me no leſs abſurd in writing againſt Vanity, whilſt I am ſo vain myſelf as to write Books, than the Philoſophers were judged of old, for denying Motion whilſt their Tongues mov'd in their Cheeks. But to theſe my Anſwer ſhall be, that finding many groveling in their Errors, I have, in this Eſſay, proffer'd them my Aſſiſtance; not to ſhew my *Strength* but my *Compaſſion*. The Multitude (which albeit it hath ever been allowed many Heads, yet was never allowed any Brains) will doubtleſs accuſe my Studies of Adultery, for hugging Contemplations ſo excentric to my Employment. To theſe my Return is, that theſe Papers are but the Parings of my other Studies; and becauſe they were but Parings, I have flung them out into the Streets. I wrote them in my Retirements when I wanted both Books and Employment; and I reſolve that this ſhall be the laſt Inroad I ſhall ever make into foreign Contemplations. There are ſome Thoughts in this Piece which may ſeem to rebel againſt the Empire of the Schools; yet, who knows but my Watch goes right, albeit it agree not with the public Clock of the City? Eſpecially where the Sun of Righteouſneſs hath not, by pointing clearly the Dial of Faith, ſhewed which of the Two are in the Error. There are ſome Expreſſions in it, which Cenſure may force to ſpeak otherwiſe than they have in Commiſſions; yet none of them got Room in this Diſcourſe, until they firſt gave an Account of their Deſign to a moſt pious and learned Divine: And ſo, it may be the Lines are of themſelves ſtreight, albeit they ly not parallel'd with each Cenſurer's crooked Rule. As this Diſcourſe intends for the Divines of our Church all Reſpects; ſo all that is in it, is moſt freely ſubmitted to their Cenſure.

***The Author intended this Diſcourſe only as an Introduction to the Stoics Morals; but probably, he will, for many Years ſtop here.***

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### *POSTSCRIPT.*

BY the *Laws of this Country*, the Author means that Religion which is ſettled by Law. In other Expreſſions the Author recommends himſelf to the Gloſs of the Reader's Charity.

### *FINIS.*

# A
# MORAL ESSAY,
PREFERRING
# SOLITUDE
TO
# Publick Employment,
And all its
# APPANAGES:
SUCH AS
Fame, Command, Riches, Pleaſures, Converſation, &c.

——*Would'ſt thou be ſpoken for to the King, or to the Captain of the Hoſt? And ſhe anſwered, I dwell among mine own People,* 2 King. 4. 13.

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## To the Right Honourable
## *JOHN* Earl of *Crawford, &c.*

My LORD,

SEEING *Man can glory in nothing, but in that he is God's Image; certainly that muſt be his moſt glorious State wherein that Image is moſt clearly ſeen; and this is* Solitude; *wherein his compoſed Soul (like the ſmooth Face of the Ocean) repreſents, with much Advantage, this glorious Image, which the unequal Riſings of ſtormy and aſpiring Waves of Ambition do exceedingly conceal. The Heathen Poet* Lucretius *deſcribes the great Perfections of the Deity to conſiſt in that it is,*

——Privata dolore omni, privata periclis,
Ipſa ſuis pollens opibus——

*And* Cicero *upon this Score confeſſes, That the Philoſopher's Life was of all others moſt preferable, becauſe of all others it approached neareſt to that of the Gods. This,* My Lord, *invited me to write this Diſcourſe in its Favours; which becauſe I intended as a Bundle of Rods, for whipping ſuch as were fondly Ambitious, I did therefore ſtrip naked of thoſe Leaves and Flouriſhes of Eloquence, which by making them more pleaſant, could not but make them leſs ſharp. And if any tax me for ſending this Book to public View, from that* Solitude *which both it and I ſo much commend; my Anſwer is, That either it will convince thoſe who read it, and then it will gratify that* Solitude *which it hath left; or elſe it will meet with Cenſure and Diſdain, and then its Fate will demonſtrate how dangerous it is to gad abroad: To preſs which is another of my great Deſigns.*

*I intend not really to depreciate ſuch by this Diſcourſe, as enjoy Honours and Employment; that Deſign lies as far out of my Road, as it is rais'd above my Power: But I intend by it to congratulate with ſuch as either undervalue them out of Inclination, or have loſt them by Accident; and to diſcipline ſuch unquiet Humours, as like Powder, do in blowing up themſelves deſtroy all that is above them, or reſiſts their violent Aſcent: Wherein as I oblige Philoſophers by complimenting the Object of their Complacency, ſo I gratify Stateſmen by reclaiming ſuch as are the ordinary Object of their Fears. Neither ſhould any Thing in this Diſcourſe, which is picquant againſt thoſe Courtiers who have been rather Great than Good, diſpleaſe ſuch as are both Good and Great; more than it ſhould diſpleaſe a Gentleman of Noble Shapes and Features, to ſee a Painter draw another Man (though of the ſame Species with himſelf) under all the Diſadvantages that can be trac'd by a deforming Pencil.*

*THAT I ſhould chuſe your Lordſhip for my Patron, is no Act of Virtue; becauſe your Condition, as it ſtands circumſtantiate, made you almoſt the only Perſon who deſerv'd it at all, and altogether the Perſon who deſerv'd it moſt; for being the beſt Pattern for ſolitary Perſons, ye were the Perſon who deſerv'd moſt to be the Patron of* Solitude *it ſelf; eſpecially having obliged it ſo far, as to prefer it to that Rival againſt which it now diſputes for Precedency; and preferr'd it, after its adverſe Party had been your old Acquaintance, and had offer'd to bribe you for your Suffrage, with a Purſe heavy enough to have weigh'd down a light Spirit. Fear not,* my Lord, *the Want of* Fame *(which is the only Thing that* Solitude *is thought to want:) For as the* Heathens *reſembled it to a Maid, ſo it hath this of a Coy-Maid likewiſe, that it courts moſt thoſe who ſeem moſt to undervalue it; and rarely any Perſon admires his own Servants ſo much, as it doth thoſe who are Strangers to it. And great Men have this Loſs, that their Superiors will not admire them, as being leſs than themſelves; their Equals will not, becauſe they hate them; nor their Inferiors, becauſe they envy them; and do but too oft imagine that they are oppreſt for feeding their Luxury. That famous Rod which wrought ſo many Miracles for others openly in* Egypt, *did never it ſelf flouriſh till it was laid up in the Tabernacle, (according to their Opinion, who will have both theſe to have been one and the ſame;) and the Diamond ceaſes not to enjoy a greater Luſtre, though hid in the darkeſt Corner, than theſe pleaſing Bloſſoms do, which the weakeſt Breath of a Storm will command down from the higheſt Branch upon which they parch.* Fame *then ſhall tranſmit your Name to Poſterity, as the* Jews *did their embalm'd Bodies which they preſerv'd perfumed and odoriferous in ſecret and retired Grots and Sepulchres; whereas it will preſerve that of more public Perſons, only as the* Egyptians *did theirs, whom by expoſing to the open Sun they kept as Mummy, but ſo black and parch'd, as that it had been better they had return'd to their former Aſhes. But though* Fame *ſhould not thus gratify you, yet Virtue (who hath ſo few deſerving Followers now, that it cannot but pile up Pyramids of Favours upon ſuch as are) will recommend you to ſucceeding Ages, both to let ſee that ſhe wants not her Trophies even in this Dotage of the World, (wherein ſhe is not ſo deform'd by Age, as not to have Charms ſtrong enough to conquer ſuch as deſerve her Favour) and to engage others by this Act of Gratitude to a Dependance upon her. And amongſt her Admirers, You, as one of her Minions, ſhall have ſtill all Deference paid you, by*

Your Lordſhip's

Moſt Humble Servant.

SOLI-

# SOLITUDE

Preferr'd to

# Publick Employment.

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*Generous* **CELADOR,**

I Know that your Advancement was to you, but as the being thrown up is to ſolid Bodies; from which State they cannot be ſo properly ſaid to fall, as to run with Inclination to that beloved Centre and Level from which they were at firſt rais'd. I know you made no other Uſe of that Height which makes others giddy, than to take, from off its loftieſt Tops, a full Proſpect of all theſe Vanities which ſo much raviſh mean Spirits. And your publick Deportment being thus ſo exact a Picture of true Virtue, I hope your Retirement will be the ſhadowing of that noble Draught.

In the Confidence of this, I ſend you this Elogy of *Solitude*; not as Phyſicians ſend Pills, with Praiſes to their averſe Patients: For, as it were below your Stoiciſm to need ſuch; ſo it is above my Skill, to be able to adminiſtrate the meaneſt Remedy to ſo well a complexion'd Soul as yours. But I praiſe it to you, as we uſe to praiſe a Miſtreſs to her enamour'd Gallant, whoſe Intimacy with her, though it far exceeds the Acquaintance of the Praiſer, yet it breeds not in her *Enamorato* an Unwillingneſs to hear what he already knows; Complacency being oftner the Product of our Knowledge, than the Occaſion of our Enquiry. In paralleling *Greatneſs* and *Solitude*, as to their Moral Advantages, I ſhall firſt make ſome few Reflections upon the Ends for which both are ſought; upon the Employments wherein both are exerciſed; and laſtly upon the Revenue made upon either of theſe Employments, when Fate or Death ſhall force us to leave both.

*Sect.* I. The Motives to both compared.

AS to the Deſign which Men propoſe to themſelves, in purſuing Greatneſs and publick Employment; all will tell you, That they ſeek theſe either to under-prop their falling Families, (whoſe proud Tops begin to bow in Homage to that Mortality, which will needs one Day triumph over us and ours,) or elſe to defend themſelves againſt ſome conſiderable Enemy, or to wipe off the Stains and Scars of Diſloyalty or Prejudice. For when opulent or great Perſons undertake them, the very Rabble have ſo much Prudence, as to condemn theſe for mad Men. When Philoſophers or ſtrong Spirits embark in them, they ſay they do it to ſerve their Country, and not their Inclinations; and Flatterers pretend, That they deſign in theſe, the pleaſing of their Prince, and not of their Humour: So that, as if all were aſhamed of them, all do excuſe their Zeal after them: Whereas *Solitude* (like a great Beauty) is courted for itſelf, and not for its Portion. And ſuch as intend publick Employments, will pretend a Love and Deſign for *Solitude*; and when they have attain'd their Honours, they will ſtill praiſe Retirement: Whereas, ſuch as live privately, may ſometimes pity, but will never ſeem to envy ſuch as are in publick Employment. And not only is *Solitude* courted for itſelf, and Greatneſs for ſome remoter End; but even Greatneſs and publick Employment are themſelves oft (if not always) deſign'd as ſubſervient to *Solitude*. Thus Merchants hazard drowning, and, like the Sun, reel about the World, that they may gain as much as may afford them the Conveniency of a Receſs. For this, Lawyers empty their Brains, and Soldiers open their Veins; and have oft nothing to ſweeten their Anxieties, but the remote Proſpect of a ſolacing Retirement: So that *Solitude* muſt be excellent, ſeeing its Enemies buy it at ſo dear a Rate. And even *Cæſar* behoved to recreate himſelf, with an *aliquando mihi licebit mihi vivere*, eſteeming that Part of his Life to belong to others, which was ſpent on other Men's Employments. And ſeeing all aim at *Solitude*, it muſt certainly be by as much more nobler than publick Employment, as the End is more noble than the Means: And in this it approaches very near the Nature of Happineſs, which is defined to be that *To which all Things tend, and which itſelf reſpects nothing yet acquirable.* But yet I muſt condemn thoſe, who are at all this Pains to gain *Solitude*, whom for this I eſteem as unskilful in the Art of Happineſs, as thoſe Navigators in *Solomon*'s Time were of the Art of Sailing; who cruiſed along ſo many tedious Shores for reaching the Gold of *Ophir*, a Journey eaſily to be accompliſhed, in far leſs than Half the Time. Happineſs is not the Product of ſuch Endeavours, and theſe are rather Hindrances than Helps to *Solitude*. And this remembers me of that notable Anſwer, given by *Cineas* the Philoſopher, to *Pyrrhus*; who when he told him that he intended to conquer *Greece*, then *Rome*, and ſo all the World; askt him, Why he propoſed all that Toil to himſelf? To which *Pyrrhus* anſwering, that he would do it to the End he might, at his Return live happily and merrily with his Friends the Reſidue of his Life; *Cineas* tancing him moſt ſharply, told him that he might live ſo, and do ſo preſently, and ſo need not be at ſo much ſuperfluous Pains.

*MAN* is ſo frail a Creature, and his Imperfections are ſo great and many, that that can only make him be reputed Excellent, which can beſt conceal his natural Frailties: And albeit our Judgments are but ſhallow, yet here lies our Misfortune, that we are not able to abide the Teſt of one another's Judgment. And this is the Knack for which Men, who are ſilent and reſerved, or melancholy and dumpiſh, are reputed wiſe: For we admire not what we ſee, but what we ſee not. And yet, neither Melancholy nor Silence ſerve ſo to skreen our Infirmities, as *Solitude* does; ſeeing ſuch as converſe in the World may be fathom'd by other Means than Diſcourſe, and may upon unexpected Rencounters be even provoked to that likewiſe. Wherefore it is a virtuous Impoſture, and an allowable Charltanry, to deſign Retirement; becauſe that ſecures againſt all the Inconveniencies of either of theſe, by abſtracting us from the Temptations of the one, and from the Engines of the other: And if Melancholy or Silence poſſeſſes any Thing in their Nature, which can be thought Excellent, certainly *Solitude* enjoys the ſame in a more eminent Meaſure; for theſe make but Parcels of that noble State; Silence being but a *Solitude* in Diſcourſe, and Melancholy a *Solitude* in Humour: Whereas *Solitude* is more Excellent than theſe, becauſe in poſſeſſing both their Advantages, it wants the aduſt Bile and Jealouſies of Melancholy, and the Conſtipation of Silence.

EXCEPT ſome volatile Heads, whoſe Mercurial Complexion hath inclined them rather to a Reſtleſneſs, than virtuous Activity; and who, like the Wind, are nothing at all when they are not moving; and ye will find the Reſidue of Men ſo averſe from Toil and Employments, that they muſt be either brib'd to them by Gain, or baited with Honour: And the moſt diligent amongſt active Stateſmen will wiſh, that their long'd-for Triumphs, or deſired Employments were at a Period, that they might *enjoy themſelves* (for ſo they term it) *in a ſolitary Retirement*; which is that *Canaan* of Reſt, which, like *Moſes* on *Piſgah*, they ſee afar off, but without Hopes of Enjoyment; and ſo fond are theſe upon one Moment of it when enjoyed, that they will diſoblige for it On-Waiters, neglect their Intereſt, and ſlight oft great Advantages. Thus then we ſee that Nature, Inclination and Pleaſure, vote all for *Solitude*; and that publick Employment is unnatural in its Riſe, and wearying in its Sequel, as it is dangerous (if not fatal) in its Termination.

I know that there are ſome great Perſons, who, like great Fiſhes, never come to Shore till they be wounded; Diſaſters, Affronts and Neceſſities driving them there for Shelter, rather than Choice; and this makes many think that theſe *Encomiums* given to *Solitude*, are either contrived by Pedants, who could never reach Preferments, or by degraged Courtiers, who after they have been outed of their publick Employments, harangue againſt what they have loſt, to ſatisfy not their Reaſon, but their Revenge. But to theſe I anſwer, That *Solitude* is by this Objection prov'd to be an excellent State, ſeeing even the Diſtreſſed expect an Aſyle and Protection there: For Diſtreſſes make us run where we may expect Help; and that muſt be the ſecureſt Harbour, to which the diſtreſſedſt Veſſels make their Application. And I believe beſt theſe Elogies, which *Solitude* gets from ſuch who know both States; and becauſe ſome uſe this as a Pretext, therefore it muſt be Excellent: For the excellenteſt Things are only uſed, and can only ſerve as Pretexts; and that cannot but be much reſpected amonſt Men, whoſe very Shadow can make Miſery paſs for Virtue, and make Misfortunes be eſteemed Happineſs. Yet certainly Misfortunes may make Men real Philoſophers, as Afflictions make real Chriſtians: And it is very probable that one, who after much Confidence in Court and Riches hath been tumbled down unexpectedly, will be more really convinced of its Slipperineſs and Emptineſs, than ſuch as never found the Effects of ſo much Revolution. But there are many alſo, ſuch as *Diocleſian* and *Charles* the Vth, both Emperors, and many others, who after a complete Fruition of all courtly Succeſs and Pleaſure, have taken a ſolemn Congy of it, whilſt it yet ſmiled upon them; and I am confident many more would, if they did not apprehend much Hazard in their Retreat from thoſe who thought themſelves injured by them in their Proſperity.

Sect. 2. The Employments and Difficulties of both compared.

IN ballancing the Employments of *Solitude* with thoſe of Greatneſs, becauſe Greatneſs will ſtill ſtruggle for Precedency, I ſhall therefore ſcan firſt its Diſadvantages; amongſt which, this is one, That either Publick Perſons have attained to the Fruition of what they deſign'd; and in that Caſe there are many Ways to make them miſerable, becauſe the Subſtraction of any one of theſe many Enjoyments, robs them of all the Satiſfaction they can enjoy in what remains; and there are but few Ways to make them happy, becauſe little can be added to their preſent Poſſeſſions: Or they have not attain'd to what they have projected; and then they fret more, and ſuffer more Diſquietings, than the meaneſt Servant whom they command; and like that Man in the Parable, conſider more the one loſt Sheep, than the Ninety Nine which yet remain. Did the Conqueſt of all that the Sun ſees, reſtrain *Alexander* from weeping, becauſe he could conquer no more? No. For Ambition is like Hunger; which tho' it is once ſatiſfied, continues no longer ſo than it hath for a little Time prey'd upon what was at firſt preſented to it; and, like the Fire, is ſo far from being ſatiſfied with what is thrown into it, that it is by that new Fewel not only enabled to deſtroy, but likewiſe forc'd to ſeek more Aliment for ſuſtaining its waſting Rage.

THOSE who are in publick Employment have either many Dependers, or not: If they have not, they are not ſatiſfied; for the Scope of ſuch is to be depended on, and the miſſing of this renders them more miſerable, than Poverty or Sickneſs could a *Stoic*: But if they be encircled by Crowds of Attenders, then are they intereſſed, not only in maintaining their own Poſts, but likewiſe in ſuſtaining their numerous Clients; in whoſe Fall their Reputation is, as in their own Standing, equally intereſſed. And when they have been at great Pains to effectuate the Pretences of theſe their Dependers, if theſe Pretences ſucceed, then either the Pretenders whom they aſſiſt do arrogate the Succeſs to themſelves, or their own Merits; or elſe they think it but the Price of their Attendance, and ſo look upon it as paid before beſtowed: Whereas the Party with whom theſe have to do, will ever thereafter carry the Patron at implacable Malice. Or, if theſe Pretences ſucceed not, then they impute it to the Want of Conduct, or of Gratitude in theſe their lofty Patrons. And if any Two, or more of theſe Dependers, ſhould juſtle amongſt themſelves, (as ordinarily falls out amongſt ſuch as are Rivals in Favour) then the Grandee is divided in his Reſolution; and as he gains no new Friend by aſſiſting the one, ſo he loſes an old Servant by oppoſing the other. And when a Grandee hath ſpawn'd out his Eſtate amongſt his Favourites, one of a Thouſand will not prove grateful: But tho' all the Thouſand ſhould prove grateful to one, the Ingratitude of that one would be more unpleaſant, than can be repair'd by the Gratitude of all the remanent Nine Hundred Ninety and Nine.

AS to their Equals, ſuch as are in publick Employment, ly under this Inconvenience, That either they pleaſe them not, and theſe they either find or make their Enemies; or, if they endeavour to pleaſe All, then the Task is either impoſſible, or unprofitable: Impoſſible, becauſe after that they have crook'd their own Humour, to make it fall parallel to another Man's uneven Fancy, then they may inſtantly loſe their Pains; when, upon the ſame Principle (of pleaſing All) they endeavour to oblige one, who either is, or is believed to be, either Rival or Enemy to him who was firſt obliged. And is there any Thing more ordinary (tho' nothing more unjuſt) than to hear, *Ye muſt either not be my Friend, or that Man's Enemy?* This pleaſing All is likewiſe unprofitable, becauſe Things are not valued by Advantage but by Propriety: And thus we value that Friendſhip moſt, which is born to us ſolely, or in a greater Meaſure than to others. Whereby it appears clearly, that if ye carry equally to all, ye oblige none; and if more to ſome than to others, ye diſoblige thoſe to whom ye carry leaſt; which certainly (becauſe our Love is like ourſelves, moſt finite) muſt be the greateſt Part: And theſe who are diſobliged, are more zealous in their Enmity, than thoſe who are obliged are in their Friendſhip. The Concluſion of all which is, That albeit the great Pleaſure of publick Employment is, that thereby they may oblige many to a Dependence upon them; yet Men gain by it more and more vigorous Enemies than ſuch as are recluſe do, albeit they profuſe none of their ineſtimable Time upon ſo uncertain a Purchaſe.

AS to their Superiors; it vexes doubtleſs ſuch as are at ſo much Toil to be high themſelves, to ſee any yet higher than themſelves; and they count as many Croſſes, as they do Superiors. If Stateſmen be not at the higheſt Pitch of Favour, they fret at the Unluckineſs of their own Fate, and exclaim againſt their ill-fac'd Stars: And if they attain to it, then they are oft jealouſed by their Promoters. And *Sejanus* is loaded with more Contumely by his Patron *Tiberius*, than ever he was with Honours. And after that theſe plodding Pates have raiſed their Deſigns to that Line, that they conceive they may juſtly admire its noble Structure, and their own Skill in its Contrivance; then that Fabrick, upon which for (poſſibly) their whole Life, they have laid out the whole Stock of their Happineſs and Expectation, may be in one Moment blown over by one Word from their Prince, who is a Man ſubject to his own Fate, as they are to theirs: And when they perceive that the ſame Prince is thereafter forc'd to yield to his own Deſtiny, they cannot but conclude, That they have been themſelves mean Perſons, who were ſo eaſily deſtroy'd by one who was ſo eaſily deſtroy'd himſelf. If *Parmenio* had not killed *Attalus*, or *Cleander Parmenio*, their Diſobedience had been a Crime; and when they obey'd, their Obedience was really a Crime in them, and was hated as ſuch by *Alexander* who commanded it: So that Superiors do oft tie their Favourites to the Obſervance of what is contradictory, and conſequently acquire what is impoſſible.

Sect. 3. IT was nobly ſaid by that Grand Maſter of Stoiciſm, *Seneca*, that, *Qui multa agit, ſæpe ſe fortunæ objicit*. And publick Perſons are in this, like great Gariſons, which by how much the greater they are, are ſo much the worſe to be defended; and by how much the richer they are, are ſo much the more ſtoutly aſſaulted. For eſtabliſhing this great Truth, which is *unum ex mirabilibus Stoicorum*, I ſhall under-prop it by theſe Two ſubſervient Concluſions. 1. That ſeeing that is only, in all the Schools of Philoſophers, defin'd to be morally Good, which is complete at all Points; and that to be Evil, which labours of the leaſt Defect; certainly it muſt be a great Task, not only to do Good, but even not to fall into the Commiſſion of Evil. The Second Concluſion ſhall be, That as it is almoſt impoſſible not to ſlip into the committing of Evil, yet our Eſcapes are never forgot when once committed; and not only wrong they us as to that Action, but they likewiſe detract from all our ſubſequent good Actions. And albeit it be very hard to do what is Good, yet our good Actions are moſt unfrequently remembred; or if they be, then they are eſteemed Duties, and ſo they bring us by that Remembrance no other Advantage from Men, than not to bring a Taſh upon us. Marſhal *Biron's* many Victories, obtained by his Valour for *Henry* the IVth.; *Walſtien*'s for the Emperor, nor *Eſſex*'s for Queen *Elizabeth*, did not excuſe their After-Treaſon. And *Balaam*'s Beaſt (tho' otherwiſe an Aſs) could tell its Maſter, *Have not I ridden with thee ever ſince I was thine without ſtumbling; and yet now thou haſt ſtruck me thrice?* From all which it follows, That publick Employments, becauſe they oblige a Man to many Actions, they therefore engage him in many Miſfortunes, and lay him open to much Detraction. Neither doth Man's Miſery ſtint it ſelf here; but, which is worſe, Envy, Malice and Miſtake, blaze us for more vicious than really we are. We commit ſome Eſcapes, wherein we miſtake our ſelves; but we are ſaid to commit others, wherein others do but miſtake us: We commit ſome, which are really our own Tranſgreſſion; but we are ſaid to commit others, which are but other Men's Imputations. Such as are in publick Employments can never want Rivals; and ſuch as want not Rivals can never miſs Miſreports; eſpecially in our Country, where the Way to Preferment is ſo narrow, that we imagine no Man can get by his Neighbour, except he run over him. O! what a Divine State then muſt *Solitude* be, wherein a virtuous Inactivity fortifies us againſt all theſe Inconveniences, and begets in us a Tranquility, not conceivable by ſuch as do not poſſeſs it!

HAVE you not, my Lord, oft heard great Men ſay, *I muſt do this, and aſſent to that; tho' neither the one nor the other ſatisfies my Judgment?* Have you not ſeen great Men forc'd to abandon their moſt deſerving Friends; forc'd to connive at, and oft to congratulate the Promotion of their greateſt Enemies? Will they not be ſometimes oblig'd to put on a conſtrain'd Countenance, feign an unnatural Mind, and expreſs what is diametrically oppoſite to their Thoughts; all which are Servitudes which Greatneſs exacts from us. For every force is a Yoke ty'd upon our Nature: And Man, being more Noble than Brutes, becauſe he is more free than they are, certainly what impairs his Freedom, deſtroys his Reaſon. And moſt of theſe Reſtraints, as they are againſt Nature, in being Servitudes, ſo they are againſt Virtue, in being oppoſite to what our Reaſon would (if not over-power'd by Intereſt or Fancy) exact of us. And I ſhould think, that the ſame Impulſe which hurries Men on to deſire to be Great that they may be Maſters, ſhould with far more Reaſon carry them to be Solitary: For there they are emancipate from theſe Neceſſities, and have none to obey but God and Nature; Maſters who command us to do nothing, but what were fit for our ſelves to do, albeit we were not commanded.

AS theſe Countries are eſteemed moſt excellent and preferable, whoſe Neceſſities are ſupply'd by their native Commodities, pulling out of their own Boſom all that their Inhabitants require; ſo by the ſame Rule, *Solitude* muſt be by much preferable to publick Employment, ſeeing this requires and wants but little, but the other needs much, and is not ſatisfied when it gets what it needs. *Solitude* requires no Avarice to maintain its Table, nor Oppreſſion to bear up its Train: It is ſatisfied without Coaches, Lacqueys, Treaſures and Embroderies. The Solitary Man is not vext that others muſt take the Door of himſelf, or are able to maintain a more ſumptuous Table than he: He is not diſquieted at the Infrequency of Gueſts, nor Eccho's of his Equal's Praiſes. And ſeeing great Men are ſtill diſquieted at the Advancement of others, they muſt ſtill be unfortunate; for tho' they were capable to receive, yet they are not able to ſuſtain the Weight of all Employments alone.

Consider thoſe Clouds which ſit oft upon the Countenance of Men in Employments; their Gate like to that of a diſrudder'd Ship, and their Diſcourſe disjointed, and blown, as it were, all to Pieces by their tempeſtuous Paſſions; and ye will find ſuch (many Times) to differ but by an Ace from thoſe who have Keepers at *Bedlam*: And by thoſe Diſorders ye may perceive, that Employment and Madneſs are of too near an Alliance; and if the one, certainly both muſt be Diſeaſes, ſeeing both have the ſame Symptoms, and the ſame Prognoſtics. And in theſe Diſtempers, how oft ſpeak the Things which are thereafter either quarrelled openly, or at leaſt are the Seed-plot of continual Heart-burnings to thoſe at whom they aim? But to abſtract from all theſe accidental Diſadvantages; is it not a Madneſs for a rational Soul, for whom all the World was created, to obſerve nothing in this World, but whether another manages his Proceſs well; with what Harmony ſtrikes another Man's Pulſe; or how to brigue the Favour of a Minion? Acts ſo extrinſic to the Nature of an Immaterial Creature, ſuch as the Soul, that if Men got not Money by theſe Employments, they would themſelves condemn them as ridiculous. And is there any Thing more ordinary, even amongſt the Herd of brutiſh Buſy-bodies, than to chide their Friends for attending either the Perſons or Employments of thoſe who reward not ſuch Pains, and for ſo doing upbraid them as Mad-Men? And ſo they are indeed. By which it is moſt evident, That Men in Employment have nothing to excuſe their Madneſs; but, That they are not mad, but for Money or Preferment. And is it not a Shame for ſo noble a Creature as Man, to be content to ſhew himſelf mad for any Hire whatſoever?

*SOLITUDE* has likewiſe this Advantage over publick Employment, that there is no Vice commiſſable in *Solitude*, to which Men in publick lie not yet more open; whereas, there are ſome Crimes, ſuch as Treaſon, Sedition, Oſtentation, and a whole Tribe of the like nature, which retired Perſons can hardly commit; and tho' they could, yet hardly does that State admit of theſe Temptations, which are previouſly neceſſary to the Commiſſion of them. Is there any Thing more ordinary, than to hear one who is accuſed for deſerting his Friend or Party, to anſwer, that his Office, or preſent Deſigns, occaſion'd and required that Defection? And are not Men, for accompliſhing their Projects, tempted to betray Secrets, to become Rivals to their Friends, and aſſiſting to their Enemies? Whereas, no Record can witneſs againſt retired Perſons, that they ever either ruin'd their native Country, betray'd their Prince, or deſerted their Friend. At leaſt, if any in that State have been tempted to the leaſt Degree of any ſuch Crime, certainly they had commited more and greater Villanies, if they had lived in Publick, where thoſe wicked Inclinations might have been ſtrengthned by Example, Deſign, Paſſion, Revenge, or ſome ſuch Temptation. And if our Inclinations be ſo wild when they are caged up in *Solitude*, how untame will they become when they are licens'd to range abroad? He who would ſtab his Prince who had never the Occaſion to offend his remote Cell, would burn the World, if he had a Deſign to which that might be ſubſervient. Did not *Nero*, *Tiberius*, *Heliogabulus* and others, enjoy the Repute of noble Souls, before their mounting the Imperial Throne brought them new Vices with new Honours, and made them as much beyond others in their Debauches, as they were in the Power which fed them in that their diſſolute Humour? Since then no honeſt Perſon can deny, but that it were better never to have the greateſt Honour, than to be ſaid by After-ages to have committed the leaſt Villany; certainly the State of publick Employment is ſcarce to be wiſhed for, seeing therein Men are tempted to commit the greateſt of Crimes; eſpecially ſeeing theſe their Eſcapes muſt be committed in publick, where they are never concealed, and but ſeldom (if ever) pardoned.

Sect. 4. The Periods of both.

AS to the Periods of both, certainly *Solitude* hath by much the Advantage: For look over the Calendar of all thoſe Heroes or Grandees who have governed Kingdoms, or were Favourites of the firſt *Rate* to ſuch as did govern them; and ye will find moſt of their Fates marked with the red Letters of a violent *Death*, or the black Letters of *Shame*. Ignominy overtakes whom Fate hath left undeſtroy'd, and gleans the Grapes after the other hath cut down its Vintage:

*——Sine cæde & ſanguine pauci*
*Deſcendunt Reges & ſicca morte Tyranni*,

It is obſerved, That betwixt *Julius Cæſar* and *Charlemain*, Thirty *Roman* Emperors have been ſlain, and many ſince. And I am ſo aſhamed of the Cruelty of thoſe who are of the ſame *Species* with myſelf, that I muſt conceal the many other Murders of Kings and Grandees:

dees: And as to the Diſgrace of others, theſe can hardly be ſufficiently either numbered or regretted. And albeit others are not deterr'd from embracing thoſe Honours under which their firſt Owners have been cruſhed, upon the Account that they imagine their Predeceſſors Ruin to have flow'd from ſome perſonal Frailty or Error, againſt which they are confident they can guard; yet certainly all ſhould, even from this Anſwer, conclude, That Greatneſs muſt be moſt undeſirable, ſeeing at leaſt it diſcovers theſe Frailties, or tempts Men to commit thoſe Errors, which thereafter occaſions theſe Ruins. Neither find we any ſuch Dangers to attend *Solitude*, either neceſſarily, or by Accident: So that albeit theſe be the Miſfortunes of theſe Men, and not of the Employment, yet ſeeing theſe are only the Miſfortunes of Men in Employment, I ſee not why Employment ſhould be ſo deſirable by Men who fear Miſfortunes. But the Truth is, it is impoſſible to ward againſt the unexpected Blows which are thruſt in at ſuch; for they are ſo cunningly contriv'd by the Attackers (becauſe of the Danger of being diſcovered) that they are ſooner felt than foreſeen. Who could diſappoint the Malice of thoſe who killed thoſe noble Princes, *Henry* the Third, and *Henry* the Fourth of *France*? Who could have targetted *Buckingham* againſt *Felton*'s Thruſt? And all the Prudence of *Cæſar*'s Court could not avert his Maſſacre in his Senate, eſpecially being contriv'd by his Confident *Brutus*; *Et tu, fili* Brute, ſaid that great Emperor. And that which renders the ſudden Fall of theſe Heroes the more deplorable, is, That by being ſudden, it not only diſorders their Affairs and endangers their Souls, but likewiſe ſo amazes their Friends and Followers, that they are thereby incapacitate from providing againſt the Sequels of that Fall, and are themſelves (who only can help their falling Friend) brought to fall with him. I have often remark'd with Wonder, how ghaſtly the Favourites of a falling Minion do look, and how aſtoniſhingly they are look'd at by their former Intimates; and which is ſtrange, not only do the Enemies of a fallen Grandee inſult over his Miſfortunes, but even thoſe who were his former Well-wiſhers, are (to avert the Jealouſy of thoſe who occaſion his Fall) neceſſitated to inveigh moſt bitterly againſt his Memory.

*Dum jacet in ripa calcemus* Cæſaris *hoſtem.*

Neither can I ſee how Greatneſs can be defended againſt Miſfortunes; for ordinarily theſe riſe from ſuch unexpected Beginnings, that none ſee in (or apprehend the leaſt Danger by) them: And all the World is not able by Conjecture, to fall upon that *Medium* by which Providence intends to infer their Ruin. Who could have gueſſed, that *Mordecai*'s diſcovering a Plot to *Ahaſuerus*, wherein *Haman* was not concerned, would be the Mean to deſtroy that great Favourite? I have oft heard the Friends of thoſe who are now low, ask at ſuch as told them of the Slipperineſs of Favour, how could their Patron ever be deſtroyed? And it was impoſſible that could fall out during ſuch a Government. And yet I have myſelf ſeen theſe Men outed of all their confident Expectations: A paſſionate Expreſſion, a raſh Act, a Jealouſy or Miſ-information, which could not be foreſeen, becauſe then there was no Bottom for ſuch a Conjecture, hath ruined oft-times ſuch as never expected any Alteration: And who can promiſe that they ſhall never drop one Word in Paſſion, act any Thing without a previous Deliberation, or never fall under Miſ-information? And, which is yet worſe, when Miſ-informations are forged againſt great Men; they are not acquainted by ſuch as either give or receive them, and ſo their Defence becomes impreſtable. I have heard of Favourites who have been ruined, becauſe the Queen ſaid they were handſome Men, or the King thought them to excel himſelf in any Thing wherein himſelf pretended to a Maſterſhip: And what plodding Pate could have ſtav'd off, or foreſeen theſe Miſfortunes? No, no,

*Ludit in humanis divina prudentia rebus.*

And ſeeing there are many who have the Courage to throw away their Lives upon the Revenge of a ſmall Affront, or to hazard them in an open, and yet almoſt barren Robbery, why ſhould it be thought, that to ſatisfy ſo impetuous a Paſſion as Revenge, there ſhould not be ſome found who will hazard Death, by giving it in the Revenge of either an Injury done to a Family or Nation, much more of an Affront fix'd upon the Undertaker himſelf, in his Honour, or entire Fortune, as oft falls out?

BUT albeit great Men and publick Miniſters eſcape the Fate of a Murder or Maſſacre, yet how is their Happineſs founded? Is it not either upon the Humour of a capricious People, if in a Commonwealth? And then how unſolid is that Happineſs where the Foundation is ſo fleeting? Conſider *Rome*, which though the wiſeſt of all Republicks, yet, upon a Jealouſy or Miſtake, or ſometimes out of Wantonneſs, deſtroyed in an Inſtant the moſt carreſſed and moſt deſerving of her Favourites. Or, upon the Favour of a Prince, if in a Monarchy; and then ye muſt confeſs them oftentimes ſubject to all the Caprices of a lofty Humour, licens'd by the Extent of his Power, to equal his Power and his Humour; and entic'd, by the

Inſtigation of Enemies or Rivals, to ſtretch his Humour beyond all his allow'd Power. Why did *Solyman* the Magnificent, cut the Throat of *Ibrahim Baſſa* his Confident? Was it not to ſatisfy the Fancy of a Concubine? Or *Juſtinian* pull out the Eyes of valiant *Belliſarius*? Was it not to gratify an inſolent Wife? So that a Stateſman lies open not only to the Hazard of his Maſter's Fancy, but to the Paſſion of his Wife, his Concubines, his Favourites and Fellow-Servants, and even to Fate itſelf, which is the moſt comprehenſive of all Dangers.

But albeit a Stateſman were able to eſcape private Revenge, and to manage with Succeſs, his Prince's Humour, and to ſatisfy that of his Favourites, yet he is ſtill obnoxious to *ragione del ſtato*, and Intereſt of State, by which his Prince is oft (to evite the Rage of a Multitude) either forc'd to object his Minion to their Rage, as the Head in a natural Body defends it ſelf by throwing up its Hand or Arm to receive the Stroke, or elſe he may be pull'd from the kind Boſom of his unwilling Maſter: And of this Hazard our own Age affords us a lamentable Inſtance in the Perſon of the great Earl of *Strafford*, whom popular Fury did drag to the Scaffold; his Prince's Protection not being ſufficient for his Defence; who viewing from that deplorable Stage, the Inconſtancy of Courtſhip and Advancement, did leave in Legacy to his Son, a ſtrait Command never to aim at higher Promotion than that of a Juſtice of Peace in his own County.

Consider likewiſe how ſometimes the Satiety of a Prince produces the ſame Ruin of Favourites, which is at other Times the Product of his Cruelty. And *Commines* obſerves, That *Lewis* the Eleventh of *France* uſed to ſay, That ſeeing Princes grew weary of Houſes, Countries, and other inanimate Things, which could never offend them, and which no Rival or Enemy was at the Pains to traduce, it was no Wonder that they were wearied of Favourites, who were ſubject to all theſe Inconveniencies. Princes do likewiſe ruin their Grandees, ſometimes to ſatisfy their Vanity, in ſhewing that their Power is able to remove thoſe who think they cannot fall without a Miracle; and ſometimes to make Way to new Favourites, thinking it Injuſtice to entail all Honours upon the ſame Perſons. And, as in the Body Natural, ſo likewiſe in the Politic, it is obſervable, that Nature hath provided more Diſeaſes, than the beſt of Phyſicians can prevent by Remedies.

To conclude this Period, be pleaſed to conclude the Unluckineſs of publick Employment from this, That not only amongſt Rivals, one of two Pretenders ſatisfy by their Fall the Rage of Fate, but when it hath aſſiſted the one to deſtroy the other, it then turns its Fury againſt the late Victor. Thus *Pompey* and *Cæſar*'s Blood purpl'd equally the Swords of Murderers, agreeing in nothing but their Deſtiny. *Hannibal* beats the *Romans*; *Scipio* beats *Hannibal*; and the *Romans* baniſh *Scipio*. *Belliſarius* makes *Gilimer*, King of the *Goths*, ridiculous, leading him as a Priſoner in his Triumph; and Fate renders *Belliſarius* yet more ridiculous, driving him to beg, with this Expreſſion, *Beſtow but a Farthing upon* Balliſarius. And it is moſt obſervable, that during our Civil Wars, Four moſt eminent Perſons who did head contrary, as well as different Parties, did all loſe both their Heads and their Fortunes in the Quarrel; whereas it might have been expected, that at leaſt one of the Oppoſites, ſhould have worn unfading Lawrels: And really there was more Hazard in the Fear of being the one who was to be deſtroyed (for they might certainly have expected, that one of themſelves ſhould fall) than all the Grandeur, which the Survivors might expect, could ſufficiently requite.

And when the Monarch or Commonwealth, which a Stateſman hath long ſerved, intends, either in Compliance with their Intereſts, or to gratify their Humour, to out their Servant of his Employment, or in order thereto, to fix a Crime upon him; then how can he eſcape from that Trial, or defend his Right againſt that Purſuit? For where the Judge is Party, there the Law may prove Advocate. And in theſe *contraſto's*, I remember few Deciſions, amongſt all who have collected them, of any Subject who came off with Honour.

SEEING as of all other Things, ſo of our Thoughts the Firſt-born ſhould be ſacrificed to our Almighty Maker; I therefore reſolved to begin my firſt Diſcourſe with theſe Reflections, which *Solitude* might borrow from Devotion. But, ſince Orators recommend the laſt Place in our Diſcourſe, to the ſtrongeſt Perſwaſives (as being able when plac'd there to leave the freſheſt Impreſſions, upon the leaving Reader) I ſhall therefore in this laſt Place, (which is, alas! the too ordinary Room allow'd to Devotion) recommend to you, to conſider, that God poſſeſſes more Excellencies, and we labour under more Sins, than can be fully contemplated, in the one Caſe, or lamented in the other, throughout the whole Flux of Eternity. And after that we have evacuated our more refined Spirits, in Chaſe of theſe fleeing Follies, will it ſatisfy Him to have our dulled Thoughts (the Lame of the Flock) ſerved upon His Holy Altars? And ſeeing He ſtiles Himſelf a Jealous God, certainly He cannot but be jealous,

**Sect. 5.** Motives to *Solitude* from Religion.

that because we converſe with others more than with Him, we muſt therefore either love theſe better, or expect more, either Advantage or Pleaſure, in their Society than in His.

I confeſs that publick Employment, is lawful in itſelf, and neceſſary to the Commonwealth, and that Men may ſerve God in the Intervals of their other publick Negotiations. But the Queſtion is not, What is lawful in itſelf; but what is convenient for us? And ſeeing we run already but too ſlowly that Divine Race, I ſee not why we ſhould ſlow our Pace yet more, by taking on the Burden of publick Employment. And ſeeing all our Time is but too ſhort for the Service of Him, whom far more excellent Creatures than we worſhip inceſſantly, Time without End; I think it ſtrange, that we ſhould content ourſelves to ſerve him *per Parenthaſin*, or by Intervals.

To theſe I ſhall add this important Conſideration; That moſt of Temptations are in *Solitude* diſarm'd of theſe Charms, which render them formidable to us in Publick: Love wants there the Preſence of an inflaming Object to ſecond it; Revenge wants the Preſence of the Party injured to preſs it; and Vanity, when it wants Admirers, wants Force. Tho' *Moſes* was the meekeſt Man upon the Earth whilſt he liv'd in the Deſart; yet the Extravagancy of thoſe whom he govern'd, when Providence had advanc'd him, made him offend his Maker ſo highly, that all his former Services could not obtain, even from the Father of Mercies, a Liberty to enter into an Earthly *Canaan*. If *Naaman* had liv'd an Hermit, he needed not have crav'd Leave to bow to the Idols of his Maſter in the Houſe of *Rimmon*. And if *David* had not been Governor of *Iſrael*, he had wanted the Means both to humble *Bathſheba*, and kill *Uriah*. Such is the ill Fate of publick Employment, that it not only affords us Temptations, but the Means likewiſe of effectuating that to which we are tempted.

It was, I confeſs, God's own Verdict of Man, That it was not good for him to be alone; but this was when becauſe of his congenial Innocence, he needed not fear the Contamination of Society. But to demonſtrate what the Hazard of being in Company is; even *Adam* could not live one Day in it, and live innocent; for the firſt News we hear of him, after that *Eve* was aſſociate to him, is, that he had forfeited that native Purity.

I know that our Saviour was carried by Satan to the Wilderneſs, that he might tempt Him there. But it is moſt obſervable, that after that experienced Enemy found that His Divinity would not yield to any Thing therein repreſented, he thereafter (as the laſt, and ſo the ſtrongeſt Shift left to him uneſſayed) did bring Him to *Jeruſalem*; and having advanc'd Him above the Temple, he proffer'd Him the Half of the belted World, and all its Glories; a Temptation fitted only for ſuch as value Honour and publick Employment.

When God Almighty intended to converſe with *Moſes*, He called him from the populous Camp to the Top of Mount *Sinai*. And our Saviour did not diſcloſe the Glories of His Transfiguration at *Jeruſalem*, but upon the Top of the Mount of *Olives*. The Widow who
2 Kings 4. 10. intended a Lodging for *Eliſha*, that great Prophet, did build it apart upon the Wall, furniſhing it only with a Stool and Candleſtick: And when he asked her, If he *ſhou'd ſpeak for her*
2 Kings 14. 12. *to the King, or Captain of his Hoſt?* She told him, without farther Anſwer, *That ſhe dwelt amongſt her own Friends, and in her own Country*; intimating thereby, that there was no need of any Favour Kings could beſtow upon ſuch as enjoy'd ſo happy a Receſs. I recreate myſelf to think I ſee *Elijah* ſitting under a Juniper Tree, or in a concealed Grove, viſited in that *Solitude* by the ſame God, who refus'd His Preſence to mighty *Ahab*; and to contemplate how *Ahaziah* was able to find no Eaſe upon his purpl'd Couch, till he diſpatched in queſt of it ſome of his chiefeſt Captains to court it from the ſame Prophet, ſitting upon the Top of a Mountain. By all which Places and Poſtures the Spirit of God (who loſes no Obſervation) intends doubtleſs to enamour us of *Solitude* and *Receſs*. And it is very obſervable, that none of theſe old Prophets are found in Scripture at Court, or in Publick, but as bearded Comets appear in the Air, where they have no other Errand than to denounce Judgments to the Place over which they hover.

GOD Almighty, who becauſe He is the Object as well as Enjoiner of our Devotions, ſhould, and does upon theſe and many other Scores, beſt know how to addreſs them, hath commanded us to retire into our Cloſets (the moſt ſolitary of all our Rooms;) and to make theſe yet more retir'd, hath ordained us to cloſe our Doors behind us, when we make any Religious Applications to Him; promiſing, that *He who ſeeth in ſecret, will reward us openly*: And if we will conſider theſe gaudy Diſtractions, whereby our publick Devotions are almoſt rendred no Devotion at all; and that there is more Noiſe in the World, than will ſuffer us to hear that ſtill Voice which cries behind us, *This is the Way, walk ye in it*; certainly we may conclude from both Reaſon and Experience (as well as out of Obedience to Divine Commands) that *Solitude* is the true Forge of the pureſt Devotions. When God did intend to diſcipline His beloved (though rebellious) *Iſrael*, He choſe firſt the Wilderneſs of *Sinai*, and then the Two Captivities, to be His ſacred School. And *Hoſea* 2. 14. He tells His own People, That *He will allure her* (meaning the *Jewiſh* Church) *and bring her to the Wilderneſs, and ſpeak comfortably unto her.*

**Religion** hath another Quarrel at Advancement, which is, That it diveſts oft-times its Enjoyers, not only of Devotion and of Friendſhip, which is a Moral Virtue, but even of Affection; which is ſo natural to Brutes themſelves, that a Man is worſe than theſe when he wants it: And not only forego they it upon ſuch Neceſſities as might at leaſt excuſe, if not juſtify their ſo doing, but do ſo likewiſe to ſatisfy their Humours; a Slavery which deſerves to be condemned, though its Object were in itſelf juſtifiable. No Man could have believed, if Scripture had not told it, That *Saul* would, from being an abſolute Monarch, deſcend 1 *Sam.* 1.
to ſo low a Baſeneſs, as to caſt away his Daughter *Michal*, merely that he might deſtroy her Husband: Or, that a Prince of *Midian* would have proſtituted his Daughter *Cozbi* to the *Numb.* 25.
promiſcuous Multitudes of the *Iſraelitiſh* Camp, of Deſign to tempt them to a Sin which could not but be attended with his own Infamy, as well as their Ruin. Was it not for this that *Romulus* cemented the firſt Foundation of the *Roman* Walls with the Blood of his Brother *Rhemus*? And tho' *Abel* and *Cain* had the Diviſion of what tempts, (I will not ſay ſatisfies) now the Ambition of many Thouſands to gratify their Expectations; yet was not ſo ample a Partage able to prevent the ſpilling even of a Brother's Blood, by one whoſe Crime was ſo much the greater, that it was without Precedent, and was to become an Example to many Thouſands of ſucceeding Ages. Many whereof might, and have been thereby not only encourag'd to commit afreſh this old Sin, but likewiſe to ſeek, in the Greatneſs of this Offence, Excuſes, whereby to leſſen their own Barbarity.

**But** if any call in queſtion the Advantages that accrue to Devotion by *Solitude*, let him caſt back his Eye upon the Primitive Church, wherein the material Fabrick was contriv'd dark, and ſituate in the remoteſt Corners and ſolitary Groves, both by Pagans and Chriſtians; as if that black Enamel heighten'd the Luſtre of the Golden Candleſtics: And upon the infinite Swarms of ſuch as became Monks and Hermits, encourag'd thereto by the Homilies and Intreaties of the nobleſt Fathers; of which State the Emperor *Juſtinian* did, after he had kept that Oecumenic Council, become ſo enamour'd, that he hath regiſter'd its noble Elogies in the Frontiſpiece of his Divine *Codex*. Whilſt upon the other Hand, the Heathens of Old, and now the *Mahometans*, did and do teach, That one of their Miſchief-Torments in their Hell ſhall be, that Men will there be caſt looſe to thoſe Occupations and Civil Employments, which here exercis'd them; eſteeming it a Torture for illuminate Spirits, and ſuch as are defecate from Senſuality, to be re-embaraſs'd with ſuch terreſtrial Affairs, as buſy us in this our earthly State. Pardon, my Lord, this Inroad I have made upon Devotion; and learn from it, that *Solitude* and *Devotion* are ſo nearly related, that we can hardly praiſe the one, and not commend the other.

I ſhall here uſe the Authority of great Heroes; who, after the Fruition of Both, have by much preferr'd *Solitude*; whereas (which is very ſtrange) there is not a ſingle Teſtimony to be had from ſuch as theſe, in favour of publick Employment.

**The** Firſt ſhall be of *Charles* the *Great*, who being to die, cry'd out to thoſe who ſtood *Marinæus*, lib. 18.
about him; *Oh! how vain are the Thoughts of Men? and how wretched are they that aſpire to Glory? What hath my Kingdom, or the Service of ſo many Men gain'd me? Much more happy had I been, if inſtead of a Sceptre, I had weilded an Hedging-Bill; and if of a King, I ſhould have made myſelf a Clown:* Following in this almoſt the very Expreſſions of *Alphonſus*, his Brother. *Suatocopius*, King of *Bohemia* and *Moravia*, having loſt a Battel againſt the Emperor *Arnold*, did retire himſelf into a Wilderneſs; where after he had lived a long Time with Three Hermits, he at his Death told them, That there was not any Greatneſs preferable to the Tranquillity of that *Solitude*. *The ſafe Sleep* (ſaid he) *which we enjoy here, makes the Roots ſavoury, and the Waters ſweet; whereas the Cares of a Kingdom make all Meat and Drink taſte bitter. That Part of my Life, which I have paſt with you, was true Happineſs; whereas that which I led upon my Royal Throne, deſerves more the Title of Death than of Life.* And *Giges*, King of *Lydia*, puff'd up with his great Wealth and many Victories, having ask'd the Oracle of *Apollo*, If there was any Man happier in the World than himſelf? had *Ageſilaus*, the poor *Arcadian* Shepherd, preferr'd to him. And *Similis*, one of *Adrian* the Emperor's chief Captains, having retired to the Country after all his Preferments, cauſed to grave this Epitaph upon his own Tomb; *Here lies* Similis *of a very great Age, who yet lived but Seven Years.* I might here cite *Conſtantine*, that excellent King of *Scotland*; *Theodatus*, King of the *Goths*; *Charles* the Fifth; *Sertorius*, and Hundreds of other Princes, if I thought it not of more Advantage to *Solitude* to ſay of theſe, that they are ſo many, they cannot be cited.

Sect. 6. Fame examined.

SEEING then Reaſon and Experience do impreſs us with ſo pungent Diſſuaſives from Greatneſs, let us a little examine, what can be in it able to preponder to ſo weighty Diſcouragements.

THE firſt Prize contended for by great Perſons, is *Fame*, a Revenue payable only to our Ghoſts; and to deny ourſelves all preſent Satiſfaction, or to expoſe ourſelves to ſo much Hazard for this, were as great Madneſs as to ſtarve ourſelves, or fight deſperately for Food to be laid in our Tombs after our Death. Either publick Miniſters value much the Diſcourſes of the Multitude; and if ſo, they err in offending them, as oft as their Gain or Pleaſure affords them the meaneſt Temptation: Or elſe they value theſe not; and if ſo, why is there ſo much Pains taken for *Fame*, which is nothing elſe but a Collection of their Suffrages? Which Reflection recommends much to me that Stoical Jeer given to *Hannibal* by *Juvenal*;

——*I demens, & ſævas curre per Alpes,*
*Vt pueris placeas, & declamatio fias.*

——Climb o'er the *Alpes*, thou mad, vain-glorious Fool,
That thou may Children pleaſe, and be their Theme at School.

FOR convincing us of the Folly of this Paſſion, be pleas'd to conſider, That either our Souls have the ſame Period with our Life, and then to talk of us after Death, is to talk of what is not; and what Advantage brings it to us, when ſeeing we are not, what is ſaid of us cannot effect what is not? Or our departed Souls ſurvive in eternal Bliſs; and then the loud Halelujahs of Miriads of Angels, will ſo eaſily drown the Voice of *Fame* in our Ears, that it will not be heard by us; and our Souls will be ſo replete with infinite Joys, that there will be no Room for its Report, though it were exaudible; for *Fame*, being but Air, muſt yield and flee out at the Acceſs of any Thing, that is more ſolid. Or elſe the Souls of thoſe, who are praiſed, will be damned; and then they will not be ſuſceptible of any pleaſing Impreſſions. And I am confident that one of the Torments of damned Spirits, is, that they imagine all the World to be full of their Infamy. And ſeeing the *Fame* of the greateſt of Men is not able to ſolace him in the Fit of a Fever, or Gravel; Why ſhould we imagine that it can leſſen the Weight of ſuch preſſing Torments, as infernal Horror, or eternal Damnation? To talk of *Amphialus*, who never was, is the ſame Thing as to talk of *Alexander*; only *Amphialus*, cannot be ſtained with Cruelty, Vanity and Drunkenneſs, as *Alexander* is. But albeit *Fame* were to be courted, what Share of it can we expect, who are ſcarce known beyond the Line of our own Hiſtory, and but tranſiently in that likewiſe? Who amongſt us would toil as we do, to be eſteemed, as *Popenham* or *Bajard*, (whom I believe very few have heard of) and yet theſe acted upon the Continent of the World, and did greater Things than the preſent State of Affairs will admit us to do. And I am confident, that there liv'd lately at the Court of *France* and *Spain*, Hundreds of Courtiers, who enjoy'd far taller Honours than we; and who would not have embrac'd the Honours we graſp after; and yet *Fame* ſcorns to be at ſo much Pains as once to mention their Names. How many know not at preſent, the Name of that Grand Viſier, who but lately made *Germany* tremble? and to ſay that it was the Grand Viſier, is to praiſe his Office, and not himſelf. Who can name the greateſt Cardinals at *Rome*, or *Dogi* of *Venice*? And yet, what infinite Pains is taken to gain theſe Employments, by ſuch as live upon the Place?

I ſmile to ſee underling Pretenders, and who live in a Country ſcarce deſign'd in the exacteſt Maps, ſweat and toil for ſo unmaſſy a Reputation, that when it is hammered out to the moſt ſtretching Dimenſions, will not yet reach the neareſt Towns of a neighbouring Country: Whereas, examine ſuch as have but lately returned from travelling in moſt flouriſhing Kingdoms, and though Curioſity was their greateſt Errand, yet ye will find that they ſcarce know who is Chancellor or Preſident in theſe Places; and in the exacteſt Hiſtories, we hear but few News of the famouſeſt Pleaders, Divines or Phyſicians; and by Soldiers theſe are undervalued as Pedants, and theſe by them as Madcaps, and Both by Philoſophers as Fools.

BUT though *Fame* were deſirable, yet publick Employment is not always attended by it: For, either Advancement is attributed to the Fancy of the Advancer, or to Fate and Hazard. And in either of theſe Caſes, the Perſon promoted is not honoured, but his Fate; and it will be loudly proclaimed as a Thing moſt ſtrange, That one of ſo mean Merit or ſo rebellious Principles, or tainted with any ſuch Vice (as Envy will either find or make) ſhould be promoted to ſuch Honours: Whereas if the ſame Perſon had ſatisfied himſelf with a ſolitary Life, his real Vices had neither been diſcovered, nor ſuch forg'd Vices proclaimed;

and becauſe People blame Minions, whilſt they live, for what they dare not charge upon their Maſter, their Envy or Revenge tranſmits to Poſterity that Character which was receiv'd to their Prejudice whilſt they yet governed. Was *Perennius* famous, tho' *Commodus* then Emperor rais'd him next to the Throne? or *Oliver* the Barber, though *Lewis* XI. made him his Minion? No, for Princes can beſtow Greatneſs, but *Fame* lies no more under their Juriſdiction than the Winds do, from which it doth but little differ. Of all Witneſſes *Fame* is the moſt ſuſpected, becauſe it ordinarily flatters moſt thoſe who depended upon it, and were at greateſt Toil to gain its Suffrage, and to depone falſly againſt the greateſt of ſuch Men as value not its Teſtimony: And as its Report is by Law judged to be unſtable as Water; ſo in this it reſembles much the Water, that it preſents (like to it) the ſtreighteſt Objects to our Sight, as crooked and uneven. And ſince *Fame* depends upon the credulous Multitude, and upon unreſtrainable Accidents, who can aſſure himſelf of its Suffrage? or believe it when it is obtained? If the Soldiers prove cowardly, and loſe a Battle, the General is for ever affronted, and yet he cannot help it: Or if a Servant betray a Stateſman's Secret, then the Maſter's Prudence is for ever traduc'd. Ignominy being, like all other black Spots (a Tenaciouſneſs peculiar only to that Colour) which cannot be worn off, nor waſht out: And the Deſigns of Stateſmen being as latent as the Springs which do inwardly move mechanick Machines, the People (whoſe Intelligence cannot reach theſe) judge of the Deſigns by the Events: And if at any Time the Event anſwer the Contriver's Expectation, then the malicious Multitude aſcribe this Succeſs, either to Hazard or to their Power. And to ſpeak ſeriouſly, *Power* is ſo happy a Suffragant, that it takes off much of that Repute which is due to the Contriver: For who can be foil'd having ſuch a Second? And to convince us, that Power and Command conceals what Strength and Energy there is really in the Governour's Wit, reflect but a little upon thoſe pitiful Rebels, who govern'd lately this Country, and did ſeem moſt wiſe, while they were veſted with Power; of which being now again diveſted, their Wit falls far ſhort of the firſt Caſt. Like thoſe *Venetian* Ladies, whoſe Native Stature riſes and lows in Appearance, according to the Height of thoſe *Socculi* whereupon they walk. But if *Fame* be the great Prize, I ſee not why the *Literati* and *Virtuoſi*, or retir'd *Curioſi*, may not put in for as large a Share in it, as moſt, (if not any) Stateſman: For if that Maxim hold, that *propter quod unum quodque eſt tale, propter hoc, illud ipſum eſt majus tale*; certainly it follows in true Logic, that ſeeing ſolitary Perſons are the Diſpenſers and Beſtowers of *Fame* upon great Men, they cannot miſs it themſelves. How had *Æneas*'s Conduct, or *Achilles*'s Valour been forgot, had not *Homer* or *Virgil* ſung their Elogies? And after a great Man hath defeated Kingdoms, a Pedant is (like the ſilly Worm) able in one Night to conſume that bloſſoming Gourd of his Reputation; and ſeeing the World know not what the one did, they will believe what the other ſaid. Hiſtory (which is the grand Regiſter of *Fame*) is known for the moſt part only to retir'd Perſons; and theſe will admire moſt what ſuits moſt with their own Humour: And *Fame* itſelf being moſt obliged to ſuch as ſtudy *Solitude*, it obliges ordinarily theſe moſt, becauſe they have obliged it. *Ariſtotle* hath prov'd himſelf by his Syllogiſms, a greater Perſon than *Alexander* his famous Scholar: *Solon* is more famous for his moral Advice to *Creſus*, than *Creſus* who poſſeſs'd thoſe Mountains of Gold, which were the Subject of his Advice: And *Cicero*'s Tongue, though pull'd out of his Head by *Anthony*, hath ſpoke out his Praiſe louder than all the Acclamations of the *Roman* Legions and ecchoing Artillery could proclaim that more than Monarch. And ſeeing that Man is happieſt, who is happy whilſt he is a Man; ſuch as attain to *Fame* by *Solitude*, are happier than great Men, becauſe they are happy whilſt they are able to find it; whilſt the others have it only when they are not ſenſible of what they have. Compare *Julius Cæſar* (to the Stature of whoſe Repute our dwarfiſh Endeavours will never be able to riſe) with *Lucan*, who wrote the Story of his Wars, and ye will find *Lucan* the much happier: Conſider *Cæſar*, macerate oft with Hunger, ſtiffned with unrewarded Toyl, jealous of his own Soldiers, and apprehenſive of the Senate; tortured with uncertain Events of the War, and terrified by the having kill'd his Son-in-law *Pompey*, after he was ſure of the Victory: And then return your Reflections upon *Lucan*, ſitting in the Boſom of a ſhadowy Grove, flankt with a cryſtal Stream, and there creating thoſe noble Lines, which have ſince carried his Fame as far as *Cæſar*'s Actions; and having in this the Advantage of *Cæſar*, even as to Poſterity, that *Cæſar*'s Soldiers, *Pompey*'s ill Fate, the Senates Irreſolution, and the Cowardlineſs of their Auxiliaries, ſhare with *Cæſar* in the Event, and really more than he; whereas *Lucan* inherits the ſole Praiſe of his Story now, as he did the Pleaſure of having wrote it whilſt he was yet alive. But to conclude the Folly of *Fame*, conſider even this generous *Lucan*, falling under the Sword of *Nero*; becauſe that cruel Prince was aſham'd to ſee himſelf ſo far out-done in Wit by one of his own Subjects: And from this learn, That *Fame* is ſuſpicious to its Dependers when it beſtows its Favours, and unjuſt when it denies them.

Sect. 7. The Pleaſure of commanding others examined.

NEXT to this, the Satisfaction received in commanding others, is admired as one of the raviſhing Advantages of publick Employment; and the Soul of Man in this ſeems to have retain'd ſtill a falſe Appetite of being like to its Maker. But ſeeing this Deſign could not be managed even by the Judgment and Purity of the greateſt of Angels, ſo as not to deſerve the ſevereſt Puniſhment, and did in them prove alſo ineffectual; I find that little hopes can be entertained of our ſucceeding in it. But conſider ſeriouſly, that it being a congenial Humour in all Mankind, to deſire Freedom; certainly, great Men muſt conclude, That their Dependers would not bow to ſuch Homages, if they thought not thereby to oblige their Patrons to the full Requital of what they ſo highly value: And therefore theſe being Debts rather contracted by us, than Favours done us, I ſee not why we ſhould ſo highly prize them; and ſeeing in Return to theſe, Protection, Salaries and Offices are expected, all which put us to real Pains; conſider if theſe imaginary Pleaſures deſerve to be bought at the Rate of ſuch real Vexations. The *Magnifico* muſt himſelf bow to his Prince, bear his Extravagancies, ſwear a Friendſhip with theſe whom he hates, diſpence with Affronts, ſpend all his Time in Attendance at Court, and in obſerving thoſe Humours, which he muſt hereafter ſuperſtitiouſly obey; and all this that he may gain wherewith to repay Salutations, Flatteries, Legs, Congies, and ſuch like pitiful Pleaſures; and that he may ſcrew himſelf ſo far into the Reſpect of the People, that he may have Hats pull'd off to him, which will be likewiſe done (and for the ſame Reaſon likewiſe) to a lifeleſs Chair of State, or the meaneſt Fool, if his Shoulders be ſtrong enough to bear a Title, or any other the meaneſt Mark of his Prince's Favour. And that he may be magnified by his Dependers, whom becauſe of their Intereſt none will believe, being bribed to depone what they ſay of him; is not this Satisfaction a mere Act of Fancy? And is it not ſafer to tranſlate our Fancy to ſome other Object, than to moderate it here? And who can aſſure himſelf, that when he hath arrived at that Pitch of Command which he preſently propoſes, that this ſhall terminate his Ambition? And is not the *French* King as much troubled, that he cannot command the Grand Signior, as a *French* Courtier is for being lower than his King? And after that a Chancellor hath rendred his Place, by any ſhort Poſſeſſion, familiar to him, he then deſpiſes what he enjoys, by the ſame Principle which invited him to deſire that Employment, when it was yet above his Reach. But abſtracting from theſe Conſiderations, What can it advantage any Man that another bows to him? It can neither cure Gout nor Gravel: And when he is diſpleaſed at any Thing elſe, it is ſo far from being able to ſolace him, that that which vexes him moſt is, that any Perſon can be found who dares diſpleaſe one who is ſo great as he; and if he had not been ſo great, that Accident which now grieves him could not have vexed him: So that in wiſhing to be great, we wiſh that we may be made more ſuſceptible of Affronts, than Nature hath already made us.

I need not tell you, *Celador*, that great Men are obliged to attend more ſubmiſſively their Superiors, than we do them, becauſe theſe have more Deſigns than we, and Deſign is the Occaſion of our Dependance: So that if there be any Pleaſure in Liberty, we enjoy it more than theſe; and if there be none, Why is there ſo much Pains taken to be great, upon Expectation that Greatneſs ſets at Liberty? A private Man is not oblig'd to oppoſe his Relations, fight againſt his Country, give his own Judgment the Lie; all which are but the meaneſt Impoſitions that ſome Princes lay upon Greatneſs: And why ſhould Men purchaſe, at ſo dear a Rate, the Liberty to ſerve others, which is all that Greatneſs can beſtow?

Sect. 8. The Satisfaction of Society examin'd.

I know that Society is one of thoſe Satisfactions which we rank amongſt the Pleaſures of the firſt Magnitude; and that as to the Poſſeſſion of this, Solitarineſs ſeems to cede to publick Employments. But when we conſider, that the Prerogative of Society ſtands not in ſeeing one another, but in rational Converſation, it will appear that the Difference is not wide. For, what Pleaſure can be receiv'd by talking of new Faſhions, buying and ſelling of Lands, Advancement or Ruin of Favourites, Victories or Defeats of ſtranger Princes, which is the ordinary Subject of ordinary Converſation? And really, I have admir'd to ſee Perſons of Virtue and Honour long much to be in the City, where when they come, they found, nor ſought for no other Divertiſement, than to viſit one another; and there to do nothing elſe, than to make Legs, view others Habit, talk of the Weather, or ſome ſuch pitiful Subject: And it may be, if they made a farther Inroad upon any other Affair, they did ſo picque one another, that it afforded them Matter of eternal Quarrel; for what was at firſt but an indifferent Subject, is by Intereſt adopted into the Number of our own Quarrels. This begets Heats; Heats, Opprobries; Opprobries, Revenge; and Revenge leads either to fret, if we cannot ſatisfy its Thirſt; or to Ruin, if we cannot quench it. How many likewiſe are in theſe Reincounters, tempted either to betray their Ignorance or Malice? And if one know not the new Name of ſuch a Diſh or Dreſs, ſuch an Intrigue, or ſuch a Quarrel or Marriage, then they are eſteem'd Blockheads. Moſt of Men deſire to frequent their Superiors, and there Men muſt either ſuffer their Raillery, or muſt not be ſuffer'd to continue in their Society: If we converſe with thoſe who ſpeak with more Addreſs than our ſelves, then we repine equally at our own Dulneſs, and envy the Acuteneſs that accompliſhes the Speaker; or if we converſe with duller Animals than our ſelves, then we are weary to draw the Yoke alone, and fret at our being in ill Company: But, if Chance blow us in amongſt our Equals, then we are ſo at Guard to catch all Advantages, and ſo intereſſed in point *d' honneur*, that it rather cruciates, than recreates us. How many make themſelves cheap by theſe Occaſions, whom we had valu'd highly, if they had frequented us leſs? And how many frequent Perſons, who laugh at that Simplicity which the Addreſſer admires in himſelf as Wit, and yet both recreate themſelves with double Laughters? It is remarked by Geographers, That no King alive is worſhipp'd by his Subjects, but the King of *Binon*, and that he is never ſeen by them: And certainly, if he were ſeen, he would not be worſhipp'd. And thus theſe ancient Heroes were never deify'd till Death had, by burying themſelves, buried the Memory of theſe Infirmities, which, tho' they were but few in ſome, and mean in others, had notwithſtanding enough of Allay in them to make the Committers not only be conceived no Gods, but oft-times to repreſent them as frail Men. *Familiarity is* (in the Proverb) *ſaid to breed Contempt*; which it does not only by that natural Satiety, whereby nothing can become common and continue (to our Apprehenſion) good; but likewiſe, by laying open to Converſers theſe Lapſes and Failures, which if they deſerve not Contempt, do at leaſt leſſen that Repute, which was in others founded for them rather upon *Idea's* which they framed of our Perfections, than upon theſe Merits which might juſtly challenge them. Familiarity hath likewiſe this Prejudice in it, that it blunts thoſe Endeavours in us, whereby Repute is ordinarily required; and in remitting that Exactneſs whereby we entertain Strangers, we loſe that Share of Eſteem which Exactneſs and Politeneſs deſerves; theſe extraordinary Parads, made ordinarily to our leſs Familiars, being a Holy-Day's Dreſs in Converſation, which though it flatters, ceaſes not therefore to weary us. Our Saviour does Himſelf, and of Himſelf, ſay it in holy Scriptures, That *a Prophet hath no Honour in his own Country*; and the fooliſh *Jews* gave Him Ground to ſay ſo, when they concluded that He could not work Miracles, becauſe His Mother and Brethren dwelt amongſt them, and becauſe they did know Him and His Extraction.

But if Variety be that which is admired in Society, certainly our own Thoughts, or other Men's Books, can in theſe far exceed Converſation; poſſeſſing above it this Advantage, that we can never be either importun'd or betray'd by theſe, as is much to be fear'd from the other. And it is moſt remarkable, that after *Solomon* hath fixt a *Vanity and Vexation of Spirit* upon all the Actions of Men, and hath after ſeveral Times ſubjoined it to publick Employment, he only ſays, That *Reading is a Wearineſs to the Fleſh*, without adding it to be *a Vexation of Spirit*. But albeit Society were to be valued at the Rate imagin'd, yet ſolitary Perſons enjoy more the Sweets of Society, than great Men do: For in all Addreſſes to theſe, the Addreſſers conſider only what is fit for their private Intereſt; and little elſe is added, beſides the dropping of a flattering Expreſſion or two: And when any diſintereſſed Subject is fallen upon with them, it is ſpoke to with ſo much Conſtraint, and the Speakers are ſo hemm'd in by Diſcretion and Reſpect, that the Diſcourſe is manag'd with much Diſadvantage. And our very Duty teacheth us, that to ſpeak learnedly is Pedantry there, and to ſpeak religiouſly is impertinent; ſo that we muſt either tranſgreſs our Duty, or elſe be mean in our Converſation. But, albeit the Humour of the Grandee was ſo noble, as to admit of Freedom in Converſation; yet few ingenious Spirits (who are the only beſt Companions) can ſpeak freely in Publick, or to publick Perſons: Whereas the moſt hidebound Orator can pour his Conceptions into his Neighbour's Boſom, in their natural Set and Faſhion, and with as little Alteration as a Diſcourſe receives by being caſt off the Preſs upon Paper.

Reflect but upon theſe many Thouſand Apologies which are carried up and down amongſt ſuch as converſe much together; and which, as they make up the greateſt Part both of their Employment and Vexation, ſo are not incident to any who live ſolitarily, theſe being the natural Product of Conference and Rencounters: And ye may conclude, That either theſe who make ſuch Apologies, are as real in making them, as they ſeem paſſionate in having them to be believed; and then Converſation may appear to be moſt dangerous, ſeeing theſe prove, that Men may eaſily miſtake, and are ſo eaſily miſtaken by ſuch as daily frequent them, as yet to need ſo ſolemn and ſo numerous Apologies; or elſe theſe are but feign'd, and then they prove Converſation to be yet more dangerous; ſeeing, as Men are ſubject to miſtake and be miſtaken, ſo our own real Apologies for thoſe Miſtakes will not be believed, becauſe of the Frequency of other Counterfeits; nor can we, for the ſame Reaſon, diſcern whether ſuch as are made to us be real or not: What was the Subject of this

Day's Conference, will be the Subject of an Accuſation to Morrow; and that Secret, which we thought we did but lately depoſitate in our Friends Breaſts, will ſhortly fly in our Faces from the Mouth of our Enemies: But tho' our Friend were real and ſecret, yet his Inconſtancy may make theſe either no Virtues at all, or ineffectual and unprofitable ones; a Quality now ſo ordinary, that I take Pleaſure to ſee both myſelf and others miſtake the ſeveral Intereſts which they knew intimately a Year ago; Cabals and Intrigues moulding themſelves almoſt every Month in different Shapes, according to the Humours or Intereſts of the Parties concerned: And ſo peſtilential is the Malignity of Converſation, that even Ladies fail here, and this piece of Frailty they are ſuffer'd to carry about them, to keep them from being ador'd, becauſe of their other amiable Qualities: For if their Converſe were not dangerous, becauſe that any Error is there a Crime, and no Affront can there be revenged; certainly there ſhould no Place elſe be frequented. Conſider, I pray you, how Diſcourſes are laught at, tho' never ſo witty, if Three or Four combine to repreſent them as ridiculous; how a Slip, either in the Choice or Accent of a Word, becomes irreparable, by being incurred in a Society where nothing is deſign'd but Cenſure; and when any prove happy in that Trade of Gibing, they muſt be gadding Abroad (ſo tempting is this Folly) tho' ſure to meet in theſe Journeys the Repute of *ſlight* or *diſhoneſt*; and that Jeerer, who at the Beginning was eſteem'd a Wit, is, by continuing his Trade (yea, tho' he improve in it) undervalued as a Buffoon.

It was nobly obſerved by *Marcus Antoninus*, that great Emperor and Philoſopher, That a Weaver or Cobler would willingly ſequeſtrate themſelves from all Society, that they might proſecute their ſeveral Trades; and yet Man cannot retire himſelf, that he may admire the Creation, and exerciſe his own Soul, which is the great Trade of a rational Creature, and of a true Philoſopher. And ſince Gain can prevail with all ſo far, as to make them renounce Society, and eſteem Company an idle Folly; certainly, if we would reflect upon the great Advantages of *Solitude*, both as to Morality and Devotion, it were an eaſy Matter to prefer it to thoſe which are in themſelves but Trifles, if not Burdens.

Sect. 9. That *Solitude* is more pleaſing than publick Employment.

I have theſe Three Arguments to perſuade me, That *Solitude*, Contemplation, or a Country Life, have more of Pleaſure in them than publick Employment: The Firſt is, That Pleaſure being in Men an Act of the Fancy, and conſequently of the Soul; certainly theſe Pleaſures, which do more immediately affect the Soul, muſt needs be the moſt active Pleaſures; and ſuch are thoſe which ariſe from Contemplation: Whereas ſenſual Pleaſures, and ſuch as ariſe from exterior Objects, do arrive but conſequentially at that immaterial Agent, and ſo they do move it with far leſs Vigour. A Second is, That Contemplation does often drive our Souls into Ecſtaſies, and is ſo charming, that it may be rather ſaid to raviſh than pleaſe, committing ſo open a Rapture upon our Souls, that it pulls them almoſt into a State of Separation: Thus thoſe old Hermits are the Members of the ancient Church, who are ofteſt remark'd to have become thus nobly ſenſeleſs, being as far tranſported out of themſelves, as they had formerly tranſported themſelves out of the World, and lying whole Weeks under that ſpiritual Amazement, and drunk, as it were, with thoſe Streams of Conſolations which flow from thoſe bleſſed Ciſterns, the open Wounds of our glorious Saviour. And amongſt the Heathens, did not *Pythagoras* almoſt diſtract with the Satiſfaction conceiv'd in finding that noble and famous Demonſtration mention'd in the ſecond Book of *Euclid*? Was not *Pliny* ſo raviſh'd with the Pleaſure of contemplating the Rarities of the Hill *Veſuvius*, as for further Enquiry to approach ſo near, that he loſt himſelf in its Flames? And was not *Archimedes* ſo much pleas'd with his Demonſtration upon the Sands of *Siracuſe*, that he would not loſe ſo much Time from it, as wherein he might beg his Life from the rude Conquerors: Whereas, beſides what comes from Fear or Revenge, we read nor hear of no ſuch mighty Paſſion in any of thoſe who live in the Fruition of publick Employments, or ſophiſticate Satiſfactions. The Third Argument is, That we find the Satiſfaction reſulting from Honour and Ambition, to cede to very mean Pleaſures, and to ſuch as have nothing of ſatiſfying in them, beſides what they owe to the Corruption of our Senſes, and to be ſuch as do themſelves yield eaſily to this energetic Pleaſure of Contemplation.

Is not a Gallant, and even a Stateſman, who is in Love with a Miſtreſs, and ſometimes with a Whore, or hath an unquenchable Thirſt for Wine or Companionry, willing to prefer the Satiſfaction of theſe Paſſions to all Advancement, or the Pleaſures which he can receive by them? And this evidences, that this Deſire to govern, is, of its own Nature, none of the ſtrongeſt; at leaſt that our Fancy may have other Objects leſs dangerous, and equally pleaſing, whereupon to dote. And a Pedant, reading *Pompey*'s Actions in good *Latin*, is as much enchanted with it, at leaſt with the having written handſomly his Epitaph, as *Pompey* could have been himſelf in the Fruition of all his Glories, and the moſt ſpreading Ruff of his Pride. And a Country Gentleman is as much taken with a happy Chace, or a

Clown with a mean Hire, as the happieſt Favourite can be with the Purchaſe of the higheſt Office, which the Fear to loſe, or new Pretences, and much anxious Attendance, doth leſſen much to him: But if theſe Conceſſions of Gain or Honour occaſion Raptures in the Receivers, that Joy brings more Tickling with it, than is fit for the Spirit of Man to receive; and occaſions Want of Sleep, Diſcompoſure in Diſcourſe, and all thoſe other Extravagancies which proceed from Grief at other Times: Whereas *Solitude* gives no other Pleaſures than what is fit for our Recreation, or ſuitable to our Reaſon and Stoical Indifferency. So that ſeeing every State hath pleaſant Objects provided for the Enjoyer's Fancy, that State muſt be moſt preferable which fancies Objects the leaſt dangerous; and ſuch is *Solitude*, but ſuch is not publick Employment.

I think the ancient Philoſophers put but a mean Compliment upon Man, when they call'd him *a little World*: For certainly, his vaſt Soul hath in it nobler *Ideas* of all that is created, than the Fineteneſs of Matter will allow to the Creation itſelf. Whoſe Spirit is ſo narrow, but it can in one Thought repreſent larger Spheres, a more vaſt Globe, and more boundleſs Seas, than all thoſe which were brought from the Boſom of the firſt *Chaos*? And after infinite Expence hath impoveriſhed a building Prince, the meaneſt Peaſant can in his Fancy add exceedingly to its Bulkiſhneſs; and which is more, that Faculty can mould *Ideas* of Thouſands of Species never yet created, that can bring forth more Monſters than *Afric*, and can produce more Novelties than *America*: And as we cannot but admire theſe Productions, for their Variety; ſo we cannot but love them, becauſe they are our own. And thus ſeeing there can be no Pleaſure in that Variety, which is to be diſcerned in the World, but what our Fancy takes; (for what elſe is there in beholding real Caſtles, Navies, Courts or Cities, but a divertiſing of our Fancies? for Nature needs none of thoſe) certainly, Retirement hath in this the Start of its Rival: For there Fancy is at fuller Freedom and roves with leſs Contraction, than when it is limited by the Narrowneſs of the Senſes; through which Wickets, certainly nothing can enter which is auguſt or ample. In Publick we ſee the ſame Men, moſt ordinarily, ſtill act the ſame Things; and we our ſelves are ſo much buſied with our Intereſt, that we regard little even the ſmall Variety which is diſcoverable in them. And certainly, it is a great Diſparagement to the Creation, to think that there is not Variety enough there, to buſy our Meditation; or that there is leſs there than in a City or Court: It is true, that we'll ſee Variety of Hangings, Cabinets, and ſuch like Toys; but if we would view the various Faces of the Sky but one Day, we would perceive more of Variety in thoſe, more of excellent Colours and various Motions, than in Ten Thouſand ſuch Trifles as theſe. Conſider but the Beauty of one Tulip, and its ſeveral Freckles; the Motion of one Bird, and its ſeveral Wheelings, the Shapes of ſeveral Worms, and their different Crawlings, and ye will find Task enough, and more Variety there, than a City can afford; wherein they may repreſent a painted Roſe, but not its Smell; the Shape of a Fowl, but not its Motion: And yet Men there dote upon that one Quality of Shape in Pictures, more than upon Ten Thouſand real Species in the *Complex* of all their excellent Qualities; which if ye call Fineneſs, I ſee no Reaſon why ye may not call Madneſs Virtue. It is not then Want of Variety in Nature, but Want of Obſervation in us, which occaſions this Error; and He underſtood all Things infinitely better than we, who ſaid, *That* Solomon *in all his Glory was not like one Lilly of the Field.* It's reported of a great Philoſopher, that for Fifty Years he employ'd himſelf in the Obſervation of Bees, and all that Time found both new Task and Pleaſure; and never any could ſay, That he had obſerved fully all that was to be obſerved in Flowers, Anatomy, Aſtrology, or any of thoſe Sciences, amongſt which the leaſt copious in meaſuring Lengths hath Advantage of our Lives; and yet we complain, that Retirement (where theſe are only to be found) hath not Employment or Divertiſement enough for us.

But if theſe ſuffice not, my dear *Celador*, enter into your own Breaſt, and there ſurvey the ſeveral Operations of your own Soul, the Progreſs of your Paſſions, the Struglings of your Appetite, the Wandrings of your Fancy, and ye will find I aſſure you, more Variety in that one Piece, than there is to be found in all the Courts of *Chriſtendom*. Repreſent to yourſelf the laſt Age, all the Actions and Intereſts in it; how much this Perſon was infatuate with Zeal, that Perſon with Luſt; how much one purſueth Honour, and another Riches, and in the next Thought draw that Scene, and repreſent them all turn'd to Duſt and Aſhes.

The World is a Comedy, where every Man acts that Part which Providence hath aſſigned him; and as it is eſteemed more noble to look on, than to act; ſo really I know no ſecurer Box, from which to behold it, than a ſafe *Solitude*; and it is eaſier to feel than to expreſs the Pleaſure which may be taken in ſtanding aloof, and in contemplating the Reelings of the Multitude, the excentric Motions of great Men, and how Fate recreates itſelf in their Ruin; as if it fed them with Succeſs, as the *Romans* fed their Gladiators, who ſerv'd for nothing elſe, but in beating one another to recreate the diſintereſſed Beholders. Conſider, *Democ.* *Herac.*

how ſome are cartelling for not drinking off a Glaſs, others fretting at the Promotion of their Equals; one vexed that he was not ſafely delivered of his prepared Harangue, another ſcanning every Syllable of his frowning Miſtreſs's Letter: And even theſe Humours again laught at by ſome; and that Laughter wept at by others of theſe *Virtuoſo's*, who pretend to a Dictatorſhip in Moral Philoſophy.

*Sect.* 10. *Solitude* enriches more than publick Employment.

SOME admire publick Employment, and prefer it to *Solitude*, becauſe the one gains (whilſt the other waſtes) an opulent Fortune: But theſe ſhould conſider, That as thoſe Merchant-Venturers would eminently deſerve to be eſteem'd Mad, who would hazard their Stock in a Voyage, where certainly Ten of a Thouſand Bottoms will not return unſhipwrack'd; ſo Pretenders to Advancement muſt be Mad, ſeeing ſcarce Ten of a Thouſand prove ſucceſsful in the Deſign, ſo few are the Preferments which can enrich, and ſo many the Hazards in reaching them; and which is worſe, of theſe Ten which are preferr'd, ſcarce Four will be found who do not prove ſo unhappily long liv'd, as not to ſurvive their Conqueſts and Honours; and having got a Glimpſe only of Happineſs, *en paſſant*, do become ſo much the more miſerable, that they have been once happy. And as to theſe with whom Greatneſs is pleas'd to continue, do they not oft-times, by raiſing themſelves as high as their Fancy, raiſe themſelves too high for their Eſtates; and the one by ſwelling, make the other to burſt? How few Grandees are not forc'd to eke up their Spendings with contracted Debts after their own Revenues are waſted? Whereas, ſuch as live privately, and in a Country-Life, tranſmit to their Poſterity the Remainders of that yearly Rent, which reſts after all Neceſſities are defray'd: So that the Country-Man muſt be rich, ſeeing his Neceſſities overcome not his Fortune; and publick Perſons muſt be reputed poor, ſeeing they have not Sufficiency for their Maintenance. Is not a little Man as well cloath'd in his Four Yards of Cloth, as a Taller is in Six? And are not the Princes of *Italy* eſteem'd but petty Princes, becauſe in deſiring to be ſuch, they have made thoſe Fortunes, which might have made them rich Subjects, too ſmall for the Support of ſo weighty Titles, as that of Sovereign? But admit that theſe Enjoyments continued for the Enjoyer's Life-time; yet God ordinarily takes from the Length of the Duration, what theſe added to the Breadth of their Conqueſts. As a too haſty Concoction deſtroys the Body, ſo a too ſoon Conqueſt-Eſtate deſtroys the Conqueſt; and what like *Jonah*'s Gourd flouriſhes in one Night, loſes the next thoſe Bloſſoms wherewith it was adorn'd. *Haſten not to be rich,* was the Counſel of a great Moraliſt, as well as Divine; and God Almighty gave us no other Task, than to *Gain our Bread*, and that with *the Sweat of our Brow*: So that in deſiring great and ſudden Eſtates, we are peccant both as to the Matter and Manner of our Acquiſition. And what can we propoſe reaſonably to our ſelves in thus doing? For little can defend us againſt our preſent Neceſſities, and nothing can defend againſt the future. And when theſe Riches are pil'd up, they ſerve either to ſatiſfy Nature, and that is eaſy; or to ſatiſfy Fancy, and that is impoſſible. When a publick Miniſter hath gain'd, by either Toil, Oppreſſion, or a long courted Favour, a great Sum, he poſſibly makes a great Entertainment, or buys a great Jewel, with that or the equivalent, and either ſurfeits in the one, or vexes himſelf in loſing the other; and albeit he do not, What Pleaſure is there in either of theſe, but the ſerving of our Fancy after the ſame Manner that Children do, when we laugh at them for hugging Toys and Baubles? Moſt Men are as much troubled in the ſpending of what they gain, as in gaining it; and thus one Trouble creates another by an alternate Succeſſion. All we gain (ſaith *Solomon*) is either for Food or Rayment (Pomp and Superfluity being no Deſign allow'd by Nature) and much or fine of either of theſe ſerve not to defend againſt either Cold or Hunger: And ſo ſeeing the Peaſant or ſolitary Philoſopher, attains ſooner to the true End of Riches by his Sobriety, than the other by his Abundance; certainly he muſt be the richer: And that is moſt excellent which attains ſooneſt to the End for which it was deſtinate. If ſuch want Money to give Lawyers or Phyſicians, they alſo want Employment for theſe; and without Employment no Man deſires Money: So that Riches are really (though they remain) but like the *Manna*, whereof *He who gathered little had abundance; and he who gathered too much, had nothing over*: And if Riches remain not, but *take the Wings of the Morning, and flee away*, as oft they do; then conſider, that publick Perſons are moſt ſubject to theſe Alterations; for Forfeitures, Alterations of Government, or Favour, inteſtine Wars, Luxury, Gain, popular Fury, or an Heir confiding in his Father's Proſperity, or educate amidſt many ſpending Wanters, and ſuch other diſſolute Perſons as frequent publick Places, will ſooner drive to that Neceſſity, which Men ſhould only fear, than Moderation or Retirement can do. And when great Men are impoveriſh'd by theſe Accidents, they are aſham'd becauſe of their former State, and incapable by Want of ſuitable Breeding to repair their Loſſes, or ſatisfy their Neceſſities by Pains or Frugality, as private Men can; and which is worſe than all this, their former Proſperity makes Want far more unſupportable to ſuch, than to the other to whom the greateſt Hardſhips have been rendred familiar.

*Exod.* 16. 18.

*Sect.* 11. The Satisfaction of Luſt conſidered.

AS to ſuch who think, that publick Employment and Command will afford them Convenience to ſatisfy their Luſt, I can ſay nothing, but that 'tis better to live in a ſober *Solitude*, wherein Men may ſo tame their Luſts, that they need not ſatisfy them. There is no Pleaſure in eating, but to ſuch as are hungry; and certainly it were for our Advantage, rather that we could live without being hungry, than even to have as much as might ſatisfy Hunger when it comes: High Feeding, and Want of better Employment, begets this; and what impairs theſe, extinguiſhes it: Whereas I am confident, ſuch as are ſervilely ſubject to it, ſuffer more Anxiety in the purchaſing of that Conveniency, than private Men can do by the Want of Bread; for they will for that Purpoſe, diſoblige Friends, cheat their Intimates, prove ungrateful to their ſweet Bedfellows, ſuffer themſelves to be talked of, and run a Thouſand other Hazards, which they would not encounter for ſtaving off the greateſt of theſe Neceſſities under which mean Men ſuffer; and when this is gain'd, what brings it but Sickneſs, Jealouſies, Horrors in Conſcience, and Reproach amongſt Men?

*Sect.* 12. The Recreations of both compared.

WHEN I compare *Solitude* with publick Employment, as to their Recreations, I find that the one follows only ſuch as becauſe Nature hath invented, it doth therefore ſweeten, and ſuch as have no Danger in them, beſides that of being too much charming; as Hunting, Hawking, Angling, and the like, wherein we have Occaſion to learn, as well as to praiſe the Workmanſhip of our mighty Maker: And in the other, ſuch Divertiſements are moſt familiar, as if they have not been invented to gain Money, or feed Luſt, yet are not really Recreations, if they look not towards theſe Ends; and which are attended by ſo much Toil, Fretting, Sweating, Swearing, Lying, Cheating, and other Vices, that their great Pleaſures are the worſt of Torment, except their tragick Periods; of which Nature are Cards, Dice, Tennis, Dancing, Drinking, Feaſting, and Whoring; which do oftner divert Men from being real Chriſtians, than divertiſe thoſe who are really ſuch. If great Men enjoy not Recreations, they become unfit for Employment, and Employment becomes a Burden to them; and if they ſequeſtrate the meaneſt Portion of Time for private Recreations, they are curſt by thoſe Thouſands whom Multitude of Affairs, rather than Lazineſs, hath deferr'd; and who are ſo unreaſonable, as only to conſider, that they are put off, but not to conſider wherefore.

*Sect.* 13. Both compared as to their Food and Rayment.

THO' Food and Rayment are no Conſtituents, yet they are too often looked upon as conſiderable Appendages of our more material Happineſs; and theſe uſed by great Men, tho' they cannot make the Enjoyer happy, yet ſerve to make the By-ſtanders conclude themſelves unhappy in the Want of them: And therefore I ſhall make theſe few Reflections upon Both, whereby it will appear, that as to theſe the meaneſt Men are more happy than the greateſt Monarch.

AS to Rayment, certainly that uſed by private Men is moſt Noble, moſt Eaſy, and attended by feweſt Inconveniencies: Moſt Noble, becauſe in theſe, great Men follow the Mode, but mean Men make their own Mode; and ſo the one as to that is a Subject, and the other a Sovereign. Great Men are Servants not only to the Faſhion, but to ſuch Cloaths as are in it; they muſt abſtain from every Thing which may ſoil or diſorder them, and muſt employ much of that Time and Life, which is the only Thing they pray for, and which they buy with much Torture and Money from Phyſicians, merely in adjuſting them every Morning; and tho' it ſhould prejudge their Health or Eſtate, they muſt have theſe faſhionable and rich. How many Shifts will be uſed, and other Pleaſures abandoned, that Money may be got to give for theſe? Whereas a ſolitary Perſon wears ſuch as are convenient for his Health, and may be ſubſervient to any Employment; and that his are more eaſy, appears from this, That great Men, when they reſolve to take their Eaſe, lay aſide their Robes, which ſerv'd for nothing elſe but make themſelves ſweat, and others gaze: Jewels and Embroideries may make Cloaths, by being ſtiff, uſeleſs and inſupportable, but neither are neceſſary to cover our Nakedneſs, or entertain our natural Heat. And when the Faſhion changes, theſe rich Suits ſerve only either to make the Owner ridiculous, if he wear them, or to make him fret and grumble when he muſt lay them aſide; and tho' they continue faſhionable, yet if another out-ſtrip us in a more ſumptuous Suit or Retinue, then we repine, and by miſſing our Deſign of being more gallant than others, we likewiſe miſs our Happineſs; which becauſe it was not placed upon ſomething which was in our own Power, it is therefore in the Power of every other Man to take from us.

AS to Food, that which is us'd by mean Men is both more natural, and more pleaſant: More natural, becauſe it is prepar'd with leſs Toil, and being cook'd by Nature itſelf, ſerves

Nature more adequately, as to all Intents and Purpoſes; it neither entices Men to eat, till they be unable for their Affairs, nor brings it Sickneſs; it affords Strength, and prolongs Life; whereas, when publick Employment brings Riches, and theſe have hir'd Cooks, all they can do, is to cheat the Stomach into an Oppreſſion, and by Fumes ſent from thence, chaſe away fine Thoughts out of our Heads to make Room for Vapours. Solitary Perſons dine when they pleaſe, but great Men when it ſuits with their Buſineſs; and as they are more ſubject to Invitations, to Feaſts and Entertainments, ſo they muſt there ſit longer, and eat more than Nature requires, and they muſt either diſoblige their Hoſt, or kill themſelves. I know many, who in place of complimenting ſuch as they invite, make them envy them; and many who are vext when they hear of another who lives at a nobler Rate than themſelves, and who pillage the Poor, that they may entertain the Rich. That the Food of private Men is more pleaſant, ariſes from this, that the Stomach hath, by its Fumes, depraved the Taſte, ſo that nothing can reliſh; or Cuſtom hath rendred the fineſt Delicacies ſo ordinary, that nothing can appear pleaſant; a Peaſant by faſting longer, or working more laboriouſly than at other Times, can thereby heighten the Reliſh of his Diſh beyond all the Art in the Emperor's Kitchen, or Apothecary's Shop. And I have heard of a Merchant's Wife, who being much ſubject to Diſeaſes whilſt her Husband's Trade flouriſh'd, did live very long, and very healthfully, after he was broke. And when rich Perſons fall ſick, who knows but their Phyſician may contribute to make the Diſeaſe continue long, or the apparent Heir to make it end ſuddenly: And when the Phyſician is honeſt, does he not forbid the Uſe of all theſe Delicacies, whereof Greatneſs boaſts as an Advantage?

*Sect.* 14. *Object.* That the Country muſt be ſerv'd.

THE greateſt Pretext uſed to excuſe this Zeal after publick Employment, is, That the Country muſt be ſerved, and Man is not made for himſelf. To which my Anſwer is, That this makes Employment the Object of our Duty, not of our Paſſion; and infers it as a Neceſſity, not as a Choice, which is all that is contended for. Who is ſo abſurd as to deny his Country that Service, which is really but the Return of its Protection? Or, who will be ſo mad as not to contribute either Skill or Agility in ſaving that Ship from ſinking, wherein himſelf ſails? And this makes me conclude, ſuch as rebel againſt their Governours, to be as mad as thoſe are, who pull down their own Houſes, which defend them oft againſt the circumambient and bluſtering Storms; and gives me a Veneration for the Perſons of ſuch as are my Superiors, to whom nothing ſaid here, that is diſadvantageous, ſhould be applied. But if the ſerving of our Country be that Impulſe which only acts us on to undertake Employments, this ſame Deſign ſhould make us wait till we be called for by our Country: Do not Pretenders to Employment, in deſiring each to enter firſt, obſtruct all Entry to Employments? As we ſee, in entring at publick Places, where the preſſing of all, hinders the Entry of all. Do we not upon this Account oft remark, That Offices are kept vacant by Princes, becauſe of the Multitude of Rivals who compete for Preference; and ſo by their Haſte to enter, prejudge the Country more, than by their Entry they can aſſiſt it? Whereas, if it were for the publick Good that we undertook theſe Employments, all would wait till their rational Reluctancy were vanquiſh'd, with either the Importunities of their Prince, or Conveniency of their Country: And when that Deſign for which they were call'd, were ſatisfy'd, or driven to its deſign'd Period, they would willingly ſolace themſelves again, by their Retreat to theſe Country Employments, from which they were at firſt rather driven, than brought. And certainly, if the publick Intereſt were that which only did invite Men to appear in Publick, they would not repine at their being laid aſide, nor force an Entry thro' the very Sides of their Country, making a Breach in its Ramparts, becauſe they cannot enter at its Gates, as too many Pretenders daily do.

*Sect.* 15. It is juſt that there ſhould be Changes in Favour.

SHOULD not ſuch as the State have thought fit to remove from Employment, conſider, That others have an equal Title by Nature to Advancement with them; and that if their Predeceſſors in theſe Offices had not been remov'd, they had not been advanced? So either it was Injuſtice to remove theſe, or elſe it is no Injuſtice to remove them; and they ſhould rather prove grateful for having enjoy'd theſe Honours ſo long, than ingrate in repining, that they retain'd them not ſtill; which were as unnatural as if the Sun ſhould conſtantly dwell in one of his Twelve Houſes (making that the only Summer-houſe in Heaven) and ſhould not, by ſucceſſive Withdrawings and Returns, magnify his Preſence by his Abſence, and by that conſtant Change be ſo juſt, as not to gratify All that he may pleaſe a Few. If thoſe who are in Offices, were not ſubject to Alterations, they would preſume too much, and ſuch as wanted them would certainly deſpair; whereas, now the Fear of being degraded, makes ſuch as are in Employment virtuous and compaſſionate, fearing leſt their Practice become their Ditty; and the Hope of Advancement makes ſuch as yet have not attain'd to it, walk ſo as may deſerve Applauſe, and ſo as they may ſhun Reproach: If ſuch Alterations were not incident to great Men, they would oft want Occaſion and Time to repent of thoſe Sins which they committed in Publick, either by Inadvertence, having their Thoughts diſtracted with many Things; or by Extravagancy, having their Thoughts rais'd above their juſt Level. And if there were not ſuch Alterations, great Men ſhould neither have Time to admire God's many Wonders, nor to review His many Mercies, and it ſhould be unknown whether *Greatneſs* or *Solitude* were the moſt Chriſtian State.

*Sect.* 16. *Solitude* leſſens not our Vivacity of Spirit.

MANY noble Spirits have been frighted from *Solitude*, as conceiving it to be a State wherein the Soul contracts a Ruſt, which cankers its own Subſtance and makes it unpleaſant to others, and that it begets Men the Name of a Country-Clown, and unfaſhions him as to the World. But theſe ſhould conſider, That ſeeing the Finiteneſs of our Souls allows not a complete Accompliſhment, it is our Wiſdom to fill our narrow Rooms with the moſt neceſſary Proviſions, and theſe are *The Knowledge of God, and His Works*; from which will reſult that Tranquillity of Spirit which is peculiar to Philoſophy, and is the Gueſt of *Solitude*: So that when in Exchange of Compliment, Courtſhip, Knacks, Repartees, and ſuch other Appendages of Converſation, we become Pious, Learned, and Moral Philoſophers; I think us Loſers in no other Senſe, than a Tree is, when its gaudy Flouriſh ripens into ſuch Fruit as can both pleaſe the Reliſh, and feed the Body. It may be, a Philoſopher may forget by his *Solitude* whether to give a Lady his Right or Left-Hand; but if in his *Solitude* he hath learn'd to know what is right or wrong in her or his own Actions, I think ſhe ſhould eſteem him ſo much the more, and he is by much the more happier. And if the World conclude him improven, who in learning how to order an Army, hath forgot how to order a Ball; I ſee not why they ſhould account him an Apoſtate in Breeding, who is ſo Intent upon the Contemplation of a Deity and its Productions, as not to care to adore theſe Mortal Goddeſſes, except for whom the Preſſers of this Objection have little or no Devotion, being rather devoted Servants to theſe, than devout Servants to the Almighty: And how can that Soul ruſt which is in continual Exerciſe, as thoſe of Philoſophers are? And this is more to be feared in ſuch, as by living in Publick are ſtill buſied, and yet idle: For may not we be buſy in ſolliciting for unneceſſary Favours to others, in receiving and paying Viſits, in driving on unneceſſary Factions, and yet our Souls contract a Ruſt, whoſe Canker may make it at laſt moulder away to nothing? For what Share can our Souls take in ſuch Actions, wherein it hath no other Concernment than ſuch as a Man hath in the Motions of his Enemies?

LET us then admire *Solitude* (Noble *Celador*) ſeeing to it religious Perſons flee when they would ſeek God's Face; ſick Men when they would ſeek Health: Here Stateſmen find their Plots, learn'd Men their Knowledge, Poets their ſublime Fancies. In *Solitude*, neſtle the greateſt of Saints; in Publick, range the greateſt of Sinners; to the one we owe the beſt of Inventions; to the other the worſt of Cheats.

HAVING thus rais'd this pitiful Structure to its Cape-ſtone, I reſolve to furniſh it with theſe two Landskips; the one of *Solitude*, the other of *Greatneſs*.

*Sect.* 17. The Landskip of *Solitude*.

WHEN I come to repreſent *Solitude*, I muſt confeſs that its Advantages are ſo great, as that if any Thing can ſurpaſs them it muſt be the Eſteem I have of them. And for contriving its Landskip, I repreſent to myſelf *Quintus Mætius Poſthumius*, that noble *Roman*, who having been brought from his Plow to govern that great City, did after he had conquer'd its Enemies, return to his former Employment; and being ready to leave them, call'd for a Ballance, and by putting the *Faſces* (or Marks of Authority) in one Scale, and his Plow in the other, did let them ſee, that theſe Imperial Enſigns were the far lighter. Not far from him, I repreſent *Timon* the noble *Athenian*, and *Gerſon* Chancellor of *France*, who ſtarv'd after they had ſpent their Eſtates in Compliment and Liberality; exclaiming againſt all publick Perſons as perfidious, and Friends (as they found) to a Man's Fortune, but not to himſelf. Here *Diogenes* undervalues ſo far all *Alexander*'s Preſents, as to prefer one Sight of the Sun to all that he could command, who commanded all that the Sun ſhin'd upon: And there *Fiacre*, that illuſtrious *Scot*, refuſes to return from his Hermitage to receive the Crown of his Anceſtors. Here lurks St. *Jerom*, laughing in the midſt of his own Torments, at the Follies of the World: And there the great *Conſtantine* bewails with Tears the Want of *Solitude*; and the Multitude of thoſe Diſtractions, which tho' they did not extinguiſh, yet did diſturb his Devotions. Below theſe ſtands a Country-Gentleman, admiring the Folly of a *Venetian* Ambaſſador, for being vext to Death, becauſe he was at a Feſtival plac'd upon a Stool and not upon a Chair; and ſmiling to ſee a *Ruſſian* Ambaſſador, who could not ſtep (though very ſound) till he was led by two Attendants; and to hear, of the Emperor's and *Turks* Ambaſſadors, who at their laſt Meeting, behov'd, like two Pendula's Clocks, either to ſet their Paces equally, or elſe not to be reputed juſt. Repreſent

ſent to your ſelf rich Valleys, where the liberal Soil need neither be brib'd by yearly Acceſſions, nor courted with nice Attendance, nor torn by Inſtruments (as in City-Gardens) before it will beſtow any Thing upon its Maſters; but without keeping cloſe Doors (as theſe do) keeps an open Houſe to all Paſſengers, for Herbs and Flowers of all Taſtes and Liveries. Here the Nightingale is conſtrain'd to ſtay, without any other Cage than that of the native Pleaſures of the Place; and here the Sun looks from Morning to Night with a pleaſing Countenance upon the Off-ſpring of his own Beams, neither clouded with Smoak, nor intercepted by Angles of falling Houſes; and theſe, in Effect, differ from Gardens, but as Proſe from Metre, where the Materials are oft-times richer, tho' the Contrivance be not ſo artifical. Here the Levelling, tho' aſpiring Trees lay their Heads together, to protect ſuch as ſeek Shelter under their well-cloath'd Branches: And the cryſtal Streams run ſlowly and turn many Windings, as if by that and their quiet Murmurings, they would expreſs an Unwillingneſs to leave ſo pleaſant a Field; and in token of their Thankfulneſs, do in a generous Manner (becauſe without ſhewing how) enrich freely the Neighbouring Lands, and draw to their Maſter his Picture in one inſtant, without putting him to the Pains of frequent or long ſitting, beyond all the Skill of *Vandyck* or *Angelo*, entertaining likewiſe for him whole Plantations of Fiſhes, which may afford him both Aliment and Recreations beyond all that the City can boaſt, where Water never comes, but empty, and as a Priſoner, and like all other Things and Perſons corrupts, if it ſtay a while there. Here old Age crowns, with Innocency's Livery, thoſe who have innocently improv'd their Youth; and Youth beſtows Strength, becauſe it knows, that the Strength it beſtows is not to be revell'd away in Whoring and Banqueting. Here Ladies ſcorn, and need not ſubmit their native Colours to fading, and in their bluſhing at the Sins and Impudence of City Gallants, ſhew a Scarlet far exceeding the nobleſt Lillies, tho' *Solomon* and all the Glory of his Court was not to be compar'd to one of theſe. Here Compliments (which, like Cobwebs, are but the artifical Texture of pitiful Stuff, woven by poiſonous Spiders) are look'd upon as unneceſſary and dangerous; unneceſſary, becauſe there goes much of Time and Pains to their Contrivance, yet do they not perſwade ſuch as they are addreſt to, to believe them ſo well as Country Ingenuity does its Inhabitants: And dangerous, becauſe they are ordinarily but handſom Diſguiſes for ſuch cheating Inclinations, as are ſent Abroad to betray the Party concerned. Here Lovers are not like Priſoners, coupled together with Chains of Metal, nor join'd, like Princes, in a League for Civil Intereſt. Jealouſy, that moral Fever, which tortures ſo the Soul of Man, as that God was content to ordain a Miracle for ſatisfying his Doubts, finds no Employment here: For Virtue entertains thoſe Matches which itſelf hath made, and lengthens out their Productions to many more Ages, than are able to conſume Thouſands of publick Families. And (to diſpatch) here, Nature, the eldeſt Daughter of Providence, governs as Queen Regent, and receives ſo abſolute a Deference to all her Laws, that Man may be here thought to be reſtor'd to that primitive Innocence, which he formerly forfeited by his Courtſhip.

**Sect. 18.** The Landſkip of *Greatneſs.*

FOR framing the Landſkip of Greatneſs, repreſent to your ſelf *Alexander* running like a mad Man up and down the World; and killing every Man who would not call him Maſter, (for certainly we would call any Man mad, who would behave himſelf ſo in our Streets, and yet they might as juſtly do the one as he the other) and all this is to gain as much as might make him a Perſon worthy of being poiſon'd; and eſteeming all his Greatneſs ſo meanly, as to prefer to its Enjoyment the Embraces of a Whore, who would have proſtituted herſelf to the meaneſt of his Attenders. Here lies *Tiberius*, toiling more for the Title of Emperor, than a Porter would do for Bread, and yet preferring to all that *Roman* Pomp (after he knew what it was) the Pleaſure of ſeeing a naked Strumpet, than which no Man is ſo mean, as not to enjoy many greater Pleaſures: There ſtands *Hannibal*, as a *Switz*, guarding the King of *Bithynia*, here Chancellor *Bacon* ſtarts at Liberty, and there the D. *d' Alva* ſtarv'd in Priſon; in this Bed lies a jealous Courtier, tortur'd with another's growing not only greater, but even equal with him; and in another lies one loaded with Wounds, receiv'd for his Country or Prince, but not regarded by them: Not far from theſe lies *Anthony* ſtabbing himſelf, and *Cæſar* ſtabb'd by the Senate. In another Corner, ye may perceive a rich Heir ſelling that rich Suit to a Frippery, wherein he had but lately ſpent a great Fortune at Court; and another deſpairing under theſe Wounds which he did receive, for challenging one who took the Wall of him. Here ye may ſee the Head of a Nobleman, who to be reveng'd of his Prince for complimenting another, was content to hazard the Happineſs both of Prince and Country, in a Rebellion which at laſt could not but ruin himſelf and his Family: And there you may ſee the Quarters of another, who after he had gain'd much more Honour, than he at firſt deſign'd, yet was ſo deſirous to have more, as that to ſatisfy that deſired Super-addition, he would hazard what he was already poſſeſſed of in Jeopardies, which any Man not blinded by Ambition, might have ſeen to be fatal. In a Third Corner lies Heaps of ſuch as *Somerſet*, Marquis *D' Ancre*, Duke *Murdock*, Cardinal

*Wolſey* and others, whom nothing but their Affronts have made famous, albeit they were the greateſt Miniſters and Minions of their Age.

In a Fourth Corner are repreſented many great Men, who having left a pleaſant Country to come to a City, cover'd with Smoak and infected with Stink, are there vex'd to get Money to entertain their Ladies in that Luxury and Fineneſs, whereof the One tempts them, and the Other tempts others to entertain theſe Amours which are dangerous, and may prove fatal: And who have likewiſe quit their own Families, wherein all theſe Reſpects were paid them, that they are glad to have Occaſion to pay at that Court, for which they exchang'd their former Reſidence; and who, by the Diſeaſes occaſion'd by want of that free Air which they have left, are rendred unable to reliſh all the other Pleaſures which they expected to enjoy in the City. And if, after all this, ye will not conclude a Solitary Life to be more noble than publick Employment; yet at leaſt ye will, with Seraphic Mr. *Boyle*, confeſs, That there is ſuch a kind of Difference betwixt Virtue ſhaded by a private, and ſhining in a publick Life, as there is betwixt a Candle carried aloft in the open Air, and encloſed in a Lantern; in the former of which Situations it gives more Light, but in the latter it is in leſs Danger to be blown out.

I ſhall (*Celador*) in this laſt Place, cloſe this Diſcourſe with the laſt Advantage of *Solitude*; which is, That by abſtracting its Favourites from being Rivals to great Men, and from being Sharers with covetous Men, it conciliates to them that Applauſe, which as it was due to their Merit, ſo was obſtructed by theſe and the like Incentives.

------*Defunctus amabitur idem,*

hath been the Fate of many who were perſecuted whilſt they were alive: And Death and *Solitude* have this in common, That they ſuffer Enemies and oblige Friends, to expreſs their former Eſteems: *Fame* reſembling in this a Shot, where the Ball is fled, before the Report arrive at our Ears.

But I have ſpent ſo much of the Age of this Night, in ending this Letter, that it now begins to grow gray; and the dapling Twilight brings as much Light as to let me ſee, that I have been rather Zealous than Mannerly, in ſhewing you how much I am,

*Dear,* Celador,

*Your moſt Humble Servant,*

*and Sincere Well-wiſher.*

FINIS.

# Moral Gallantry:

A

# DISCOURSE

Wherein the Author endeavours to prove,

**That Point of Honour,** (abſtracting from all other Ties) obliges Men to be *Virtuous.*

And that there is nothing ſo Mean (or unworthy of a *Gentleman*) as Vice.

To which is Added,

*A Conſolation againſt* CALUMNIES: *Shewing how to bear them Eaſily and Pleaſantly.*

Written in Return to a Perſon of Honour, and at his Deſire ſubjoin'd to this Diſcourſe, becauſe of the Contingency of the Subject.

*Though God did not know, nor Men would not puniſh Vice, yet would I not commit it; ſo mean a Thing is Vice.* Seneca.

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## To His GRACE
## *JOHN* Earl of *ROTHESS,*

His Majeſty's High Commiſſioner, Lord High Chancellor, Lord Preſident of His Majeſty's Exchequer and Council, and General of His Majeſty's Forces in *Scotland*, &c.

May it pleaſe Your Grace,

MY *Obligations to You are ſuch as may excuſe real Paſſion in a* Stoic, *and ſeeming Flatteries in a Philoſopher: And my Gratitude deſerv'd not to aſpire to that Name, if it ſhould not, like them, want Meaſures. But, ſeeing your Modeſty makes you think even what is Juſtice to your Merit to be Flattery; as the Greatneſs of your Merit keeps the higheſt Eulogies I can give you from being ſo; I ſhall retain my Reſpects for you in a Breaſt, which may diſpute Sincerity as to your Intereſts, with the firſt of thoſe who pretend to it: With which I ſhall the ſooner reſt ſatisfied, becauſe no Paper, nor any Thing elſe except the Heart which ſends you this, is capable to contain or expreſs that Kindneſs it feels for you. In the above-written Enumeration of your Titles,*

*Titles, I have neither deſign'd to flatter you, nor to contribute to your Fame; but rather, to remember you how much you are Debtor to Providence for its Kindneſs; and we to you for your repeated Cares: That thereby ye may be thankful for it, and we to you. In order to which, I have preſented you and my Country with theſe Diſcourſes; which by inciting both to be Virtuous, will not allow either to be Ingrate. And therein if I evidence not Abilities, I will at leaſt Kindneſs and Reſpect; which cannot but far outvalue the other, ſeeing the Laſt relates to You, and the Firſt reſpects only Myſelf. Since then holy Altars have not diſdain'd to offer up Pigeons and ſuch like value-leſs Things, which nothing but the Sincerity of the Offerer could render conſiderable; refuſe not to accept and reviſe theſe, though unfiniſh'd Diſcourſes. And if a Man's laſt Words may be believ'd; I (who am to make theſe my laſt Words in Print, and confine my Thoughts for the future to my ordinary Employment) do aſſure you that they are preſented with all imaginable Reſpect and Zeal, by*

Your Grace's moſt Humble Servant,

George Mackenzie.

## TO THE
# Nobility and Gentry.

*My Lords and Gentlemen,*

HAVING lighted this, tho' the ſmalleſt and dimmeſt of *Virtue*'s Torches, at *Honour*'s pureſt Flame; I thought it unſuitable to place it under the Buſhel of a private Protection; but rather to fix it upon ſuch a conſpicuous Elevation as your exalted Names; that Virtue might launch out from thence its glorious Beams more radiantly; and the better direct thoſe who intend to be led by it. Narrower Souls than yours, have not Room enough to lodge ſuch vaſt Thoughts, as *Virtue* and *Honour* ſhould inſpire: And that which rais'd you to that Height which deſerves this Compliment from Virtue, does deſerve that ye ſhould not, when ye have attain'd to that Height, neglect its Addreſs, tho' ſent you by the meaneſt of its and your Servants.

YE may (*My Lords and Gentlemen*) make yourſelves Illuſtrious by your Virtue; and which is yet Noble, (becauſe more extenſive) ye may illuſtrate Virtue by your Greatneſs; and as the *Impreſſa* of a great Prince, makes Gold more current, tho' not more pure; ſo your Patrociny and Example may render Virtue more faſhionable and uſeful, than now it is. Undervalued Virtue makes then its Application to you, as to thoſe whom, or whoſe Predeceſſors it hath obliged; and perſecuted Virtue deſerves your Patronage, as rewarded Virtue is worthy of your Imitation. And ſeeing it did raiſe your Families, and offers ſtill to raiſe Monuments for your Memory; ye do in that Aſſiſtance but pay your Debt, and buy Fame from ſucceeding Ages. And as what is engraven upon growing Trees does enlarge itſelf as the Tree riſes; ſo Virtue will be ſerious to advance you, knowing that it will receive Extention accordingly as ye are promoted. Virtue is nothing elſe, but the Exerciſe of theſe Principles, which reſpect the univerſal Good of others; and therefore Nature out of Kindneſs to it's own Productions, and Mankind in Favour to their own Intereſts, have enobled and adored ſuch as were ſtrict Obſervers of thoſe. The only ſecure and noble Way then to be admired and honoured, is to be Virtuous; this will make you, as it did *Auguſtus*, the Ornament of your Age; and as it did *Titus Veſpaſian*, the Delight of Mankind. This is (tho' to my Regret) the Way to be nobly *Singular*, and truly Great. For Men follow you, when ye are Vicious, in Compliment to their own depraved Humours; but when they ſhall aſſimilate themſelves to you in your Virtues, they will ſhew truly their Dependance; and that they follow you, and not their own Inclinations. In Vice ye but follow the Mode of others; but in re-entring *Virtue* into the Bon-grace of the World, ye will be Leaders: By this your Lives will become Patterns, and your Sentences Laws to Poſterity; who ſhall enquire into your Actions, not only that they may admire, but (which is more) that they may imitate you in them. I intend not by this Diſcourſe (my Lords and Gentlemen) that all Virtues ſhould ſhrink into the Narrowneſs of a Cell, or Philoſopher's Gown: No, no; public Virtues are in their Extenſion, as much preferable to private, as the one Place is more Auguſt than the other; of which to give you but one Inſtance; (for the Principle is too well founded to need more) there is more Virtue in relieving the Oppreſſed, than in abſtaining from Oppreſſion; for That comprehends This, and adds to it the Nobleneſs of Courage, and the Humanity of Compaſſion. The one is the Employment of Philoſophers, but the other of that Omnipotent GOD, whom theſe Philoſophers with trembling adore: In the one we vanquiſh, but in the other we only fly, Temptations. Virtue has Employment for you, great Souls, as well as for retired Contemplators; and tho' Juſtice, Temperance, and theſe Virtues wherein none ſhare with you, be more intrinſecally Nobler than the atchieving the greateſt Victories, wherein Fate, Soldiers and Accidents, challenge an Intereſt; yet Virtue loves to beſtow Lawrels as well as Bays; and hath its Heroes, as well as Philoſophers. Rouze up then your native Courage, and let it overcome all Things, except your Clemency; and fear nothing but to ſtain your Innocence; undervalue your Anceſtors no otherwiſe, than by thinking their Actions too ſmall a Pattern for your Deſigns; and aſſiſt your Prince, till he make the World (which is waſh'd by the Sea on all Quarters) that Iſle which ſhould acknowledge his Sceptre: Your Time makes the richeſt Part of the Public's Treaſure; and every Hour ye miſpend of that, is ſacrilegious Theft committed againſt your Country. Throw not then ſo much Time away, (tho' ſome be allowable) in Hunting and Hawking, which are not the nobleſt Exerciſes, ſeeing they favour always the Strongeſt, and do incline Men (tho' ſurdly) to Oppreſſion and Cruelty; (for which Reaſon (I believe) *Nimrod*, the firſt Tyrant, is in Scripture obſerved to have been a mighty Hunter;) and with *Lucullus*, that glorious *Roman*, think it the nobleſt Hunting, to purſue Malefactors by Juſtice in Peace, and irreclaimable Enemies by Armies in War. Raiſe Siege from before theſe coy Ladies, (I ſpeak not of the nobler Sort, for to court ſuch will oblige you to learn Wit, Liberality, Patience and Courage) who do heighten their Obſtinacy, of Deſign to make you lenghten your Purſuits, and lay it down before theſe ſtrong Cities, which are by no forced Metaphor called the Miſtreſs of the World; level their proud Walls, when they refuſe your juſt Commands, with the Ground whereon they ſtand, and leave it as a Doubt to your Poſterity, when they ſee their Ruins, to judge whether your Fury, or the Thunder, has lighted there. But, if ye will juſtify your Compliments to deſerving Beauties, employ your Courage, as well as Affection, in their Service; (for till then ye ſerve them up but by halves.) And as *Cæſar* at his parting, told *Cleopatra*, Think your ſelves unworthy of them, till ye have raiſed your own Value by ſuch Exploits as Courage has made Great, and Virtue has made Generous. Court them, as he did her, with no other Serenades, than the pleaſant Noiſe of your Victories; and after ye have returned, covered not with Perfumes or Tiſſue, but with deſerved and bloſſoming Lawrels; then that ſame virtuous Courage, which hath forced a Paſſage through Walls and Ramparts, (piercing where Shot of Cannon languiſh'd, or gave back) will find an Entry into the hardeſt Heart; which, if it yield not to thoſe gallant Importunities of Fate and Fame, it is certainly more unworthy of your Pains, than ye of its Choice. But forget not amidſt all your Trophies, rather to chaſtiſe Pride, than to be proud of any your plumpeſt Succeſſes; (which become Cheats, not Victories, when Men are vain of them) for by ſo doing you ſhall become Vaſſals to it. Whilſt ye toil to enſlave others to you, endeavour rather to deſerve, than to court, Fame: For in the one Caſe, ye will make it your Trumpet; whereas in the other, it will become your imperious Miſtreſs, and ye will thus oblige it to follow you; whereas otherwiſe you may weary yourſelves in following it. The nobleſt Kind of Vanity, is to do Good, not to pleaſe others, or to expect a Reward from them; and Fame is nothing elſe, but to do ſo of Deſign, to gratify your own gallant Inclinations, judging that the having done what is Good and Great, is the nobleſt Reward of Both; and ſcattering, like the Sun, equal Light, when Men look, or look not upon it. The nobleſt Kind of Detraction, is to leſſen thoſe who rival your Virtue, not by obſcuring their Light, as the dull Earth eclipſes the Moon; but by out-ſhining it, as the Sun renders all theſe other Stars inconſpicuous, which ſhine, but appear not at the ſame Time with it; raiſe your Spirits, by theſe heroic Exploits, to ſo generous a Pitch, that ye need not think Heaven itſelf too high for you; and as if all Things here below were too unworthy a Reward for that Courage, to which all thoſe Things do at laſt ſtoop; attempt Heaven, (if ye will be truly Couragious) which the Scripture tells us *is taken by Violence, and the Violent take it by Force.* And when Virtue hath made you too Great for this Lower World, the Acclamations and Plaudites of ſuch as conſider the Heroicneſs and Juſtice of your Actions, ſhall be driven upwards with ſuch Zeal and Ardour, that they ſhall, (as it were) rent the Heavens, to clear an Entry for you there; where, when ye are mounted, tho' *Cæſar* or *Auguſtus*, *Alexander* or *Antoninus*, were adorning the Skies, transformed into Stars, as their Adorers vainly imagin'd, yet we may with Pity look down upon them, as Spangles, which at beſt do but embroider the Outſide of that Canopy, whereupon ye are to trample. Ye ſhall there have Pleaſure, to ſee our Bleſſed Saviour interceed for ſuch as were Virtuous, and welcome ſuch as come there under that winning Character; and ſhall from theſe lofty Seats, ſee ſuch terreſtrial Souls, as by their Love to the Earth, were united and transformed into it, burn in thoſe Flames, which took Fire firſt from the Heat of their Luſts here; which tho' it be an inſupportable Puniſhment, yet yields in Horror to theſe Checks they ſhall receive from their Conſcience, for having undervalued, or oppreſſed, that Virtue which I here recommend.

### THE

# Author's Deſign and Apology.

*THOUGH I can by no other Calculation than that of my Sins, be found to be old; yet in that ſmall Parcel of Time which I have already tranſacted, I have by my own Practice been ſo criminal, and by my Example adopted ſo many of other Men's Sins into the Number of my own, that though I ſhould ſpend the Reſidue of my Allowance without one Error, (which is equally impoſſible and deſirable) yet that negative Goodneſs being a Duty in itſelf, could expiate my foregoing Sins no more, than the not contracting new Debts can be accounted a Payment of the old. The Conſideration of which prevailed with me to endeavour to reclaim others from their Vices by Diſcourſes of this Nature; that in their proſelyted Practice I might be virtuous, as I have been vicious in the Practice of ſuch as have followed my Example: And that I might, in the Time they ſhould employ well, redeem what I myſelf had ſo miſ-ſpent. In order to which, I did reſolve to addreſs my ſelf to the* Nobility and Gentry, *as to thoſe whoſe Reaſon was beſt illuminated; and by prevailing with whom, the World (who imitates them, as they depend upon them) may be moſt compendiouſly gain'd to the Profeſſion of Philoſophy; and to ſuch as have moſt Leiſure to reflect upon what is offered, and feweſt Temptations to abſtract them from obeying their own Perſuaſions. And as Phyſicians do judge their Medicaments will be moſt ſucceſsful, when they rather ſecond than force Nature; ſo I reſolved to uſe the Aſſiſtance of their own Inclinations, in my Diſcourſes to them; laying aſide an Enemy, and gaining thus a Friend, by one and the ſame Task. Wherefore finding that moſt of them were either taken by an Itch for Honour, or a Love to Eaſe, I have fitted their Humours with Two Diſcourſes; in the one whereof, I endeavour to prove,* That nothing is ſo mean as Vice; *and in the next I ſhall prove,* That there is nothing ſo eaſy as to be Virtuous. *I had, I confeſs, ſome Thoughts of this Diſcourſe, when I firſt undertook the Defence of* Solitude; *but I thought it fit to acquaint myſelf with Writing, by writing to private Perſons, before I attempted to write to ſuch as were of a more elevated Condition: And that it was fit to invite all Men firſt to* Solitude; *which I prefer as the ſecureſt Harbour of Virtue. But if ſome would purſue a public Life, as the more Noble, I thought it fit to demonſtrate to them, That there is nothing truly Noble, but what is ſincerely Virtuous. I doubt not but ſome will, out of Miſtake, (I hope few will, out of Malice) think, that the writing upon ſuch foreign Subjects, binds this double Guilt upon me, That I deſert my own Employment, and do invade what belongs to thoſe of another Profeſſion. But if we number the Hours that are ſpent in Gaming, Drinking, or bodily Exerciſes (at none of which I am dextrous;) if we conſider what Time is ſpent in Journeys, and in attending the Tides and Returns of Affairs, we will find many more vacant Interludes, than are ſufficient for writing Ten Sheets of Paper in Two Years Space; eſpecially upon a Subject which requires no Reading, and wherein no Man can write happily, but he who writes his own Thoughts. With which, pardon me, to think him a ſober-Wit, who cannot fill one Sheet in Three Hours; by which Calculation, there needs go only Thirty ſelect Hours to Ten Sheets: And his Life is moſt uſuriouſly employ'd, who cannot ſpare ſo many out of Two Years to his Divertiſements; eſpecially, where the Materials are ſuch daily Obſervations as are thruſt upon me, and all others, by our living in the World; and are ſo Orthodox and Undeniable, that an ordinary Dreſs cannot but make them acceptable. And ſo few (I may ſay, none) have written upon the Subject, that I am not put to forge ſomewhat that may be new. But whatever others judge of this, or me, I find that it is a Part of my Employment, as a Man and Chriſtian, to plead for Virtue againſt Vice. And really, as a Barriſter, few Subjects will employ more my Invention, or better more my unlabour'd Eloquence, than this can do. And I find, that both by writing and ſpeaking Moral Philoſophy, I may contract a Kindneſs for Virtue; ſeeing ſuch as repeat a Lye with almoſt any Fre-*

*Frequency, do at leaſt really believe it. Neither is there any Thing more natural, than to have much Kindneſs for either theſe Perſons, or Sciences, wherewith we are daily converſant: And by this Profeſſion and Debate, I am obliged (tho' I fear that I ſatisfy not that Obligation) by a new and ſtrong Tye to be Virtuous, leſt I elſe be inconſequential to my own Principles, and ſo be reputed a Fool, either in not following what I commend, or in commending ſo much, what by my Practice I declare is not worth the being followed. And therefore if I cannot pleaſure others, (which is my great Aim, and will yield me great Satisfaction) I will at leaſt profit myſelf: Which becauſe it is more Independent, is therefore more Noble; and ſo will ſuit beſt with my Subject, tho' the other would ſuit better with my Deſires.*

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# A
# DISCOURSE,

Endeavouring to prove,

### *That* POINT OF HONOUR *obliges Men to be* Virtuous: *And that there is nothing ſo mean as* Vice, *or ſo unworthy of a* Gentleman.

BY how much the more the World grows older, by ſo much (like ſuch as wax old) its Light grows dimmer; and in this Twilight of its declining Age, it too frequently miſtakes the Colours of Good and Evil; and not infrequently believes that to be the Body, which is but its Shadow. But amongſt all its Errors, thoſe which concern Honour, are the moſt (becauſe conſpicuous, therefore) dangerous; every Fault being here an original Sin, and becoming, becauſe of the Authority of the Offender, a Law, rather than an Example. Some conceive themſelves obliged in Honour, to endeavour to be Second to none; and therefore, to overturn all who are their Superiors: Others to think every Thing juſt, whereby they may repay (tho' to the Ruin of public Juſtice) the Favours done to their private Perſons, or Fortunes. Some imagine, that they are in Honour bound to live at the Rate, and maintain the Grandeur of their Predeceſſors, tho' at the Expence of their ſtarving Creditors; (obedient to Nature in nothing oft-times, but in this fantaſtic keeping of their Ranks;) and there want not many who judge it derogatory to theirs, to acknowledge theſe Errors of which they ſtand convinced. Young Gallants likewiſe look upon Virtue, as that which confines too narrowly their Inclinations; judging every Thing mean, which falls ſhort of all the Length, to which Power or Fancy can ſtretch itſelf; and as a genteel Wit hath handſomly expreſs'd it, they believe that,

> *Honour is nothing but an Itch of Blood;*
> *A great Deſire to be extravagantly Good.*

And thus whilſt every Man miſtakes his Fancy for his Honour, they make Honour to be like the Wind; (from which at that Rate it doth little differ) than which nothing ſounds higher, and yet nothing is leſs underſtood. To vindicate Honour from theſe Aſperſions, and reclaim Perſons otherwiſe noble from theſe Errors, I have undertaken this Diſcourſe: The Nobleneſs of whoſe Subject deſerves, that it had been illuminated by the victorious Hand of mighty *Cæſar*; and to have been writ by a Quill pluck'd from the Wing of Fame. But I hope, the Readers will conſider, that ſeeing I am able to ſay ſo much upon it, that more ſublime Wits would be able to ſay much more. And as in refining of Metals, the firſt Workmen require uſually leaſt Skill; ſo I hope, that after I have digged up, with rather Pains than Art, the firſt Ore, it will hereafter be refined by ſome happier Hand.

Native Honour commended.

Dan. 2.

I have in great Eſteem thoſe Honours which are deriv'd from Anceſtors; (though that be to be great by our Mother's Labours, rather than our own) and to thoſe which Princes beſtow; (though that be but to be gallant in Livery) and I believe that we may juſtly interpret *Nebuchadnezzar*'s Image (whereof the Head is ſaid to have been Gold, the Breaſt Silver, and the Belly Braſs, the Legs Iron, and the Feet Clay) to be a Hieroglyphic of this lower World, wherein Nature hath impreſs'd the ſeveral Ranks of Mankind with gradual Advantages ſuitable to their reſpective Employments; the meaner Sort falling like Dreggs to the Bottom, whilſt the more refined Spirits do like the Cream riſe above; theſe like Sparkles flying upward, whilſt the others do like the contemn'd Aſhes lie neglected upon the Level. And ſeeing the wiſe Former of the World did deſign by its Fabric, the Manifeſtation of His Glory; it is moſt reaſonable to conclude, that He would adorn ſuch as are moſt conſpicuous in it, with ſuch Charms and Accompliſhments, as might moſt vigorouſly raviſh the Beholders into the Admiration of that glorious Eſſence they repreſent. The Almighty being hereby ſo kind to ſuch whom He hath deprived of the Pleaſure of commanding others, as to give them the Pleaſure of being commanded by ſuch as they need not be aſhamed to obey; and ſo juſt to thoſe whom He had burdened with that Command, as to fit them for it by reſembling Endowments: And as by the Heroicneſs of theſe who repreſent Him, He magnifies His own Wiſdom in that Choice; ſo by their Public-Spiritedneſs, He manifeſts His Love to theſe who are to be governed. Thus, as amongſt the Spheres, the higher ſtill roll with the greateſt Purity; and as in natural Bodies, the Head is as well the higheſt as the nobleſt Part of that pretty Fabric, (from being vain whereof nothing could let us, but that as the Apoſtle ſays, *It is given us, and it is not our own Workmanſhip*); ſo amongſt Men (each thereof is a little World, or rather a nobler Draught of the greater) the higheſt are ordinarily the more ſublime; for ſuch as attain by Election to that Height, muſt be preſumed beſt to deſerve it; ſuch as force a Paſſage to it, could not do ſo without Abilities far raiſed above the ordinary Allowance: And ſuch as by their Birth are accounted noble, have ordinarily (like Water) their Blood ſo much the more purify'd, by how much the farther it hath run from its firſt Fountain. Antiquity is an abridg'd Eternity; and that being one of God's Attributes, theſe do oft reſemble Him moſt in His other Attributes, who can pretend with greateſt Juſtice to this: And as in natural Bodies, Duration doth argue Fineneſs and Strength of Conſtitution, ſo we cannot but acknowledge, that thoſe Families have been moſt worthy, who have worn out the longeſt Tract of Time, without committing any ſuch enormous Crime, or being guilty of either ſuch Raſhneſs or Infrugality, as moth away theſe their Linages; which, like *Jonah*'s Gourd, rather appear to ſalute the World, than to fix any Abode in it.

YET there is a Nobility of Extraction much raiſed above what can owe its Riſe to Fleſh or Blood; and that is *Virtue*, which being the ſame in Souls, that the other is in Bodies and Families, muſt, by that Analogy, ſurpaſs it as far as the Soul is to be preferred to the Body: And this Mortal Honour and Nobility, prizes its Value ſo far above all other Qualities, that the Stoical *Satyriſt*, following the Dictates or Doctrines of that School, is bold to ſay, That nothing but Virtue deſerves the Name of Nobility.

*Nobilitas ſola eſt atq; unica virtus.*

And in Oppoſition to this Nobility, but moſt conſequentially to that Doctrine, *Seneca*, a Partiſan of the ſame Tribe, doth with a noble Haughtineſs of Spirit tell us, That *licet Deus neſciret, nec homo puniret, peccatum, non tamen peccarem, ob peccati vilitatem*; though God did not know, nor Man would not puniſh Vice, yet I would not ſin; ſo mean a Thing is Vice. For proving of which, I ſhall advance and confirm theſe Two great Truths, That Men are, in *Point of Honour*, obliged to be virtuous: And, That there is no Vice which is not ſo mean, that it is unworthy of a Gentleman: And ſhall lead you unto that Seraglio of private Vices, of which, tho' the weakeſt ſeem in our Experience to have Strength enough to conquer ſuch who paſs for great Spirits, or Wits in the World; a Philoſopher will yet find, that theſe Defeats given by them to noble Spirits, do not proceed from the Irreſiſtibleneſs of their Charms, but from the Inadvertence of ſuch as are captivate; and is rather a Surprize than a Conqueſt: For thoſe great Souls being buſied in the Purſuit of ſome other Project, want nothing but Time to overcome theſe Follies, or elſe theſe Vices and Paſſions (which is a great Argument of their Weakneſs) do then aſſault ſuch Heroes, when they are become now mad with their Proſperity. But if we will ſtrip Vice or Paſſion of theſe gaudy Ornaments, which Error and Opinion lends them, or advert to our own Actions, we will find that theſe overcome us not, but that we by our own Miſapprehenſion of them overcome ourſelves; as will appear, firſt, by ſome general Reflections; to which in the ſecond Place, I ſhall ſubjoin ſome particular Inſtances; and ſhall by a ſpecial Induction of the moſt eminent

Virtues and Vices, clear, That there is nothing ſo Noble as Virtue, nor nothing ſo mean as Vice.

Virtue contributes more to Advancement than Vice can do.

As to the general Reflections, I ſhall begin with this; That if Advancement be a noble Prize, doubtleſs Virtue muſt by this be more noble than Vice, ſeeing it beſtows ofteſt that ſo much deſired Reward. For further proving of which from Reaſon, conſider, that no Man will aſſociate with vicious Perſons, (without which no Project for Advancement can be promoted). For who will hazard his Life and Fortune with one whom he cannot believe? And who can believe one who is not virtuous? Truſt, Fidelity, and Sincerity, being themſelves Virtues: Or, who ſhould expect to gain by Favours the Friendſhip of ſuch, as by their Vices are ingrate to God and Nature? Who have been to ſuch liberal, infinitely far above human Reach; (and thus likewiſe vicious Perſons are contemptibly mean, ſeeing they are ſo infinitely ingrate.) And in this appears the Meanneſs of Vice, that it can effectuate nothing without counterfeiting Virtue, or without its real Aſſiſtance: When Robbers aſſociate, they entertain ſomething analogical to Friendſhip and Truſt, elſe their Vices would be but barren; and without Humility ſhewed to Inferiors, the proudeſt Men and Tyrants would owe but little to the Greatneſs of their Spirit. When Undertakers league together, either they truſt one another becauſe of their Oaths, or becauſe of their Intereſts only; if the Firſt, they owe their Succeſs to Virtue; if the Second, then they never fully cement, but aſſiſt each other by Halves; reſerving the other Half of their Force to attend that Change, which Intereſt may bring to their Aſſociates: And do ſuch as fight for Hire (Intereſt being nothing elſe) acquit themſelves with ſuch Valour, as thoſe whoſe Courage receives Edge from Duty, Charity, Religion, or any ſuch virtuous Principles? Vicious Perſons have many Rivals, and ſo meet in their Riſing with much Oppoſition: The Covetous fear the Promotion of him who is ſuch; and the Ambitious of him who is of the ſame Temper: But becauſe all expect Civility from the Courteous, and Money from the Liberal; they therefore wiſh their Preferment, as what will contribute to their own Intereſt: And Princes are induc'd to gratify ſuch, as knowing that in ſo doing they tranſmit to their People what they beſtow upon ſuch Favourites; and that they preclude the Challenges of thoſe, who repine at their Favours as miſplac'd, when not beſtowed upon themſelves.

Virtue is more conducive to Fame than Vice.

If there be any Thing that is noble and deſirable in Fame, Virtue is the only (at leaſt as the ſtraighteſt, ſo the neareſt) Road to it; Poſterity taking our Actions under their Review without the Byaſs of Prejudice, Paſſion, Intereſt, or Flattery. And of ſuch as Story canonizes for its Grandees, *Alexander* is not ſo truly glorious for defeating the *Indians*, as for refuſing to force *Darius*'s fair Daughters; for in the one a great Part is due to the Courage of his Soldiers, and the Brutiſhneſs of his Oppoſers; whereas in the other he overcame the Charms of ſuch, as might have overcome all others; and was put to combat his own Youth, which had gain'd for him all his Victories: The meaneſt of his Soldiers could have forc'd a Pris'ner, but Fame reſerved it as a Reward worthy of *Alexander* in his Chaſtity, to vanquiſh a Monarch, and gratify a generous Lady; to diſpleaſe whom was as great a Crime as it was to raviſh others. Nor was *William* the Conqueror more honoured for ſubjecting a warlike Nation, than for pardoning *Goſpatrick* and *Euſtache* of *Bulloign*, after ſo many Revoltings: For in the one, he conquered but theſe who were leſs than himſelf; but in the other he conquered himſelf who was their Conqueror. *Ariſtides* was eſteemed more noble in undergoing a patient Baniſhment, than theſe Uſurpers who condemned him to it, whoſe Names remain as obſcure as their Crimes are odious; whilſt his is the continual Ornament of Pulpits and Theatres. And all the *Roman* Glories do not celebrate *Nero*'s Memory to the ſame Pitch with that of *Seneca*'s, who did (like the Sun) then appear greateſt when he was neareſt to the Setting. *Alexander* is only praiſed when we remember not his killing *Parmenio*: And the famous *Hugh Capet* of *France* ends his Glory, where we begin to talk of his Uſurpation; and (to diſpatch) this is one great Difference betwixt Virtue and Vice, in relation to Fame; That Vice, like a *Charletan*, is applauded by the unacquainted, or like rotten Wood may ſhine in the dark; but its Luſtre leſſens at the Approach of either Time or Light; whereas tho' Virtue may for a Time lie under the Oppreſſion of Malice, (which Martyrdom it ſuffers only when it is miſtaken for Vice); yet Time enobles it, and Light does not lend it Splendor, but ſerves only to illuminate its Beholders; and ſo to enable them to diſcover what native Excellencies it poſſeſſes.

An Argument from Romances.

If *Amphialus* or *Orondates* had been charged in theſe Romances ye ſo dote upon, with Drukenneſs, Oppreſſion, or Envy, certainly it had leſſen'd their Eſteem even with ſuch as moſt admire, though they will not imitate, theſe Virtues. And to ſhew how much Kindneſs Virtue breeds for ſuch as poſſeſs it, conſider how, though ye know theſe to be but imaginary *Idea*'s of Virtue, yet we cannot but love them for that, as ye can love them for nothing elſe, ſeeing they never obliged you or your Relations; and ſince abſtract Virtue conciliates ſo much Favour, certainly Virtue in you will conciliate much more: For beſides that *Idea* which will be common to you with them, ſome will be obliged thereby to love you, as their Benefactors; and others becauſe they know not when ye will become ſo; and at leaſt they will honour your Virtue, as that which will ſecure them againſt your Wrongs; and which will aſſure them of your good Wiſhes, if you cannot lend them your Aſſiſtance. Would not the moſt proſtitute Ladies hate *Statira* or *Partheniſſa*, if they had been repreſented under any one of theſe their own Vices; whoſe Number can find their Account no where but in the Moments they live, nor Excuſes no where but in the Madneſs of ſuch as commit them? And would not our Gallants think it ridiculous to ſee theſe Heroes brought in by the Author of *Caſſandra* or *Partheniſſa*, glorying in having made their Comrades brutiſh by Drinking, or poor Maids miſerable by Uncleanneſs: And though Whoring be cried up as one of theſe genteel Exerciſes, that are the Price of ſo much Time and Pains; yet we hear of none of theſe who are ſo much as ſaid to have had a Whore, far leſs to glory in it. But to turn the Medal; Conſult your own Experience, and it will remember you of many hopeful Gentlemen, whoſe Advancement hath been ſo far diſappointed by theſe Vices, that they fell ſo low as to become Objects of Pity to ſuch as fear'd them once, as their accompliſh'd Rivals. And to let us ſee the Folly of Sin; I have known ſuch as hated Nigardlineſs ſo much, as that to ſhun it, they ſpent their abortive Eſtates before they were full Maſters of them; brought by that Exceſs to flee Creditors, ſtarve at Home, walk in Rags, and which is worſe, beg in Miſery; and ſo to fall into the Extremity of that Vice, whoſe firſt and moſt innocent Degrees they laught at in others: And when they begg'd from theſe who were both Authors and Companions in their Debaucheries, (expecting to be ſupplied as well by their Juſtice, as their Compaſſion) did get no Return but that Laughter which was a Leſſon taught by themſelves; or at beſt, a Thouſand Curſes for having bred them in a Way of living, that did naturally occaſion ſo much Miſchief. If then Poverty be mean and ignoble, certainly Vice muſt be ſo too; ſeeing beſides Sickneſs, Infirmity and Infamy, it hales on Poverty upon ſuch as entertain it.

Virtue raiſed the *Grecian* and *Roman* Empires.

When the World was yet ſo young as to be led by Sincerity, in place of that Experience which makes our Age rather witty than honeſt; its Heroes, who equally ſurpaſſed and ennobled Mankind by their Virtue, were for it deified, even by theſe their Contemporaries, who in poſſeſſing much more both Riches and Power than they, wanted nothing but this Virtue to be much greater than they were. And thus *Nimrod's* Kingdom could not build him Altars, tho' ſincere *Radamanthus* had Fire kindled on his by the Heat of their Zeal, who knowing him to be mortal, could not, even in ſpite of his dying, but worſhip that immortal Virtue which ſhined in him. And as *Cicero* informs, theſe Gods of the *Pagans* were at firſt but illuſtrious Heroes whoſe Virtue, rather than their Nature, rendred them Immortal, and worthy to be worſhipped, even in the Eſtimation of ſuch undiſciplin'd Brutes, as thought the Laws of Nature a Bondage, and the Laws of God a Fable. We find, though *Licurgus* in *Lacedemon*, *Ariſtides* in *Athens*, and *Epaminondas* in *Thebes*, were not born to command, yet their Virtue beſtowed on them what their Birth denied; and both without, and againſt Factions, they were elected by their Citizens to that Rule, which they did not court; and were preferred to ſuch as both by Birth and Pains had fairer Pretences to it. And whilſt *Greece* flouriſhed, *Reges philoſophabant, & Philoſophi regebant*; theſe Commonwealths being more numerous than their Neighbours in nothing but the ſincere Exerciſe of Reaſon. And when Tyranny and Pride had, by waſting theſe Commonwealths, made place for the *Roman* Glory; nothing conquer'd ſo much the Confiners of that glorious State, (whoſe Center was Virtue, and Circumference Fame) as their Virtue. Thus the *Phalerions* are by *Plutarch* ſaid to have ſent Ambaſſadors to *Rome*, reſigning themſelves over to the *Roman* Government, becauſe they found them ſo juſt and noble, as to ſend back their Children who had been betrayed by a School-maſter. When *Pyrrhus* was advertiſed by the *Romans* to beware of Poyſon from one of his own Subjects, who had offered to diſpatch him; he did then begin to fear that he ſhould be conquered by their Arms, who had already ſubdued him by their Civilities. And ſuch Eſteem had their Juſtice gained them, that they were choſen Umpires of all neighbouring Nations; and ſo gained one of the Oppoſites firſt to a Confederacy, and then to a Dependancy upon them. And *Attalus* King of *Pergamus* did in Legacy leave them his Kingdom, as to thoſe whoſe Virtues deſerved it as a Reward; which occaſioned St. *Auguſtine* to fall out into this eloquent Expreſſion: *Becauſe God* (ſaith he) *would not beſtow Heaven upon the* Romans, *they being Pagans; he beſtowed the Empire of the World upon them, becauſe they were Virtuous.* And many have been raiſed to Empires by no other Aſſiſtance than that of their Virtue; as *Numa Pompilius*, *Marcus Antoninus*, *Pertinax* and *Veſpaſian*; whilſt the Want of this hath in Spight of all the Power with which vicious Governours have been ſurrounded, degraded others from the ſame imperial Honours; as *Tarquinius Superbus*, *Domitian*, *Commodus*. And generally there is but one Emperor to be ſeen in that long *Roman* Liſt, who was unfortunate being virtuous: And not one whoſe Vice was not the immediate Cauſe of Ruin to its Author.

Virtue hath made Philoſophers to be admired above Princes.

Antiquity hath alſo tranſmitted to us the Memory of *Socrates*, *Zeno*, and other Philoſophers, under as obliging Eulogies, as theſe of the moſt famous Emperors; whom Virtue (to let us ſee that Riches and Honours are but the Inſtruments of Fame, and not the Diſpenſers of it) hath without any Aſſiſtance raiſed to this Pitch above theſe Princes; that they have conquered our Eſteem without the Aid of Armies, Treaſures, Senates, or flattering Hiſtorians, and ceaſe not like them to command when they ceas'd to live; but by their Precepts and Diſcourſes force worthy Souls yet to a more entire Obedience, than the others did whilſt they were alive, by their Sanctions and penal Statutes. For Princes govern but a ſhort Time one Nation; and by theſe Laws they awe but ſuch vitious Perſons, whom it is more Trouble than Honour to command. But theſe illuſtrious Philoſophers, and ſuch as imitate their Virtue, have thereby attained to a Sovereignty, over both the Wills and Judgments of the Beſt of all ſuch as are ſcattered amongſt all the other Kingdoms of the World. And *Marcus Aurelius*, who was one of the greateſt Emperors, doth recommend to Kings as well as Subjects, to think that one of theſe Philoſophers is beholding all their Actions; as a moſt efficacious Mean to keep Men in awe, not to commit that Vice to which they are tempted.

Vice muſt lurk, and is cowardly.

I have ſeen very great Men ſhun to own even their beloved Vices, in the Preſence of ſuch as they needed not fear for any Thing but their Virtue. And it is moſt remarkable, that *Nero*, who exceeded all who then lived in Power, and all who ſhall live (I hope) in Cruelty, did ſtill judge himſelf under ſome Reſtraint, whilſt *Seneca* was at Court to be a Witneſs to his Actions. And every vicious Perſon muſt flee Public, and the Light (which ſhows the Meanneſs and Cowardlineſs of Vice) when he is to reſign himſelf over to any of theſe criminal Exerciſes; by which likewiſe when committed, Men become yet more Cowards; for who having ſpent his Life at that unworthy Rate, will not (if he be Maſter of any Reaſon) tremble and be afraid to venture upon ſuch Exploits, which by taking his Life from him, may and will preſent him before the Tribunal of that God whom he hath offended? And from whom (which will not a little contribute to his Cowardlineſs) he cannot expect that Succeſs, whereof the Expectation leſſens, or heightens to its own Meaſures, the Courage of ſuch as are engaged.

Servants equal Maſters in Vice.

We may eaſily conclude the Meanneſs of Vice from this alſo, that Servants without Pains or Art equal us in them; for theſe can Whore, Drink, Lie, and Oppreſs: But to be Temperate, Juſt, and Compaſſionate, are Qualities whereby we deſerve, and are by ſuch as know us not, judg'd to be Maſters and well deſcended. And have not Servants Reaſon to think themſelves as deſerving Perſons as their Maſters, when they find themſelves able to equal, or ſurpaſs them in what they glory in, as their great Accompliſhments?

Vice but copies Virtue.

Seeing what is imitated is ſtill nobler than what imitates, certainly Vice muſt be the leſs noble, becauſe it but copies Virtue, and owes to its Mask and our Errors, what it poſſeſſes of Pleaſure or Advantage. Cruelty pretends to be Zeal, Liberality is counterfeited by the Prodigal, and Luſt endeavours to paſs for Love.

All Vices employ Fear.

Is there any Thing more ignoble than Fear, which does as Slaves ſubject us to every Attempter? And have not all Vices ſomewhat of that unmanly Paſſion? In Covetouſneſs we fear the Want of Money, in Ambition the Want of Honour, in Revenge the Want of Juſtice, in Jealouſy Rivals; and when we lye we fear to ſpeak openly.

All Vices make us depend upon others.

Is there any Thing more mean than Dependance? And does not Ambition make us to depend upon ſuch as have Honours? Covetouſneſs upon ſuch as have Riches? And Luſt upon the Refuſe of Women? Whereas Virtue ſeeks no other Reward than is paid in doing what is virtuous; and owes its Fee only to itſelf; leaving Vice in the ſervile Condition of ſerving for a Fee, even thoſe whom it moſt hates. And generally in all Vices we betray a Meanneſs, becauſe in all theſe we confeſs Want and Infirmities: In Avarice we appear either Fools in deſiring what is not neceſſary, in diſobliging Friends, hazarding our Health, and other Neceſſaries, for what is not ſo in its ſelf; or elſe we confeſs that our Neceſſities are both greater and more numerous than theſe of others, by heaping together Riches and Money, which ſerve for nothing when they ſerve us not in ſupplying our Wants. In Ambition we confeſs the Want of Native Honour and Excellency: In Luſt, Want of Continency: In Anger, we want Command of ourſelves; and in Jealouſy, we declare we think not ourſelves worthy of that Love alone, wherein we cannot fear Rivals upon any other Account. And in Jealouſy, Men likewiſe wrong their own Honour in ſuſpecting their Ladies or Friends; whereas Virtue perſuades us, that our Neceſſities may be confin'd to a very ſmall Number; and that theſe may be repaired without any Loſs of Friends, and but little of Time. It teaches us that Riches were created to ſerve us; and that therefore we diſparage ourſelves, when we ſubject our Humour to our Servants. And from it we learn to rate ſo juſtly the Excellencies of that rational Soul, which is the Image of God Almighty, as to expect from it, and no where elſe under the Sun, any true and ſolid Happineſs; and to account nothing more noble than it, except the Almighty God, whoſe Offspring it is, and whom it repreſents.

**Virtue allows us a juſt Value of our ſelves.**

There is nothing more mean than to be cheated, and all Vices cheat us: Treaſon promiſes Honour, but leads to a Scaffold; Luſt Pleaſure, but leads to Sickneſs; and Flattery cheats all ſuch as hear it; and ſuch as are Proud are double miſerable, becauſe they are both the Cheaters, and the Perſons cheated. Thus Vice cannot pleaſe without a Crime; and theſe are even then gaining the Hatred and Contempt of others, when they are enquiring, or hearing from Flatterers, that the People ſeek no where without them Objects of Love and Admiration: Whereas ſacred Virtue allows us to admire ourſelves, and which is more, to believe that all theſe Things for which vicious Men neglect the Care of their Souls, are unworthy of our Reſearch; and certainly the Soul is a more noble Creature than that Earth, or Metal, which we ſtain our Souls to get: For our Souls do cenſure all theſe Things; it finds Defects in the nobleſt Buildings, and ſhews by deſiring more, an Unſatiableneſs in all extrinſic Objects; it determines the Price of all other Creatures, and like the Magiſtrate in this Common-wealth, aſſigns to every Thing its Rate; to Day it cries up the Diamond, and to Morrow it allows Preference to the Ruby; Theſe Treats and Colours which raviſh this Year, paſs the next for no Beauty. Red Hair pleaſes the *Italian*, and our Climate hates it; and it is probable that this Change of Inclination is not a culpable Inconſtancy in Man, but a Mark of his Sovereignty over all his Fellow-Creatures. Virtue teaches him not to owe his Happineſs to the Stars, nor to be like them fooliſh Emperors, ſo fondly vain, as to think that he ſhall have no other Reward for his Virtue, than the being transformed into one of theſe leſſer Lights, which he knows to have been created only for a Lantern to him; or at the beſt but to adorn with their numberleſs Aſſociates that Firmament, which was created to be one of theſe Arguments, whereby he was to be courted into a Belief of, and Love for, that God who thinks him ſo excellent a Creature, that He is ſaid to be glad at the Converſion of a Sinner, and to grieve at his Obſtinacy. And if we will conſider the miraculous Fabric of our Bodies, which tho' we be but dull, yet we may ſee to be all Workmanſhip; and wherein the Number of Wonders equals that of Nerves, Sinews, Veins, Bones, or Ligaments; the curious Fabric of that Brain, which lodges (without Croud or Confuſion) ſo many Thouſand of different and noble Thoughts; the Artifice of thoſe various Organs, that expreſs ſo harmonious Airs and raviſhing Expreſſions; the Charmingneſs of theſe Lines and Features in Ladies, which like the Sun ſcorch as well as illuminate the Beholders: We may conclude that our Soul muſt be a moſt excellent Piece, ſeeing all this Contexture is appointed to be but a momentary Tabernacle for it, when it is in its loweſt and unworthieſt Eſtate; and which when the Soul deſerts, is thrown out with all its Wonders, leſt it ſhould by its Stink trouble the meaneſt of theſe Senſes, which ſerves the Souls of theſe who are alive. Conſider, how this Soul graſps in one Thought all that Globe for which ambitious Men fight, and for ſome of whoſe Furrows the avaricious Man doth ſo much toil. Conſider, how it deſpiſes all that Avarice has amaſs'd; how it is pleaſed with no external Object longer than it fully conſiders it; and what a great Vacuity is left in our Deſires, after theſe are thrown into them; and by all this we may learn that Vice diſparages too much the Soul, when it imagines that any finite Thing can bound its Thoughts; and we are but cheated when we liſten to theſe Proffers, which Vice makes uſe of, Honour, Pleaſure, or Advantage: For who can be ſo mean to think that all theſe Faculties were beſtowed upon our Souls, theſe Features upon our Bodies, and ſo much Care taken of both by Providence, for no other End than that we ſhou'd admire that Wine which Peaſants make? Thoſe Colours which proſtitute Whores wear? That we ſhould gain Fortunes, which ſerve too oft to corrupt theſe for whom they are prepared? Or Reſpect from ſuch as bow not to us, but to our Stations?

Having thus over-run theſe general Conſiderations, whereby Men who are gallant may be courted to a Love for Virtue; my Method leads me now to fall down to thoſe Inſtances of particular Vices and Virtues, wherein I may make nearer Approaches to the Actions of Mankind: And ſeeing there is too much of Eaſe, too little of Cogency, in writing full and tedious Eſſays upon theſe common Themes, I ſhall conſider them only as they relate to Gallantry; promiſing no other Tract of Art in all this Diſcourſe; but that I ſhall purſue my Deſign ſo cloſely, as not to employ any Argument againſt Vice, nor aſſiſt Virtue with one Thought, but ſuch as may decry the One as mean, and cry up the Other as genteel and handſome.

**Diſſimulation.**

We owe that Deference to great Men, that even their Vices ſhould have the Precedency of all others; and therefore I ſhall begin this Invective with *Diſſimulation*, which is peculiarly their Sin; for when the meaner Sort are guilty of the ſame Thing, it is in them called

Falſhood; from which Diſſimulation differs nothing, but that it is the Cadet of a nobler Family. And this evinces what an ugly and ungenteel Vice Diſſimulation is, ſeeing he is no Gentleman who would not chuſe rather to die or ſtarve, than to be thought falſe: All Diſſemblers ſhew an Inability to compaſs without theſe pitiful Shifts, what in diſſembling they deſign; for this is the laſt Refuge; and by this Courage becomes unneceſſary. And we oft ſee that Cowards diſſemble beſt, gallant Men laying that Weight upon their Courage, which others do upon Diſſimulation. And at this unworthy Game it is not requiſite to be gallant, provided Men be wicked. *Diſſimulation* is but a courtly Cowardlineſs, and a ſtately Cheat: And certainly he is too much afraid of his own either Courage or Fate, and values too much his Prize above his Honour, or Innocence, who can ſtoop to play this underboard Game: Whereas a gallant and generous Soul will not fear any Event ſo much, as to leave his Road for it; and will own what is juſt with ſo much Nobleneſs of Reſolution, that though Fate ſhould tumble down upon him Mountains of Misfortunes, they may perhaps overwhelm, but they ſhall never be able to divert him. Where are then theſe gallant Reſolutions of our Fore-fathers; who ſcorn'd even Victories gained by Treachery, Falſhood, Poyſons, and ſuch other unhandſom Means? Where is the *Roman* Fortitude, which advertiſed *Pyrrhus* of his Phyſicians Offer to poyſon him, though their greateſt Enemy? And which cauſed *Marcus Regulus* chuſe to return to be a Martyr for Virtue, rather than ſtain the *Roman* Faith? Where are theſe Reſentments of the Lie in frivolous Cauſes, when great Men magnify in their Diſſimulation what is in Effect Lying and Treachery? To deceive one who is not obliged to believe us, is ill; but to cheat one whom our own fair Pretences have induc'd to believe us, is much worſe; for this is to murder one whom we have perſuaded to lay aſide his Arms: And as Diſſimulation thrives never but once; ſo to uſe it cuts off from the Diſſembler that Truſt and Confidence which is neceſſary in great Undertakings; for who will depend on theſe whom they cannot truſt? And after Diſſemblers are catcht, as ſeldom they eſcape, the abuſed People hate and perſecute them as Violaters of that without which the World cannot ſubſiſt. I appeal to the Reader, if he hath not heard Enemies lov'd for their Ingenuity; and if he hath not ſeen theſe cut-throat Lights blown out, and end in a ſtinking Snuff; and as if every Man had eſcaped a Cut-purſe, if every Man did not bleſs himſelf, and rejoyce to ſee theſe Diſſemblers fall. And I may juſtly ſay, that Diſſimulation is but the Theory of Cutpurſing, or Murder: Conſider how unpleaſant any thing appears that is crooked, and ye will find natural Argument againſt Diſſimulation; and tho' it hath great Patrons, and can pretend to an old Poſſeſſion, and much Breeding at ſome Courts, (though all who are gallant there hate it) yet it is never able to gain Eſteem; and can defend itſelf no otherways than by a cowardly lurking, and ſhunning to be diſcovered. Neither can there be ſo much Wit in this Art, as can juſtify its Error; for Women, and the meaneſt Wits are oft-times moſt expert in it: All can do it in ſome Meaſure, and none ever uſed it long without being diſcovered; and ſuch only are rendred its Prey, as make it no great Conqueſt; they being either our Friends, who expected not our Invaſion, or Fools who are not worthy to be gloried in as our Trophies.

Envy and Detraction.

THERE are none of the Vices which rage amongſt them, more deſtructive to either their Honour, or to the Honour of that Commonwealth which they compoſe, than Envy, and (which both follows it, and aggravates its Guilt) Detraction. Envy is mean, becauſe it confeſſes that the Envier is not ſo Noble or Excellent as the Perſon envied; for none are envied, but ſuch as poſſeſs ſomewhat that over-reaches, or excels what is poſſeſt by ſuch as do envy. This Vice acknowledges, that he who uſeth it, wants much of what is deſirable; and which is meaner, much of what another poſſeſſes; and as if we deſpair'd of riſing to another's Height, it makes us endeavour to pull him down to the Stature of our own Accompliſhments. Moſt Men eſſay to imitate the Actions of theſe whom they envy; ſo that in detracting from theſe, they leave others to undervalue what they themſelves deſign ardently to perform. And thus, if theſe Detracters be ſo much favoured by Fate, as to atchieve any ſuch great Action; as that is which they undervalue in others, they get but a barren Victory; and which is more inſupportable, they ſee themſelves puniſhed by their own Vice. And to convince us how mean Vices, Envy and Detraction are; we may obſerve, that, ſuch as are victorious, judge it their Honour, to magnify theſe who were vanquiſh'd; and Men wound extremely their own Honour, when they detract from Perſons who are more deſerving in the Eyes of the World than themſelves; for they force their Hearers to conclude, That the Detracters themſelves muſt be undeſerving; ſeeing theſe who deſerve better, are by their Confeſſion, cry'd down as being of no Merit; which remembers me of this excellent Paſſage in *Plinius* the Second, *Tibi ipſi miniſtras in alio laudando; aut enim is quem laudas, tibi ſuperior eſt, aut inferior; ſi inferior, & laudandus tu multo magis; ſi ſuperior, neque jure laudandus, tu multo minus:* Thou ſerveſt thine own Intereſt when thou praiſeſt others; for either he whom thou praiſeſt, is thy Inferior, and then if he deſerves to be praiſed, much more thou; if he be thy Superior, and deſerves not to be praiſed, much leſs thou. All Men are either our Friends, or our Enemies, or ſuch who have not concerned themſelves in our Affairs. We are baſe becauſe ingrate, when we detract from our Friends; and we aſſert our own Folly, when by Detraction we endeavour to leſſen the Worth of thoſe whom we have choſen for ſuch: We leſſen likewiſe our Honour, when we detract from our Competitors and Enemies, becauſe to conteſt with undeſerving Perſons is ignoble; and to be vanquiſh'd by them has little of Honour in it: Whereas as all Events are uncertain, if we be overcome by ſuch as our Detractions have made to paſs for undeſerving, our Overthrow will by ſo much become the more deſpicable; and to detract from ſuch as expected no Wrong from us, and who are Strangers to us and our Affairs, is not only imprudent and unjuſt, but is as diſhonourable and little gallant, as that is to wound one who expects not our Aſſault, and whoſe Innocency as to us, leaves him diſarm'd; and the Word *Backbiting* clears to us, That Detraction is a Degree of Cowardlineſs; for it aſſaults only ſuch as are unprepared or abſent; which is held diſhonourable amongſt the leaſt of ſuch as have Gallantry in any Eſteem. He who praiſes, beſtows a Favour; but he who detracts, commits a Robbery, in taking from another what is juſtly his; and certainly to give, is more noble than to take. Envy is alſo moſt prejudicial to great Undertakings, ſeeing ſuch as are engaged, muſt reſolve either not to act what is neceſſary for completing ſo great Projects, or if they do, to fall under the Envy of theſe for whom they act them; and the Undertakers do obſtruct by Envy their own Greatneſs, becauſe they are by that Vice perſuaded to crop ſuch as begin to perform in their Service, Attempts worthy of the being conſidered. How deſtructive likewiſe this Vice is to the Glory of Kingdoms and Commonwealths, does but too clearly appear from this, that all who are in them are either deſpicable by not being worthy of the being envied, or elſe will be deſtroyed by that Vice, which levels its murdering Engines at ſuch only who are the nobleſt Spirits, and who deſerve moſt Promotion from their Country. *Carthage* was deſtroyed by the Envy which *Hanno* and *Bomilcar* bore to *Hannibal*, who by denying him Forces to proſecute his *Italian* Conqueſts, did involve themſelves with him in the common Ruins of their Country; which ſhews the diſhonourable Folly of Envy in conſpiring againſt itſelf, with theſe, who being Enemies to both the Oppoſites, ſides firſt with the one in gratifying his Envy, and then deſtroys the other, whoſe Paſſion it firſt ſerv'd. Pitiful Examples whereof our own Age affords us, wherein many great Men were by Envy driven to oppoſe Principles, whereon they knew the public Safety and their own private Intereſt to depend. *Flaminius*, the *Roman* General, endangered *Rome*; and *Terentius Varro* did almoſt loſe it out of Envy to *Fabius Maximus*; and ſuch was the Force of Envy, that it did defeat the great *Scipio*, and baniſhed him from that *Rome* which he had made both ſecure and great; and did by his Example cool the Zeal of ſuch who retained their Blood in its Veins, as in an Arſenal, for no other End than the Service of their Country; as a Conſequence of which Envy, it was obſerv'd, That in the next Age moſt of *Rome*'s Citizens declin'd rather to entertain that Fame, which the former courted, than to be expoſed to the Cruelty of that Envy which did uſually attend it. Detraction brings likewiſe theſe great Diſadvantages to our Reputation; that it engages both theſe from whom we detract, and their Friends, partly out of Revenge, and partly for Self-defence, to enquire into our Errors and Frailties; and to publiſh ſuch as upon Enquiry they have found, or to hatch Calumnies, if Truth cannot ſupply them: And in that Caſe, Rate of Game obliges us to favour the Counterer; for we defend what may be our own Caſe, in favouring what is at preſent but the Defence of others. It legitimates likewiſe theſe Calumnies which are vented by us, by ſuch as our Detraction hath not yet reach'd, who will think it their Prudence (like thoſe who fear Invaſion) to carry the War into the Territories of ſuch, from whom they do, upon well founded Suſpicions, expect Acts of Hoſtility. If then our own Honour be dear to us, we ſhould not invade the Honour of others: For Revenge, the activeſt of Paſſions (when added to that Love of Honour, which is equal in us and them) will oblige them to do more againſt our Honour, than we can do in its Defence.

WHORING renders Men contemptible, whilſt it tempts them to embrace, ſuch as are not only below themſelves in every Senſe, but ſuch as are ſcarce worthy to ſerve theſe handſomer Ladies, whom they either do, or may lawfully enjoy. Doth not this Vice perſuade Men to lie in Cottages with Sluts, or (which is worſe) Strumpets? To lurk in Corners; to fear the Encounter of ſuch as know them; and to bribe and fear thoſe Servants, who by ſerving them at ſuch Occaſions, have by knowing their Secrets, attain'd to ſuch a ſervile Maſtery over them, that I have been aſhamed to hear Gentlemen upbraided by theſe Slaves, in Terms which were the adequate Puniſhment, as well as the Effect of their Vice. Men in Whoring muſt deſign either to ſatisfy their own Neceſſities, or their Fancy; if their Neceſſities, then as Marriage is more convenient, ſo it is as much more noble than Whoring; as it is more genteel for a Perſon of Honour, rather to lodge conſtantly in a well appointed Palace, than to ramble up and down in blind Ale-houſes; in the one a Man enjoys his own, whereas in the other he only lives as Thieves do by Purchaſe: If to ſatisfy Fancy, certainly it ſhould pleaſe more, at leaſt it is more honourable to be ſecure againſt Rivals, than to be ſure to be equal'd by them. Who will fancy a divided Affection? And who can be ſure that ſhe who deſtroys her Honour for us, will not reſign the ſame to a Second, or a Third; for beſides the Experiment we have of her Change, Oaths, Honour, and Obligations can be no convincing Evidences of, or Sureties for what ſhe promiſes; ſeeing ſhe is then breaking theſe, when ſhe gives Strangers theſe new Aſſurances. And this makes me laugh to hear Women ſo fooliſh, as to rely upon ſuch Promiſes as are given by Men who deſtroy their Nuptial Oaths, when they make them. And if Women be ſuch excellent Perſons, as to deſerve that Reſpect, and theſe Adorations, which are paſſionate enough to be paid before Altars; certainly every Man ſhould endeavour to ſecure the Eſteem of one of theſe rare Creatures; which is more noble than to reſt ſatisfied with a Tenth, or Sixteenth Part, like Men ſharing in a Caper. And therefore ſeeing Fancy nor Honour allow no Rivals, I am confident that no Man can ſatisfy his Fancy, nor ſecure his Honour, in preferring a Whore to a Wife, or in uſing Whores when he wants one. Have not Whores ruined the Repute of ſome great Men, who entertain'd them, by cauſing them to neglect to purſue their Victories, as *Thais* did to *Alexander*, and *Cleopatra* to *Mark Antony*? Have they not betrayed their Secrets wherein their Fame was moſt intereſſed, as *Dalilah* did to *Sampſon*? And there is nothing more ordinary than to hear ſuch (like *Herod*) ſwear that they dare not refuſe their Miſtreſſes, whatever is within their Reach; and thus they muſt either prove baſe in perjuring themſelves, if they think not what they ſay; or are contemptible Slaves both to their Paſſions and to theſe who occaſion them, if they reſolve to perform what they promiſe; which makes likewiſe theſe to be dangerous Maſters, who depend upon the Humour of a Woman; and ſo concludes them unfit to be great. It were then a generous Expiation of this Vice in ſuch as are oppreſs'd by it, to uſe it (not its Objects) as *Mahomet* the Great did his gallant Miſtreſs *Irene*, whoſe Life and Head he ſacrificed to the Repinings of his Court, and *Janizars*; who challeng'd him juſtly for loving rather to be conquer'd by one ſilly Woman, than to conquer the World, wherein ſhe had many, but he no Equals. It is noble to deliver Ladies out of Danger, but not to draw Dangers on them; and to puniſh ſuch as ſcoff at them, rather than to make them ridiculous: And what Thouſands of Dangers are drawn upon Ladies by being debauched, when married; and if they be not married, are they not thereby made the Proverb of all ſuch as know them? And to theſe I recommend *Tamar*'s Words, who when *Amnon* offer'd to ly with her, told him, *Thou ſhalt be as one of the Fools in* Iſrael; *and I, whither ſhall I cauſe my Shame to go?* And after this, let them remember that when he had ſatisfied his Luſt, then he inſtantly (as is too ordinary) deſpiſed her Perſon. And ſince Ladies will not ſtain their Honour with this Vice, till they be married, I conceive they ſhould much leſs after; for there the Obligation is doubled. From all which it follows, that Luſt is equally baſe and ignoble, whether it diſcharge itſelf upon Equals or Inferiors; betwixt which Two there is only this Difference, that it is brutal in the one Caſe, and cruel in the other.

THERE is no Vice whereby Gallantry is more ſtain'd, than by Breach of Promiſe; which becomes yet more ſacrilegious, when Ladies are wrong'd by it. And of this, Whoring makes Men likewiſe guilty, when it robs from Ladies their Huſbands; robbing likewiſe ſuch upon which it beſtows them, both of their Honour and Quiet. And thus, tho' it makes ſuch as uſe it barren, (God in this reſiſting the Propagation of Sin) yet itſelf brings forth its Faults in full Cluſters. And *Nathan*'s Parable to *David* proves it likewiſe to be ſo high an Oppreſſion, that no Man of Honour would commit it, if he would but ſeriouſly reflect upon his own Actions. From which Parable this new Obſervation may be likewiſe made, that tho' *David* was guilty of Murder and Whoring, yet the Prophet made choice only of this laſt to aſtoniſh this warlike Monarch, and raiſe his Indignation againſt this Vice, when ſhadowed out under a foreign and borrow'd Repreſentation; tho' Murder be ſo barbarous a Crime in itſelf, that the *Barbarians* did inſtantly conclude *Paul* guilty of it, when they ſaw the Viper faſten upon his Hand. The unjuſteſt Extravagance of Luſt is that, whereby Men contemn ſuch as become their Wives, tho' they admir'd them when they were their Miſtreſſes; for in this they confeſs it is a Meanneſs to be theirs: For ſince that Time the Neglecters thought them amiable, they, ſweet Creatures, have oft contracted no Guilt, nor leſſen'd the Occaſion of that Eſteem no otherwiſe, than by marrying their inconſtant Gallants, who ſeem'd to have ſo warm a Paſſion for them. And it is ſtrange, that Men ſhould admire their own Eloquence, Courage, Eſtates, and all Things elſe they poſſeſs, for no other Cauſe, than becauſe they are their own; and yet ſhould undervalue their Wives (the nobleſt Thing they poſſeſs) upon this and no other Account.

I cannot think Nature ſuch a Cheat, as that if Women had not been the excellenteſt of Creatures, it would have beautified them with Charms, and arm'd their Eyes with ſuch piercing Glances, that to reſiſt them is the next Impoſſibility to the finding a Creature that is more accompliſh'd than they; and I confeſs, the Love we bear them is not only allowable in itſelf, as an Inclination that is of its own Nature noble and virtuous; but likewiſe, becauſe

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it obliges ſuch as are engaged in it to deſpiſe all mean Vices, ſuch as Avarice or Fear; and is incompatible with all diſingenuous Arts, ſuch as Diſſimulation or Flattery. And tho' ſuch as are guilty of Whoring, do juſtify their debording by a Love to that glorious Sex; yet by this Pretext they are yet more unjuſt and vicious than their former Guilt made them; for by roving amongſt ſo many, they intimate that they are not ſatisfied with their firſt Choice; and that not only there are ſome of that Sex, but that there is none in it who deſerves their entire Affection. Or elſe by dividing them amongſt ſo many, they think their Kindneſs ſufficient to make Numbers of Ladies happy; by both which Errors, they wrong not only themſelves by ſwearing otherwiſe to the Ladies to whom they make Love, but they wrong likewiſe the Innocence and Amiableneſs of that ſweet Sex, in whom no rational Man can find a Blemiſh, beſides their Eſteem for ſuch Perſons as theſe, who indeed admire them no where but in their Compliments; and who are oft ſo baſe, that not only their Society is ſcandalous, but they are ready to tempt ſuch as they frequent; or if they fail in this, are oft ſo wicked, that they, to ſatisfy either their Revenge or Vanity, do brag of Intimacies and Allowances which they never poſſeſs'd. If then Gallants would be lov'd by their Miſtreſſes, they muſt be virtuous, ſeeing ſuch love only theſe who are ſecret, many Things paſſing amongſt even *Platonics*, which ſhould not be revealed. Theſe who are courageous, ſeeing this is appointed to be a Protection to the Weakneſs of their Sex; and theſe who are conſtant, ſeeing to be relinquiſh'd infers either a Want of Wit, in having choſen ſuch as would quit them without a Defect; or elſe that they were abandoned becauſe of Defects, by ſuch as the World may juſtly from their firſt Ardency, conclude, would never have abandon'd them without theſe; what Lady without a Cheat, will be induced to love one waſted with Pox and Inconſtancy? one whom Drunkenneſs makes an unfit Bedfellow, as well as a Friend? And tho' ſome worſhip the Relics of Saints, yet none but theſe who are mad as well as vicious, will worſhip the Relics of Sinners.

NEITHER is the Meanneſs of this Vice taken off, by the Greatneſs of theſe with whom it is ſhar'd: Which may be clear from this; that either Affection, Intereſt, or Ambition, are in the Deſign of theſe Offenders. If Affection, it ſhould excuſe no more her who is Whore to a Monarch, than her who is ſuch to a Gentleman; for Affection reſpects the Perſon, but not the Condition of ſuch as are lov'd: And it is certainly then moſt pure, when it cannot be aſcribed to, or needs the Help of either Riches to bribe, or Power to recommend it. But if Riches be deſign'd, then the Committer is guilty both of Avarice and Whoring; and ſhe is not worthy to be a Miſtreſs, who can ſtoop to a Fee like a Servant. And ſhe who deſigns Honour and Repute by theſe princely Amours, is far diſappointed: For tho' ſhe may command Reſpect, yet Eſteem is not ſubject to Sceptres. And I am confident that *Lucretia*, who chus'd rather to open her Veins to a fatal Launce, than her Heart to the Embraces of a Sovereign, is more admir'd than *Thais*, *Popæa*, *Jane Shore*, and Madam *Gabriel*; whoſe Obedience to their own Kings was a Crime in them, tho' it was Loyalty in others. Bluſhes are then the nobleſt Kind of Paint for Ladies, and Chaſtity is their moſt charming Ornament: And if theſe would ſend out their Emiſſaries, to learn by them how to reform their Errors, as they oft do to reform their Revenge, they would eaſily perceive, that looſe Men laugh at their Kindneſs, virtuous Men undervalue them and it. And whenever any Judgment is poured out upon the Kingdom, or Misfortune overtakes theſe Minions, then all is aſcribed by Divines to their Looſeneſs; and it is one of the allowableſt Cheats in Devotion, to invent miraculous Reſentments from Heaven upon their Failures. Young Ladies, to recommend their own Chaſtity are obliged, in good Breeding, at leaſt to ſay they hate them: Such as are married, are bound by their Intereſt to decry ſuch as may debauch their Huſbands; and theſe who are old, rail againſt them, as thoſe who place all Happineſs in what, becauſe of Age, they cannot pretend to: Whereas ſuch as are chaſt, are recommended with magnifying Praiſes, for Patterns to ſuch as are vicious; and are copied as admirable Originals, by ſuch as are virtuous. And I cannot omit this one Reflection, That chaſt Women are more frequently tainted with Pride, than with any other Vice; Nature as it were allowing to them to raiſe their own Value far above others, whom they have (almoſt) Reaſon to contemn, as Perſons who proſtitute themſelves; (which, and the Word *Humbling*, are leſſening Epithets of Whoring;) and ſuch who are naſty, ſpotted, and unclean.

LUST and Obſcenity in Diſcourſe, run in a vicious Circle, and by an odious Inceſt beget one another; for as Luſt prompts Men to Obſcenity, ſo Obſcenity pimps Men into Luſt; but in this Obſcenity is more culpable than Luſt, that in the one, Men alledge a natural Advantage, and ſome a Neceſſity; but in the other they have no Temptation, and ſo fall under that Curſe, *Wo unto them that ſin without a Cauſe*. In the one Men ſin covertly, making by their Bluſhes, as by a tacit Confeſſion, ſome Attonement for their Guilt; but in the other Men divulge their Sin, and by gracing it with what, if the Subject were honeſt, might paſs for Wit, do invite ſuch as wiſh to be reputed

Wits, firſt to admire, and then to imitate them in their ſinning; and the beſt of ſuch as uſe that Eloquence, become thereby moſt ignoble; being in Effect but Cooks, who prepare Sawces for provoking a luſtful Appetite in their Hearts. And I admire, that ſeeing Comedians are hiſs'd off the Stage, when they attempt it, that ſuch as are ſo far greater than theſe, as Maſters are above Buffoons, ſhould imagine that they can magnify themſelves by it. This Vice may well enough be ranged under one of the Species of *Sodomy*, ſeeing ſuch as uſe it, employ in their Luſt theſe Members, which were ſo far from being deſtinate for ſo low Uſes, that the *Pſalmiſt* in ſaying, *He will praiſe God with his Glory*, (which Interpreters render to be the Tongue) doth ſhew us, that our Tongues are amongſt the nobleſt Parts of our Body. And when I conſider, how melodious it is in its Harmonies; how eloquent in its Expreſſions; how whole Multitudes are reclaim'd from their greateſt Furies by it; and how *Cicero* is, in ſpight of all his other Faults, ſo admired for it, that Thouſands ſweat and toil daily, to make one in that Number, wherein he is acknowledged to be by them all far the Firſt: When I conſider, how miraculouſly it expreſſes, with the ſame Motion, ſo varying Sounds, that tho' Mankind be innumerable, yet each in it hath his diſtinct Tone and Voice; and how with little different Poſitions, it ſignets the ſame Air with Words ſo extremely differing, that one may think that each Man hath a Spirit ſpeaking out of him: I muſt tell out in Regretes and Wonders, that, and how ſo excellent a Faculty is ſo much abuſed! Neither muſt we conclude, that becauſe ſuch go away unanſwered, that they owe this to the Sharpneſs of their Wit, but rather to the Depravedneſs of its Subject; wherewith the greateſt Part of accurate Spirits are ſo little acquainted, that ſome know not the Terms, and others know them only to hate them. We muſt not think, that we admire for Wits ſuch ſtill at whom we laugh: And I believe many laugh at ſuch as are prophane, as they do at ſuch as they ſee ſlip and catch a Fall, tho' never ſo dangerous. I regrete in this Vice, both to ſee ſharp Men ſo vicious, and ſo much Wit ſo miſemployed; for tho' we may ſay here, that *Materiam ſuperabat opus*, yet ſuch is the Abjectneſs and Worthleſneſs of the Matter, that it is not capable of Ornament, no more than Excrements are to be admired, tho' they were gilded, and carv'd out by the moſt curious Hand; and their Wit is at leaſt to be charged with this Error, that it chuſes not Subjects worthy of their Pains; for whereas the Quaintneſs of Fancy doth, when employ'd about indifferent Subjects, beget its Maſter's Reſpect; and when upon excellent Admiration, all that it can do here, is but to excuſe the Faults it makes; and ſo at leaſt is ſo beggarly an Employment, that 'tis ſcarce able to defray its own Charges. I account him no Wit, who cannot deſerve that Name, tho' he be barr'd any one Subject, eſpecially ſuch a Subject as Obſcenity is; wherein former Traffickers have been ſo numerous, and ſo vacant from other Employments, that as nothing which is excellent, ſo little that is new, can be ſaid upon it; and what is ſaid, is tranſmitted from Ear to Ear, with ſo much of Secrecy, that as no Hiſtorian will write it, ſo fewer will know it, than will know any of theſe witty Productions of Learning, or moral Philoſophy, which all Men indifferently deſire to read and repeat: Whereas this will be altogether ſuppreſs'd from ſucceeding Ages; and of the preſent, Ladies, Stateſmen, Lawyers, Divines, and Phyſicians, are not allow'd to give it Audience. I have heard Women, tho' looſe, ſay, That they loved none of theſe, who publiſh their Shame, tho' they ſatisfy'd their Luſt; and that ſuch did often evaporate their Luſt in theſe Railleries, or deſign to ſupply their Defects in ſuch Diſcourſes. And I know that Lacquies, or Bawds, will be more accurate in that Kind of Eloquence, than the nobleſt of ſuch as uſe it, (if any who are noble uſe it at all.) Men muſt either think Women great Cheats, in loving what they weep and bluſh at; or elſe they are very cruel, in tormenting their Ears with ſo grating Sounds. And if Women be ſuch excellent Creatures, as Men's Oaths and Compliments make them, certainly Obſcenity muſt be a mean Vice, ſeeing of all others, ſuch decry it moſt: For Compliance with whom, it is ſtrange that theſe who offer to die, will not much rather abandon a Piece of imaginary Wit; and which paſſeth not even for ſuch, but amongſt theſe who are ſcarce competent Judges. It is moſt unbeſeeming a Gentleman, for ſuch as frequent Ladies, to ſpend ſo much Time in ſtudying a Kind of Wit, that not only cannot be ſerviceable, but which cannot in any Caſe be acceptable or recreative to theſe lovely Perſons; for whoſe Divertiſement and Satisfaction, even theſe obſcene Ranters do pretend that they employ all their Time and Pains; and whom they will doubtleſs at ſome Occaſions offend, by ſlipping into one of theſe criminal Expreſſions, which Cuſtom will ſo familiarize, that it will be as impoſſible for them to abſtain, as it will be for theſe others to hear what is ſo ſpoke without Trouble and Diſſatisfaction. Such as have their noble Souls buſied about great Matters, find little Time to invent Expreſſions, or mould Thoughts concerning ſuch pitiful Subjects. And I appeal to the worſt of theſe, if they do not abominate ſuch as are in Hiſtory noted for Obſcenity; and if they would not hate any, who would adorn their Funeral Harangue with no other Praiſes, but that they were ſo wittily prophane, that they would force Ladies to bluſh, Debauchees to laugh, Stateſmen to undervalue them, and chaſe Divines from their Table.

Avarice and Liberality.

AVARICE is ſo baſe a Vice, that the Term *Sordid* is improperly uſed in Morality, when it is otherwiſe applied; and by terming one a *Noble Perſon*, we intend to ſignify, that he is liberal. This is that Vice, which by ſtarving great Deſigns, hinders them to grow up to their full Dimenſions. None will carry about diſmembred Bodies, and wear Scars in their Service, nor gain Victories for theſe, whoſe Avarice will ſo little Reward their Pains, that they oft-times refuſe to ſupply theſe Neceſſities which were contracted in their own Employments. No great Man hath both the Hearts and the Purſes of his Inferiors. And few have been famous or proſperous, but ſuch as have been as ready to beſtow Riches upon their Friends, as they have been ready to take Spoil from their Enemies. *Themiſtocles* finding himſelf tempted to look upon a great Treaſure, bluſh'd at his Error; and turning to his Servant ſaid, *Take thou that Money, for thou art not* Themiſtocles. *Rome* then begun to be jealous of *Cæſar*'s Greatneſs, when he begun to put the Army in his Debt. It was ſaid of that noble Duke of *Guiſe*, That he was the greateſt Uſurer in *France*; for he laid out his Eſtate in Obligations. And *Tacitus* obſerves, that *Veſpaſian* had equal'd the the greateſt of the *Roman* Heroes, if his Avarice had not leſſen'd his other Virtues: Which is the Obſervation made by *Philip de Comines*, upon *Lewis* the XIth of *France*. *Perſeus*, out of Love to his Treaſures, loſt both his Kingdom, aud theſe; being as a Puniſhment to his Avarice, led in Triumph in the Company of his Coffers by a *Roman* General, who gloried, and is yet famous for having died almoſt a Beggar. The World love Eſteem, and follow ſuch as are liberal; Hiſtorians celebrate their Names; Soldiers fight their Battles; and their Beadſmen importune Heaven for Succeſs to their Arms; but no Man can have a Kindneſs for ſuch as will prefer to them a little ſtamped Earth; or value no Obligations but theſe which bind to a paying of Money. And it is well concluded by the World, that no vaſt Soul can reſtrict all its Thoughts to that Employment, which is the Task of Porters and Coblers. In this Vice we make our Souls to ſerve our Riches; whereas in its oppoſite Virtue, Riches, and every Thing elſe (whoſe Price theſe may be) are by ſuch as are truly liberal, ſubjected to the meaneſt Employment, to which the Soul can think them conducive. And the Soul is too noble and well appointed an Appartment, to be filled with Coffers, Bags, and ſuch like Traſh, which even theſe, who value them moſt, hoard up in their darkeſt and worſt furniſh'd Rooms: And ſuch as are liberal, are the Maſters; (for it belongs to theſe only to ſpend) whereas the Avaritious are in Effect but their Caſh-keepers; who have the Power to keep, but not the Allowance to ſpend what is under their Cuſtody. I am confident, that *Zeno* is more famous (and to be rich ſerves for nothing elſe) for throwing away his Money, when it begun to trouble his nobler Thoughts; than *Cræſus*, whoſe mountainous Treaſures ſerved only to bribe a more valiant Prince to deſtroy them and him. And *Marcus Craſſus*, the richeſt *Roman*, was ſo far undervalued by *Julius Cæſar*; that he ſaid, he would make himſelf richer in one Hour, than theſe Riches could their Maſter; which came accordingly to paſs, when by his Liberality he gained the *Roman* Soldiery; and they gained for him the Empire of that World, whereof *Craſſus*'s Eſtate was but a ſmall one, though his Avarice made it great a Spot in him. This Vice implies a preſent Senſe of Want, and a Fear of future Miſery; to be hoarding up what ſerves for nothing elſe, except to prevent, or ſupply us in theſe Conditions. But noble Spirits, who deſign Fame and Conqueſts, Virtue and Religion, raiſe their Thoughts above this low Vice; and deſign not to gain Riches, but Men, who are Maſters of theſe; and with whom when gain'd, they can ſoon bring all Things to their Devotion: And therefore in Point of Honour we are oblig'd to hate Avarice, and cheriſh Liberality.

Rebellion and Perfidy.

THOUGH Treaſon cheats with fair Hopes of Glory and Advancement; and at leaſt this Vice pretends to have whole Woods of Lawrels at its Diſpoſal; yet the moſt *ordinary* Preference it gains Men, is the being firſt amongſt Fools and vicious Perſons; for they are then wronging both that Honour they poſſeſs, and that to which they aſpire; when they by their Uſurpation learn others how ſweet it is to rebel againſt their Superiors: And ſuch as employ the Commons againſt their Sovereign, muſt expect to allow them greater Liberty than ſuits with the Honour of Governors; and muſt ſtile themſelves the Servants of the People. How meanly muſt theſe flatter that unreaſonable Crew? Swear Friendſhip with ſuch as have wrong'd their Honour? Lye, diſſemble, cheat, beg; meet in dark Corners with their Aſſociates; and ſuffer ſo much Toil and Miſery, as wants nothing but the Nobleneſs of the Quarrel to make them Martyrs. It is not ſafe for any Man in Point of Honour, to undertake Deſigns wherein it is probable he will fail, and wherein if he fail, it is moſt certain that his Honour will ſuffer: And there is no Crime wherein Men are more like to fail, than in this; the Rabble whom they employ, being as uncertain, as they are a furious Inſtrument: And like the Elephant, ready ſtill to turn Head againſt ſuch as employ them in Battle: And who will truſt the Promiſe of theſe Leaders, (for without large Promiſes, Rebellion can never be effectuate) who in theſe Promiſes are betraying their own Allegiance? And ſuch as theſe employ, will (at leaſt may) conſider, that how ſoon they have effectuate theſe treacherous

Deſigns; they will either diſdain the Inſtruments as uſeleſs, or deſtroy them as dangerous and as ſuch, who by this late Experience, are abler to ruin them, than they were their Predeceſſors. And when ſuch Traitors are diſappointed of their Deſigns, they are laught at as Fools; for nothing but Succeſs can clear them from that Imputation; and expoſed to all the Ludibry, and thereafter to the Tortures of Enemies; who cannot but be violent Executioners, ſeeing their Ruin was ſought by the Rebellion. Is there any Thing more ignoble than Ingratitude? And theſe Traytors are ingrate; ſeeing none can pretend to thoſe Arts, but ſuch as have been by the Bounty of theſe, againſt whom they rebel, advanced to that Height, which hath made them giddy; and to that Favour with the People, upon which they bottom their Hopes. And do not Men and Story talk more advantagiouſly of Footmen and Slaves who have relieved their Maſters, than of the greateſt of ſuch as have rebelled againſt their Princes? All Mankind being concerned to magnify that wherein their own Safety is concerned; and to decry theſe Arts whereby their Ruin is ſought. That ſame People who cut *Sejanus* in as many Pieces as he had once Favourites, did raiſe a Statute to *Pompey*'s Slave, for ſtaying by the Carcaſs of his dead Maſter. And as *Alexander* hang'd *Beſſus*, who had betrayed to him his Maſter; *Spitamenes* and *Antigonus* cauſed to maſſacre theſe *Higerſpides*, who had betrayed the gallant *Eumenes*: So *Charles* the Ninth of *France*, did refuſe to puniſh ſuch as had oppoſed him, when he was in Rebellion; for, ſaid he, Such as have been faithful to the King againſt me, when I was but Duke of *Orleans*, will be faithful to me, when I am raiſed from being Duke of *Orleans*, to be King of *France*.

INCONSTANCY is likewiſe an ignoble Vice, ſeeing it ſhews, that either Men were fooliſh in their firſt Choice, or that they were fooliſh in relinquiſhing it; it ſhews, that Men are too much ſubject to the Impreſſions of others; and ſmall or light Things are theſe which are ſooneſt blown off from their firſt Stations: Whereas virtuous and conſtant Perſons do ſhew their Greatneſs in the Impoſſibility of their being removed. This Vice likewiſe is unfit for ſuch as deſign great Matters, ſeeing no Party will care much to gain ſuch for Friends, whom they cannot retain; and when they tell you that ſuch are not worth their Pains, they tell you how mean an Eſteem they put upon Inconſtancy. All Affairs in the World are ſubject to change; and it is moſt certain that ſome Occaſion or other will ſomewhat raiſe all Parties: To be conſtant then to any one, will gain him who is fix'd, the Honour of being ſure to his Friends, which will magnify him amongſt ſuch as are in difference, and procure him Reſpect even from his Enemies; who will admire him for that Quality, which by enſuring their own Friends to them, will advantage their Intereſt more than they can be prejudg'd by him, as their Enemy, how conſiderable ſoever he be. *Auguſtus*'s Greatneſs cannot perſuade the World to pardon him this Fault; nor can *Cato*'s Severity, nor Self-Murder, diſſuade them from admiring that Conſtancy, which had as much extraordinary Gallantry in it as may be a Remiſſion for his Crime: Beſides, that it made *Cæſar* (even when his Victories had raiſed him to his greateſt Height and Vanity) regrete the loſing an Opportunity to gain ſo great a Perſon.

An Invective againſt unconſtant Friendſhip.

THERE is amongſt many others one Effect of Inconſtancy, which I hate, as mean, and unworthy of a Gentleman; and that is, to alter Friendſhips upon every Elevation of Fortune; as if (forſooth) Men were rais'd ſo high, that they cannot, from theſe Pinacles, know ſuch whom they have left upon the firſt Level. But really this implies a Weakneſs of Sight in them, and no Imperfection in their Friends, upon whom they caſt down their Looks, and who continue ſtill of their firſt Stature, though the others Eyes continue not to poſſeſs the ſame Clearneſs. A generous Perſon ſhould not entertain ſo low Thoughts of himſelf, as to think that what is the Gift of another, can add ſo much to his intrinſic Value, as to make him confeſs in the undervaluing of his former Friends, the Meanneſs of his own Parts, and former Condition: And he obſtructs extremely his own Greatneſs, who obliges his Friends, to ſtop and retard it; as what may be diſadvantageous to their Intereſt, by robbing them of ſo rare an Advantage as is a Friend. Whereas the nobleſt Trial of Power is, to be able to raiſe theſe whom Men honoured formerly with that Title; for by this, others will be invited to depend upon them; and they may thereby juſtify their former Choice; and let the World ſee, that they never entred upon any Friendſhip that was mean or low. Friendſhip, the greateſt of Commanders, hath commanded us to ſtay by our Friend; and he who quits the Poſt aſſigned to him, is either cowardly, or a Fool; and a Gentleman ſhould think it below his Courage, as well as his Friendſhip, to be boaſted from a Station which he thought ſo advantageous, out of either Fate or Intereſt: Which recommends much to me that gallant Rant in *Lucan*, when after he had preferred *Cato* to other Men, he in theſe Words extols him above the Gods;

*Victrix cauſa diis placuit, ſed victa* Catoni.

*The Gods did the Victorious approve,*
*But the great* Cato *did the Vanquiſh'd love.*

But leſt my Tedioufneſs ſhould make the Conſtancy I plead for, ſeem a Vice; I ſhall ſay no more of a Subject, whereof I can never ſay enough.

Drunkenneſs.

DRUNKENNESS is ſo mean a Vice, that I ſcorn to take Notice of it; knowing that none will allow it, but ſuch as are Mad; and ſuch as are Mad are not to be reclaimed by moral Diſcourſes. Yet I cannot but preſs its Meaneſs from this, That tho' *Noah* was a Perſon of the greateſt Authority, his once being drunk is remarked in Scripture, to have made him deſpicable in the Eyes even of his own Children; (whom he had alſo lately obliged to a more than natural Reſpect, by ſaving them from that Deluge, which drowned in their Sight the reſt of Mankind.) And yet he might have excuſed himſelf more than thoſe of this Age; as not knowing the Strength of that new found Wine: And having been drunk but once, might have defended himſelf by Curioſity, which too few now can alledge. It is a mean and mad Compliment, to requite the Kindneſs of ſuch as come to viſit us, with forcing them (after the Wearineſs of Travel) to drink to ſuch Exceſs, that they commit and ſpeak ſuch Follies, as make them return home from that ſtrange Place, without being remarked for any Thing elſe, than the ridiculous Expreſſions they vomited up with their ſtinking Excrements. Why are Servants turn'd out of Doors, and each Man (which is very mean) obliged to ſerve himſelf, when Men enter upon that beaſtly Employment? Is it not, that Servants may not hear, or ſee what Extravagancies are there to be committed? And is it not an ignoble Part in Perſons of Honour, to do reſolutely what they dare not own before the meaneſt who attend them? Men by this Vice bring themſelves to need their Servants Legs to walk upon, and their Eyes to ſee by; but which is worſe, they muſt be govern'd at that Time, by the ſervile Diſcretion of ſuch, who will be emboldned by this, to undervalue both them and their Commands; and theſe Maſters are accounted wiſeſt, who do moſt ſubmiſſively follow their Directions. Judge if that Exerciſe can be noble, which in diſabling us to ſerve our Friends, make us uncapable to diſcern the Favours they do us; and meaſure its Diſadvantages by this, that when Men have their Senſes benighted with the Vapours of Wine, they are thereby unfitted to lead Armies, to aſſiſt at Councils, to ſit in Judicatories, to attend Ladies; and differ nothing from being dead, but that they would be much more innocent if they were ſo. Men are then very ready to attack unjuſtly the Honour of others; and moſt unable to defend their own: And ſuch as they wrong then, do with a ſcornful Mercy pardon their Failings, with the very ſame Diſdain which makes them forgive Fools, or furious Perſons: And that, in my Judgment, ſhould be the moſt touching of all Affronts. And if we eſteem Roots according to the Prettineſs of the Flowers they diſplay, (as if they would give a grateful Account to the Sun, of what its Warmneſs has produced) certainly we will find Drunkenneſs (as the Apoſtle ſpeaks of Avarice) the Root of all Bitterneſs. For this is that Vice, which keeps Men at preſent from attending ſuch of their own, and of their Friends Intereſts, as concern moſt their Fame: And as to the Future, begets ſuch Diſeaſes, and Indiſpoſitions, as makes their Bodies unfit Inſtruments for great Atchievements. And ſeeing to talk idly, (a Character ſo unworthy, that a Gentleman would ſcarce ſuffer another to give it of him, without hazarding his Life in the Revenge) is the moſt pardonable of its Errors, its other Madneſs muſt be beyond all Remiſſion. By this Men are brought to diſgorge the deepeſt buried Secrets; to reveal the Intimacies, or aſperſe the Names of Ladies; to enter upon fooliſh Quarrels; and the next Morning, either to abjure what they ſaid, or fight unjuſtly their Comrades; and Victory is not in that Caſe rewarded with Fame, but is tainted with the Aſperſion of a drunken Quarrel; and is not aſcrib'd to Courage, but to Neceſſity.

I confeſs, Whoring is in this a more extenſive Vice, than others; that it corrupts ſtill two at once, for no Man can ſin ſo alone: But Drinking (as if it ſcorn'd not to be the greateſt Vice) does ſurpaſs it in another Quality; which is, that one vicious Perſon can force or tempt whole Tables and Companies to be drunk with him. And if great Men ſhould be known to love this Vice, all ſuch as have Need to accoſt them, would be in Danger, either by Complacency, or Intereſt, to plunge themſelves into this miſerable Exceſs. In other Vices, Men debauch only their own rational Souls; but here Men add to that, the Ingratitude of employing againſt God and Nature, theſe Rents and Eſtates, which were kept by Providence, from more pious Perſons; that great Men might by that Teſtimony of his Kindneſs, be engaged to a religious Retribution. So that ſuch as employ their Eſtates in maintaining their Drunkenneſs, commit almoſt the ſame Sacrilege with *Belteſhazzar*; who was terrified by a miraculous Hand upon the Wall; delivering his fatal Sentence, for carouſing with his Nobles in the ſacred Veſſels, that were robb'd from the Temple of *Jeruſalem*.

Injuſtice.

MY Employment, as well as Philoſophy, obliges me to implead Injuſtice as the worſt of Vices; becauſe it wrongs the beſt of Men, and the beſt of Things; the beſt of Men, ſeeing they have ſtill the beſt of Pleas; and ſo Injuſtice can only reach them; and theſe will not by Flattery, Bribing, or Cheats, conciliate the Eſteem of ſuch as have a Latitude, to return them this unjuſt Advantage; which good Men neither need, nor will accept. Injuſtice likewiſe debauches the Laws, which is the beſt of Things; and in affronting whereof, of all others, great Men are (when guilty) moſt ungreat: Becauſe it is their Guardian and Fence, by which they exact Reſpect and Treaſures from others; and without which ſuch Magiſtrates who are unjuſt, could not eſcape theſe hourly Maſſacres which a robb'd and oppreſt People would pour upon them. And though ſuch as are generouſly unjuſt, intend thereby to compliment their Friends, to repay old Favours; yet in Effect this Requital, is as baſe, as if one ſhould rob a Church, to pay his particular Debts. He is not worthy of your Friendſhip, who will expect ſuch Returns: And Virtue is not like Vice, ſo penurious or poor, as that it cannot build upon any other Foundation than the Ruins of another. Such as intend by their Injuſtice to gain Eſteem from the Party advantag'd thereby, are much miſtaken; for though they ſhould gain the Eſteem of one thereby, yet they would loſe that of many Thouſands; and he who is wrong'd will diſcloſe the Injuſtice done him, more than the other dare brag of the Favour. And I have myſelf heard, even the Gainer hate and undervalue his unjuſt Patron, loving not the Traitor but the Treaſon; conſidering, that by that Precedent himſelf was laid open to more Hazard, than he thereby reap'd of Advantage; for that ſame Injuſtice, which cenſured him of his late Conqueſt, made him unſure both of it, or all that he had or ſhould gain thereafter. And to be unjuſt for a Bribe, is as mean, as to ſerve in the worſt of Employments for a Fee; it is to be as baſe as a Thief, and leſs noble than a Robber; and it deſerves all theſe baſe Reproaches that are due to Avarice, Lying, Flattery, Ingratitude, Treachery and Perjury: All which are Sharers in this Caper, when it proſpers; and when it proſpers not, it leads to the ignoble Ports, Infamy, Poverty, the Scaffold, Pillory, or Gibbets.

**Public Spiritedneſs.**

Though my having uſurp'd ſo far upon the Reader's Patience, makes all I can ſay for the future criminal; yet ſuch Reſpect I owe, and ſuch I bear to the Memory of thoſe noble Patriots, who have by their public Spiritedneſs, ſettled for us that Peace, whoſe native Product all our Joys are, that I cannot but recommend that protecting Virtue, to ſuch as live now, for the nobleſt Ornament of a great Soul; and if our Actions be ſpecified and meaſured by their Objects, certainly thoſe Souls muſt be accounted greateſt, which center all their Caſes upon the public Good; ſcorning to wind up their Deſigns upon ſo ſmall a Bottom, as is private Intereſt. By this, the Heathens became Gods; and Chriſtians do by it (which is more) reſemble theirs. This is the Task of Kings and Princes; whereas private Intereſt is the Deſign of Churls and Coblers: Who can ſo juſtly expect univerſal Praiſe, as theſe who deſign univerſal Advantage? And none will grudge, that Riches ſhould be carried into his Treaſures who keeps them but as *Joſeph* did his Corn in *Granaries*, till others need to have their Neceſſities ſupplied.

These are deſervedly ſtiled *Patres Patriæ*: And it is accounted moral Paricide, to wound the Reputation of ſuch as the Commonwealth terms its Parents. And when theſe Treaſures which private Intereſt have robb'd from the Public, ſhall after they have ſtain'd the Acquirer with the Names of Avarice and Cruelty, invite Poſterity to recal them from his Offspring, as not due to them: Then ſuch as have, like Providence, toiled only for the Good of their Country and Mankind, ſhall find their Fame, like Medals, grow ſtill the more illuſtrious, by all Acceſſions of Time; and that the new born Generations ſhall augment the Numbers of their Admirers, more than following Years can moulder away theſe Heaps of Coin, which avaricious Men raiſed as a Monument for their Memory. *Epaminondas* is more famous and admired, than *Cræſus*; and Fame may be better believed concerning him; ſeeing he left neither Gold, nor Money, to bribe from it a Suffrage. And albeit he was ſo buſied in raiſing the Glory of his Country, that he had no Time to gain as much Money, as to raiſe the Meaneſt for his own; yet we find him at no Loſs thereby, ſeeing each *Theban* aſſiſted at his Funeral, as a Mourner: And Nature lays it as a Duty upon all whom it brings to the World, to magnifie him who endeavoured to reſemble it, in the Univerſalities of his Favours. That glorious *Roman*, who threw himſelf into the devouring Gulf, to divert the Wrath of the Gods from his Country, did, in exchange of a few Years (which he might have liv'd) add an Eternity of Fame to his Age; and by the Gloriouſneſs of that Action, has buried nothing in that Gulf, but his perſonal Faults. And *Brutus*, by dying for his Country, is not more juſtly called the Laſt of *Romans*, than he may be called the Firſt of Men: And for my part, I think that he ſacrificed *Cæſar*, rather as a Victim to his injur'd Country, than to his private Malice. For as Mr. *Cowley* well remarks; the Pretext of Friendſhip can be no Reaſon, why a Man ſhould ſuffer without Reſentment, his Mother to be violated before his Eyes. *Paul* likewiſe, whom Grace had raiſed as much above theſe, as Reaſon had raiſed theſe above others, was ſo zealous in this Virtue, that after he had known the Joys of Heaven more intimately than others, who had not like him travelled through all theſe ſtarry Regions; yet ſuch was his Affection to his Country, that he was content to have his Name expunged out of the Book of Life, that Room might be made for theirs. But if Men will love nothing but what will advance their private Intereſt, they will at leaſt, upon this Score, love their Country; becauſe, when it becomes famous, they will ſhare in the Advantage; as the being a *Roman*, was ſufficient to make one terrible when *Rome* flouriſhed. And I imagine, That it was ſufficient to incite one of that glorious Republick, to undertake, or ſuffer the hardeſt of Things, to remember him that he was a *Roman*; and at all Times the Unacquainted ſtill eſteem us, according to the Preſumptions they can gather from our Country, Race, and Education. For beſides that a Hawk of a good Neſt is ſtill preferr'd; we ſee, that Example and Emulation, are the ſtrongeſt Motives that can either induce, or enable Men to be noble and valorous: And though ſome term this but Fancy; yet granting it were no more; it is ſuch a Fancy, as tends much to our Honour; becauſe it heightens in others a Fear of us, and leſſens in us the Fear of them. I may then conclude with this; that as the Rays of the Sun are accounted a more noble Light, than any that is projected from a private Candle; and as amongſt Perfumes, thoſe are accounted nobleſt, whoſe Emanations dart to the greateſt diſtance; ſo amongſt Souls, thoſe are the moſt excellent, which reſpect moſt the Advantage of others.

Ambition is a mean Vice.

I confeſs there are ſome Vices, which by ſhrouding themſelves under the Appearance of Good, do advance themſelves too far in ill governed Eſteems; as we ſee in Ambition and Revenge; yet to our ſeverer Enquiries it will appear, that *Ambition* is ignoble; ſeeing ſuch as deſire to be promoted, confeſs the Meanneſs of that State they preſs to leave. This Vice obliges Men to ſerve ſuch as advance its Deſigns, exchanging its preſent Liberty, for but the uncertain Expectation of commanding others; and paying greater Reſpects to Superiors for this Expectation, than it will be able to exact from thoſe whom it deſigns to ſubject. What is Advancement but the People's Livery? And ſuch as expect their Happineſs from them, muſt acknowledge, that the Rabble is greater and nobler than themſelves: And by exchanging their natural Happineſs, for that which is of its beſtowing, they confeſs their own to be of the leaſt Value; for no Man will exchange for what is worſe. A Courtier admiring the Philoſopher gathering his Herbs, told him, That if he flattered the Emperor, he needed not gather Herbs; but was anſwered, That if he could ſatisfie himſelf with Herbs, he needed not flatter the Emperor; and without doubt, Flattery infers more Dependance, than gathering of Herbs. And in the Diſpute for Liberty; *Diogenes* had the Advantage of the *Stagyrite*; when he told him, *Diogenes* did dine when it pleaſed *Diogenes*; but *Ariſtotle* not till it pleaſed *Alexander*.

Vanity.

VANITY is too airy a Vice to be noble; for it is but a thin Cruſt of *Pride*; and but a pretending *Cadet* of that gallant Sin: It is I confeſs, leſs hurtful than Pride, becauſe it magnifies itſelf, without diſparaging others; (for if we admire others when compared with our ſelves, we are not vain, but proud) and it is oft the Spur to great Actions; being to our Undertakings, what ſome Poiſons are to Medicines; which, though they be hurtful in a Doſe apart; yet make the Compounds they enter more Operative and Pointed. And I have heard ſome defend, that Vanity was no Sin; becauſe, in admiring ourſelves at a greater Rate than we deſerv'd, we, without detracting from our Neighbour, heightned our Debt to our Maker; which might be an Error, but was no Fault. But Vanity, being an Error in our Judgment, it cannot but be mean as all Errors are ignoble: And he is a very Fool (which is the ignobleſt of Names) who underſtands not himſelf; he who underſtands not his own Meaſures, cannot govern himſelf; and ſo is unfit to govern others; and it is the Employment of a great Soul, rather to do Things worthy to be admired, than to admire what himſelf hath done. But leaving to purſue the Croud of its ill Effects, I ſhall ſingle out ſome of theſe I judge moſt Enemies to true Gallantry; amongſt which, I ſcruple not to prefer in Meanneſs, the being *vain of Proſperity*, and *derived Power*: Which ſhews, that we prefer and admire more what others can beſtow, than what we poſſeſs ourſelves; whereas virtuous Perſons may juſtly think, that nothing can make them greater; and to be vain of Proſperity, ſhews we cannot bear it; and ſo concludes us under a Weakneſs: To take Advantages of others, when we are more powerful than they, is as baſe, as it is for an armed Man to force his Enemy to fight, when he has no Weapon: This is Cowardlineſs not Courage; and who defers not his Revenge, till his Rival be equal with him, implies a Fear of grappling upon equal Terms. That one Expreſſion, of one of the Kings of *France*, That he ſcorn'd when he was King of *France*, to remember the Wrongs done to the Duke of *Orleans*, makes his Name grateful in Hiſtory: And if great Men would reflect ſeriouſly, how a Word from him they ſerve, (tho' but a Man, who muſt himſelf yield oft-times to a mean Diſaſter) or how the leaſt Error in their own Conduct, can overturn the fixedſt of their Endeavours; and make them in being unfortunate, ridiculous withal; certainly they would call this Preſumption rather Madneſs, than Vanity; and would conclude it more gallant, to bear Adverſity with a generous Courage; than to be a Fool or flatter'd by Proſperity; which vanquiſhes as oft theſe for whom, as theſe againſt whom it fights.

**The Meanneſs of being vain of Riches and Eſtates.**

Neither can I leave this Period, till I inveigh againſt that meaneſt of Vanities, whereby Men are vain of Eſtates and Territories: For, ſeeing Man is born Lord of all the World; why ſhould he retrench his own Right, by glorying in ſo little a Part of it, that his Share will eſcape an exact Geographer. I wiſh ſuch would remember, that *Pompey* beſtow'd Kingdoms upon his Slaves; and yet *Epictetus*, who was a Slave, is more admir'd than he; and yet admir'd for nothing but his Virtue; and why ſhould Men be proud of enjoying that, upon which the meaneſt Beggar pours out his Excrements: If theſe be vain, becauſe they may call it their own, what hath the Maſter, but that (as *Solomon* ſays) he beholdeth it with his Eyes? And at this rate, I may glory, in that the glorious Heavens are ſpread over me; for I may behold the one with as impropriating Eyes, as he can do the other. And he who wants a Tomb, which theſe have, hath the Heaven for a Vault and Burial Place; ——*Cælo tegitur, qui non habet urnam.*

But if the Anſwer be, that theſe Rents will allow them the keeping of a Table for their Grandeur; (which I wiſh were the only Excuſe) that Anſwer makes them Servants, and burdens them with a Neceſſity to provide for ſuch as they entertain; and ſo they are vain of being Servants; and Servants to ſuch as will riſe from their Table, to read and admire above them, *Plato*, *Socrates*, or which is leſs, the Author of a well contriv'd Play. But to leave this Folly; theſe may have ſome Pretext, for preferring their own Eſtates, above theſe of others; but why ſhould they admire themſelves for their Eſtates? Which is no Part of themſelves; and ſo they ſhould not in Reaſon think better of themſelves than others for it. Under the ſame Condemnation fall ſuch as are vain of their Horſes, Lacqueys, or ſuch like Things; which is moſt unjuſt, except their Horſes and they were all one.

**The Meanneſs of Vanity in Apparel.**

Such as cruſt themſelves over with Embroideries, and after they have divided their Time betwixt their Comb and their Mirrors, are vain of theſe ſilly Toys which are the Creatures and Workmanſhip of Servants, muſt be certainly very low and mean-ſpirited; when they imagin to add to their natural Value, by Things that have no Value in them, but what our Fancy (which is the moſt deſpicable Quality of that Soul they neglect) gives them. And do not they amongſt the reſt of Mankind, diſparage very much even theſe Miſtreſſes upon whom they beſtow theſe Adorations, which they deny their mighty Maker, when they imagin by ſuch contemptible Means, to ſcrue themſelves into their Eſteem? How ignobly undervalue they their own Thoughts; the noble Converſation of excellent Men and accurate Books; (to write ſome whereof, *Cæſar* and the greateſt of the Emperors have laid aſide their Swords) when they impend upon Ribbons and Laces, that Age of Time, which would be miſimployed, tho' it were let but out in Moments, upon ſuch womanly Exerciſe? But if Ladies or their Suitors, will magnify theſe handſom Shapes and Colours; which are too often beſtowed upon them, to repair the Want of theſe noble Qualities, of which thoſe who are Maſters may be more juſtly vain; Why are not they afraid by Whoring, Fairding, Drinking, Gluttony, or macerating Envy, to blaſt theſe florid Advantages upon which themſelves do, and would have others to dote?

**Preferment is not ſtill honourable.**

I muſt here endeavour to ſubdue one Error; which is by ſo much the more dangerous, that it wears the faireſt Maſk of all other Vices: And this is that whereby Men are induc'd to believe, that true Honour is but a Conſequent of Preferment; and that Preferment is ſeldom without Honour; but Honour comes never without Preferment; and not only are the Lees of the People taken with this Opinion; but the gallanteſt of Men, who are ſphered far above thoſe, do in this, ſlide eaſily into the Senſe of the Neighbourhood. Yet it remains ſtill an Error; for true Honour is an innate Elevation of the Soul; whereby it ſcorns every Thing which is more mortal than itſelf; and nothing is more frail than Preferment; whoſe Paint is waſht off by the leaſt Storm; and whoſe Being depends upon the Fancy or Humour of others: Whereas true Honour is independent; and as it cannot flow from any other, ſo it can't ſtoop to them. He is truly gallant whoſe Innocence fears not the Juriſdiction of Men; and who looks upon Sceptres, and ſuch gilded Trifles, as impertinent Toys, when they are not ſway'd by the Hand of Virtue; and who would not value Power for any other End, but to be a Second to theſe Inclinations which are ſo reaſonable, that they ſhould not need Power to make them to be obey'd? Tyrants can beſtow the talleſt Preferments, but they cannot make Men truly honourable; which ſhews that theſe Two differ. And *Heliogabolus*'s Cook was ſtill but a baſe Fellow, tho' his Maſter's doting made him as great as were his own Vices. A Statue becomes not taller by the Height of its Baſis; nor a Head more wiſe or noble for being adorn'd with a ſhaggy Plumage. *Julius Cæſar*, tho' no Emperor, has a more laſting Glory than *Tiberius* who was ſo: And *Cato* gloried more in that the People ask'd why he was not preferr'd, than he would have done in enjoying the greateſt Honours they had to beſtow. Preferment is but the Creation of Men; but true Honour is of God's own Creation; and as we ſhould eſteem this laſt, as a Piece done by the nobler Maſter; ſo we ſhould love it beſt, becauſe it is more our own, than what riſes from another's Favour. Greatneſs, when moſt advantagiouſly beſtow'd, can but produce Love, or Fear; to beget Fear, is not noble; becauſe the Devil doth this moſt; and theſe who come next to him in Baſeneſs, come neareſt to him in this; Brutes, Savages, and Mad-Men, have Sufficiency enough for that Undertaking: But to beget Love is peculiar to true Honour: And ſo generous a Paſſion is Love, that it is ſooneſt elicite, when leaſt commanded. A virtuous Perſon is likewiſe a greater Governour, than he who ſuffers himſelf to be commanded by a vicious Woman, and a thirſty Appetite; or than that King who ſuffers himſelf to be led by the Ears with Flatterers; and to be forc'd by his own Pride to diſobey his Reaſon, by which alone he is truly great; and which when any Man diſowns abſolutely, he is to be thrown into a Dungeon or Bedlam. Preferment leaves and obliges us to bow to others, for ſatisfying our Intereſt; ſo that Intereſt is confeſt by great Men, to be greater than they: But Virtue and true Honour teacheth us to ſubject our Intereſt to our ſelves; and puts it in our own Power to make ourſelves happy. And what a Pilot is in the Ship, a General in an Army, the Soul in the Body; that is a Philoſopher amongſt theſe with whom he converſes. *Nec enim unquam in tantum ſic convaleſcet nequitia; nunquam ſic contra virtutes conjurabitur; ut non virtutis nomen venerabile & Sacrum maneat.* Sen. *Epiſt.* 14. To which Purpoſe I muſt cite *Stat. Silv.*

*Vive Mide gazis, & Lido ditior auro,*
*Troica & Euphrate ſupra diademata fælix,*
*Quem non ambigui faſces non mobile vulgus,*
*Spemque metumque domas, vitio ſublimior omni.*
*Exemptus fatis.*

**The Ignobleneſs of Revenge.**

IN Revenge, we muſt uſe Inſtruments, who exact more, and will upbraid us more than the Law will do, when it ſatisfies us our Wrongs. And does not the Philoſopher, who denies that he can be wrong'd, more nobly; than he who confeſſes, that he is both ſubject to Wrongs, and hath receiv'd ſo great a one, that he cannot but purſue its Revenge? He who conceals his Wrongs, is only wrong'd in private; whilſt he who revenges his Wrong, is wrong'd in public: And certainly, the public Wrong is more ignoble. And ſeeing we conceive ourſelves concern'd in Honour, to puniſh ſuch as would divulge an Affront, that was ſmothered as ſoon as given; we cannot be ſaid to wrong our own Honour, when we in ſeeking Revenge proclaim ſuch Wrongs, as had elſe either vaniſht, or been leſſen'd by the Concealment; which remembers me of a Story, that goes of an old Man, at whoſe bald Head, a rotten Orange being thrown in the Street, clapt his Hat upon it; and ſaid, I ſhall ſpoil the Villains Sport, who expected to ſee me come ſhewing my Head all beſmeared over, and complaining of the Injury. It is one of the moſt picquant Revenges, to undervalue our Enemies ſo far, as not to think them worthy of our noticing; and we ſhew ourſelves to be greater than they, when we let the World ſee, that they cannot trouble us. When Children and Fools do the ſame Things, that we fret at in others of more advanced Years, we paſs them without a Frown; which ſhews, that it is not the Acts done us by our Enemies, but our own Reſentment, which in Effect injures us; ſo that it is ſtill in our Power to vex ſuch as deſign to affront us; by laughing at, or undervaluing theſe, and ſuch like little Endeavours, as what cannot reach our Happineſs. He who pardons, proclaims that by ſo doing, he fears not his Enemies for the Future; but Revenge implies a Fear of what we deſire upon that Account to leſſen. Thus Cowards, and none but they are cruel; ſeeing they then only account themſelves ſecure, when their Enemies have loſt all Capacity to reſiſt. In Revenge we act the Executioner; but we perſonate a Prince when we pardon; in the one we beſtow a Favour, and ſo are Noble; but in the other, we diſcloſe our Infirmity, which is Ignoble.

**The Gallantry of Patience.**

I admire paſſive Courage, as a Virtue which deſerves its Palms beſt of all others, becauſe it toils moſt for them. Honours and Rewards are but Gifts to them, but they are Conqueſts to it: And it merits as much Praiſe, as it meets with Injuries. *Avida eſt periculi virtus, & quo tendant non quid paſſura ſit, cogitat; quoniam & quod paſſura eſt; gloriæ pars eſt:* This Virtue hath rather a Greedineſs for, than a Deſire to find Dangers; and ſeeing its Sufferings make the greateſt Part of its Glory; it runs out to meet them, thinking that to attend them, is a Degree of Cowardlineſs. And if we remark narrowly, we will find that all other Virtues owe their Gallantry to this; and have no other Title to that glorious Quality, but in ſo far as they borrow Excellencies from it. Friendſhip is then only gallant, when to gratify our Friends, we expoſe to Injuries for them, either our Perſons or Intereſt. Gratitude is then noble, when we conſider not what we are to ſuffer; but what we owe, or (which is more gallant) what is requiſite for the Service of ſuch as have obliged us. Juſtice is always excellent, but is then only moſt to be admired, when we reſiſt Temptations; and where we reſolve to ſuffer, for having been juſt, the Envy and Rage of theſe, who conſider only how much they have been prejudg'd, but not how much the public Good hath been thereby advanced.

By this it is that a virtuous Perſon ſhews how great he truly is; and that Power and Command were the Inſtruments only, but not Parts of his former Worth. He who yields to Affliction, ſhews that thoſe who inflict it, are greater than himſelf; but he who braves it ſhews that it is not in the Power of any Thing but of Guilt, to make him tremble. It is eaſy for one who is aſſiſted by Power and Fate, to urge theſe Advantages; but to dare theſe, ſhews a Pitch beyond them: And this induces me to think, that paſſive Courage is more noble than what is active. For one who fights gallantly in an open Field, and in the View or Front of an Army, is aſſiſted by the Example of others, by Hope of Revenge, or Victory; and needs not much fear that Death which he may ſhun, as probably as meet: But he who in a noble Quarrel adorns that Scaffold whereupon he is to ſuffer, evinces that he can maſter Fate, and make Danger leſs than his Courage, and to ſerve him in acquiring Fame and Honour. But this Virtue deſerves a larger Room, than my preſent Wearineſs will allow it in this Paper; and therefore I will leave it for Praiſes to its own native Excellencies.

I ſhall (my Lords and Gentlemen) leave theſe Reflections to your own Improvement; for I am confident that the Heat of your own Zeal for Virtue, will kindle in your Breaſts ſuch noble Flames, as that by their Blaze ye may ſee further into this Subject, than I can diſcover: And in this Eſſay I deſire to be eſteem'd no otherwiſe preſumptuous, than a Servant is, who lights his Maſter up theſe Stairs which himſelf intends to mount.

# A
# MORAL PARADOX:
## MAINTAINING
## That it is much eaſier to be **Virtuous** than **Vicious.**

*—They weary themſelves to commit Iniquity.* Jer. 9. 5.

TO

## Sir *ROBERT MURRAY*,
### One of the Honourable Members of the Royal SOCIETY.

*SIR,*

*THO' I cannot but with much Thankfulneſs reſent your Favours, (wherein ye did both prevent and outdo my Wiſhes;) yet it were a Diſparagement to them, that I ſhould look upon myſelf as your Debtor for them, ſeeing ye beſtow'd them ſo freely, that they appeared Gifts, not Obligations: And ſo in this Dedication I deſign to pay, not them but my Reſpects. Neither intend I by it, to recommend you to Poſterity; for in that I would diſoblige Fame, which hath reſolved, by ſpeaking Truth of you, to repair and atone its former Guilt, in having ſo oft ly'd of others. But, Sir, I have choſe you to be the Patron of this Book, because your Practice is the ſtrongeſt Argument, whereby I can evince what is un-*

*dertaken in it; (which is to prove) That* there is more Eaſe in *Virtue* than in *Vice. And ſeeing to undertake the Proof of that, were the next Crime to the doubting of it; and that your Worthineſs and my Eſteem of it, are much raiſed above the frail Helps of Compliment, or a wearying Dedication; let me aſſure you and the World of Both, by the innocent Vanity I take in the Title of*

Your Sincere Friend,

and Humble Servant,

GEORGE MACKENZIE.

## *It is eaſier to be* VIRTUOUS *than* VICIOUS.

Numb. 13. AS theſe Spies deſerved Ill of the *Iſraelitiſh* Camp; who having inflamed their Breaſts with Deſires of conquering *Canaan*, by preſenting them of its Vines, who each Cluſter was a Vintage, and each Grape a Bottle; did thereafter, by a cruel Paricide, deſtroy theſe ſame Inclinations which they had begot, by telling thoſe their hopeful Brethren, That the Country was as unconquerable, as pleaſant; and that its Men were Giants, as well as its Fruits. So by the ſame Meaſures we have Reaſon to fear, that theſe Divines and Moraliſts are unhappy Guides to us poor Mortals; who after they have edged our Inclinations for Virtue, as the moſt ſatisfying of all Objects; do thereafter aſſure us, That it is attended with as much Difficulty as it is furniſh'd with Pleaſure: And that like ſome coy Lady, it poſſeſſes Charms, not to ſatisfy, but to exact our Longings. This infortunate Error hath in all Probability, ſprung either from the Vanity of theſe baſtard Philoſophers, who having cheated the People into an Eſteem for themſelves, as virtuous, reſolved by the ſecond Artifice, to heighten that Eſteem, by perſuading theſe their Admirers, that Virtue was a Work of much Difficulty as it met with Praiſe; or elſe from the Zeal of ſome Preachers, who to make us antedate our Repentance, reſolved to perſuade us, that Faith and theſe other ſpiritual Virtues, could not but be hardly attainable, as certainly they are, when moral Virtue, which was a lower Story of Perfection, was of ſo difficult an Aſcent; or elſe, which is yet moſt probable, our Lazineſs and vicious Habits being called to an Account for theſe Misfortunes, which they occaſion, have run themſelves under the Protection of this Defence, That Virtue is moſt difficult and uneaſy, and is deſtitute of both Pleaſure and Advantage: By which Conceit, many are diſſuaded in this Age from undertaking a Reſolution of being Virtuous, though otherwiſe they much honour it; and Wickedneſs is not only furniſh'd by this with an Excuſe to detain ſuch as it hath already overtaken; but with Charms to entangle theſe who are yet ſtated in an Indifferency for either. And though the Heat of Zeal in Preachers, ſhould not be too much diſproved in this Age; wherein the Coldneſs of their Hearers Charity, needs thoſe warmer Influences: And tho' they may be allow'd to bend our crooked Humours to the contrary Side of what they incline to, of Deſign to bring them to a deſired Streightneſs; yet if we conſider that infallible Theology delivered by our Saviour, we may find, that He invited His Diſciples, by aſſuring them, *That His Yoke was eaſy, and His Burden very light*; and by upbraiding them, for *wearying themſelves with their Sins*, and for *troubling themſelves about many Things*. And ſince the former Artifice hath either, by being too familiarly preached, loſt its Operation with ſuch as love Curioſity; or by being too ſeverely preſt, diſcouraged too much theſe who love too well their own Fleſh and Blood, to welcome any Doctrine that ſtands ſo oppoſite to it: I wiſh theſe ſame Preachers would now endeavour to reclaim Mankind, by aſſuring them, that Virtue is much eaſier, and much more advantageous than Vice; imitating in this their great Maſter, who after His Diſciples had wearied themſelves with catching no Fiſh all the Night over; did, by perſuading them to throw out their Nets upon the other Side of the Boat, put them upon the Way of catching more at one Draught, than they had catcht in their former whole Nights fiſhing. But leaving (with much Reſignation) my ghoſtly Fathers to manage the Courſe of our Devotion, as their Knowledge and Piety ſhall judge moſt fit; I ſhall endeavour to clear from Reaſon and Experience, That *moral Virtue* is of leſs Wearineſs, and ſuits better with our natural Inclinations, than Vice or Paſſion doth. And although I fail in an Undertaking, which is too Noble an Enterprize to receive its Accompliſhment from ſo weak a Hand; yet if I ſhall excite others, out of Pity to me, or Glory becauſe of the Subject, to defend what I could not, or to love that Virtue which I recommend, I ſhall reſt ſatisfied with a Return, which becauſe it will be above my Merit, I have already placed above my Expectation; and ſo I may meet with a Foil, but cannot with a Diſappointment.

Eaſe diſcommended.

All Creatures deſign Eaſe; and for this not only Brutes do toil, but inanimate Things likewiſe ſhew for it ſo much of Inclination, that they will deſtroy all intermediate Objects, that hinder them from joyning to their Centre, to which they have no other Tendency, but becauſe they find that Eaſe which is deſired by their Nature; and becauſe all Things find Eaſe in it, therefore all Things flee thither, as to the lovelieſt of all Stations. And that Happineſs conſiſts in Eaſe, is clear from this, That either we want that we need, as the Accompliſhment of our Nature; and then Nature muſt move towards the Acquiſition of what it wants; or elſe we want nothing; and then Nature will enjoy itſelf without any further Motion; *nam natura nihil agit fruſtra*; and it were moſt fruſtraneous for Nature, to ſeek what it wants not: From which we may conclude, when we ſee any Creature reſtleſs, and in Motion, that certainly it either wants ſomething to which it moves, or is oppreſs'd by a Surcharge of ſomewhat, from which it flies. This hath made Philoſophers conclude, That all Motion tends to ſome Reſt; Lawyers, That all Debates reſpect ſome Deciſion; Stateſmen, That all War is made in order to Peace; Phyſicians, That all Fermentation or boiling of the Blood or Humors, betokens ſome Diſſatiſfaction in the Part affected (and to ſhew how much Happineſs they place in Eaſe, they term all Sickneſs Diſeaſes) which imports nothing more, than the Abſence of *Eaſe*, that happieſt of States, and Root of all Perfections. And that Divinity may ſing a Part in this *Requiem*, Scripture tells us, That GOD hallowed the ſeventh Day, becauſe upon it He reſted from His Creation; and that Heaven is called an eternal Sabbath, becauſe there we ſhall find Eaſe from all our Labours; there GOD is ſaid, when well pleas'd, *to have ſavoured a ſweet Savour of Reſt*; and He recommends His own Goſpel as a Burden that is eaſy. That then wherewith I ſhall task myſelf in this Diſcourſe, ſhall be to prove, *That Virtue is more eaſy than Vice*.

Vicious Perſons moſt diſſemble Virtue, which is difficulter than to be virtuous.

For clearing whereof, conſider, that all Men who deſign either Honour, Riches, or to live happily in the World, do either intend to be Virtuous, or at leaſt pretend it; theſe who reſolve to deſtroy the Liberties of the People, will ſtile themſelves Keepers of their Liberties; and ſuch as laugh at all Religion, will have themſelves believed to be Reformers; and of theſe two the Pretenders have the difficulteſt Part, for they muſt not only be at all that Pains which is requiſite in being virtuous; but they muſt ſuperadd to theſe, all the Troubles that Diſſimulation requires; which certainly is a new and greater Task than the other; and not only ſo, but theſe muſt over-act Virtue, upon Deſign to take off that Jealouſy, which becauſe they are conſcious to themſelves to deſerve, they therefore vex themſelves to remove. *Moſes*, the firſt, and amongſt the beſt of the Reformers, was the meekeſt Man upon the Face of the Earth; but *Jehu*, who was but a counterfeit *Zealot*, drove furiouſly, and called up By-ſtanders to ſee, what elſe he knew they had Reaſon not to believe; and the juſteſt of all *Iſrael*'s Chair-men, took not ſo much Pains to execute Juſtice, as *Abſalom*, who is ſaid to have ſtaid as long in the Gates of *Jeruſalem*, as the Sun ſtaid above them, informing himſelf of all Perſons and Affairs, tho' with as little Deſign to redreſs their Wrongs, as he ſhewed much Inclination to know them; and all this, that the People might be gained to be the Inſtruments of his unnatural Rebellion: And ſuch is the Laborioufneſs of theſe ſeeming Copies of Virtue, that in our ordinary Converſation we are ſtill jealous of ſuch as are too ſtudious to appear virtuous; tho' we have no other Reaſon to doubt their Sincerity, but what ariſes from their too great Pains. From which we may conclude, That theſe who intend to be virtuous, have a much eaſier Task than theſe Pretenders have; becauſe they have not their own Conſcience, nor the Jealouſneſs of others to wreſtle againſt; and which is yet worſe, theſe want that Habit of Virtue which renders all the Pains of ſuch as are really virtuous eaſy to them: And what is more difficult, than for theſe to act againſt Cuſtom, which Time renders a ſecond Nature; and which, as ſhall be ſaid hereafter, is ſo prevalent as to facilitate to virtuous Perſons the hardeſt Part of what Virtue commands? Beſides this, theſe Diſſemblers have a difficult Part to act, ſeeing they act againſt their own Inclination; which is to offer Violence to Nature, and the working not only without the Help of that ſtrongeſt of all Seconds, but the toiling againſt it, and all the Aſſiſtance it can give; which how great a Torment it proves, appears from this, that ſuch as have as much Generoſity as may entitle them to the Name of Man, will rather weary out the Rage of Torture, than injure their own Inclinations. I imagine that *Human* was much diſtreſſed, by being put to lead *Mordecai's* Horſe, in Compliance with his Maſter's Commands; and one who is oblig'd by that Intereſt which makes him diſſemble, to counterfeit a Kindneſs for one whom he hates, or admit an Applauſe of what he undervalues, is certainly by that Neceſſity more cruciate by a thouſand Stages, than ſuch as intend upon a virtuous Account to love the Perſon, and really to praiſe that in him, which they are forc'd to commend; which is ſo far from being a Torment when it is truly virtuous, that real Love makes him who has it, hungry of an Occaſion to ſhew it; and to purſue all Means for heightning that Applauſe, which torments the other. Conſider what Difficulty we find in going one Way, whilſt we look another, and with what Hazard of ſtumbling that Attempt is attended, and ye will find both much Difficulty and Hazard to wait on Diſſimulation; wherein we are tied to a double Task; for we muſt do what we intend, becauſe of our Inclinations; and what we pretend, becauſe of our Profeſſion; and if we fail in either, which is more probably, than where Simplicity only is profeſſed, (Two Tasks being difficulter than one) then the World laughs at us, for failing in what we propoſed; and if we fret at ourſelves, for failing in what we privately deſigned. And not only does Diſſimulation tie us to a double, but it obliges us to two contrary Tasks; for we needed not diſſemble, if what we intend be not contrary to what we pretend: And thus Men in Diſſimulation do but (like *Penelope*) undo in the Night, what they were forc'd to do in the Day-time.

DISSIMULATION makes Vice likewiſe the more difficult, in that Diſſemblers are never able to recover the Loſs they ſuſtain by one Eſcape; for if they be catch'd in their Diſſimulation, or dogg'd out to be Impoſtors, (which they cannot miſs, but by a more watchful Attendance than any that Virtue requires) then they of all Perſons are moſt hated; not only by theſe whom they intended to cheat, but by all others, tho' unconcerned in the Crime; and both the one and the other do yet hate it, as what ſtrikes at the Root of all human Society: And for this Cauſe, Murder under Truſt, is accounted ſo impious and ſacrilegious a Breach of Friendſhip, that Lawyers have heightned its Puniſhment, from that of ordinary Murder, to that of Treaſon; and the groſſeſt Politicians have confeſt this Diſſimulation to be ſo horrid a Crime, that it was not to be committed for a leſs Hire than of a Kingdom: Whereas virtuous Perſons have their Eſcapes oftner pitied than puniſhed; both becauſe theſe Eſcapes are imputed to no abiding Habit, and becauſe it is not to be feared that they will offend for the future; ſeeing what they laſt failed in, was not the Effect of any innate and permanent Quality; but was but a tranſient and deſignleſs Frailty.

Diſſimulation.

DISSIMULATION is from this likewiſe more painful than Virtue, which it emulates; that the Diſſembler is obliged not only ſo to diſſemble, as that theſe whom he intends to cheat, may believe him ſerious; but ſo likewiſe, as that others may underſtand that he is not ſerious. Thus I have myſelf ſeen a Gentleman, who diſſembled a Love and Fondneſs for one whom he was oblig'd to perſuade that ſhe was his Miſtreſs, act ſo covertly that perfidious Part, that his real Miſtreſs was really jealous that he diſſembl'd with her, and not with the other; and to remove this, put the Gallant to as much new Pains as his former Cheat had coſt him. And I have heard of the like Accidents, tho' in different Actions; as of a Rebel, who counterfeited Loyalty ſo, that his Complices did really diſtruſt his Fixedneſs to theſe damn'd Principles which he ſtill retained. And in ordinary Converſation ye will often find, that in diſſembling with the one Party, ye loſe ſtill the other; and it is impoſſible to regain them who are ſo loſt, but by a ſhameful Diſcovery of the former Cheat: And after all that Loſs, this Doubt is ſtill left; How can I know but this Man diſſembles with me, who is ſo exquiſite in that Art, as even to have made me jealous, that his Diſſimulation was not counterfeit?

Virtue requires fewer Inſtruments than Vice.

LET us a little conſider; how few Inſtruments Virtue requires, and we will find it eaſy to be virtuous: It requires no Arms, Exchequer, Guards, nor Gariſon; It is all theſe to itſelf, in every Senſe wherein it needs them. Whereas Vice is a Burden to its Votaries as well in the Abundance of thoſe Attendants which it requires, as in the Difficulty of thoſe Attainments which it propoſes. And this is that happy Topic, from which our wiſe Saviour reproved *Martha*, when He told her, *That ſhe wearied herſelf about many Things, whereas there was one Thing neceſſary.* By which ſeeing he commended Devotion, I may well preſs from it the Excellency of moral Virtue. The ambitious Man is obliged to have his Houſe planted with a Wood of Partizans; as well to ſecure that Condition which ſo many envy and rival, as to magnify himſelf by ſo unequall'd Attendance. This Deſire to command, made *Hannibal* force a Paſſage through the Rocky *Alps*; *Cæſar* to commit himſelf to the Mercy of a ſtormy Sea, and ſo many weary Journeys. This obliged *Xerxes* to entertain vaſt Navies; and *Darius* ſuch Armies, as reduced all Mankind into one Incorporation. And ſo much doth Ambition tie its Dependers to depend upon ſuch Numbers, that tho' that Army of Lacquies which attend them, ſignifies no more than ſo many following Cyphers, yet the ſubſtracting of any one of theſe, doth by ſo much leſſen the Value of what they follow. Doth not Pride require Flatterers; and thoſe Flatterers Salaries; and the Proviſion of theſe Salaries much Pains and Anxiety? Doth not it require Precedency? A ſuitable Eſtate and Applauſe? And are not theſe inattainable, without more Toil and Fatigue than any Thing that Virtue enjoyns? Covetouſneſs requires aſſiduous Drudgery, and Mines as bottomleſs as the Deſires which crave them; it craves every Thing which itſelf can imagine. Luxury ſeeks only after what is unuſual, and what is rare: It muſt in *Apicius* crave Food from the *Indies*; fetch to *Rome*, in *Heliogabalus*, Fiſhes when far from the Sea; and more for one Belly, than might enrich Thouſands of nobler Creatures. Luſt requires Plurality of Women, Abundance of Strength, Numbers of Pimps, and much Money: Whereas Virtue craves only what is fit, and perſuades us to believe that only to be fit, which is abſolutely neceſſary. *Cato*'s Table is completely furniſhed with one Diſh, and his Body with one Veſture.

*Huic equilæ viciſſe famem.*

And the Philoſopher going by well and rich furniſh'd Shops, could cry out with Pleaſure, Oh! how many Things are there of which I ſtand not in need? Not only are theſe many Inſtruments troubleſome, becauſe they are ſuperfluous; but likewiſe becauſe by their Number they add to theſe natural Neceſſities, under which even virtuous Men are weighed, as long as they are Men. Theſe who have ſo numerous Families, cannot remove when their Neceſſity calls them; but they muſt expect till their Retinue be ready; and when theſe are prepared, it is no eaſie Clog to draw ſo many after them; or when any Misfortune overtakes any of theſe many, they muſt ſuffer in theſe, as oft as each of theſe ſuffers in themſelves; and their Miſeries are augmented by every new Increment that is added to their Fortunes. A great Treaſure is not only an Enticement to make its Maſter be aſſaulted, or betrayed, but is likewiſe uneaſy to be tranſported; and *Cræſus*'s many Bags are overtaken, when Moneyleſs *Solon* eſcapes with Safety. I ſhall then conclude, That Virtue is eaſier than Vice, becauſe it requires fewer Inſtruments.

**Virtue is fitted for all Places and Occaſions.**

Virtue is likewiſe eaſy, becauſe it is fitted for all Places and Occaſions; whereas Vice is ſtinted to ſelect ones. One may be juſt every where, but bribing requires Opportunity, Meditation of others, and that theſe others be dexterous in the Conveyance, and cloſe as to their Humour. Adultery muſt buſy itſelf to find a convenient Room; it requires the Husband's Abſence, a faithful, and yet a faithleſs Servant; and albeit with the Concourſe of theſe Proviſions, it may attain its Aim oftner than it is fit; yet will it want that Satisfaction oftner than it wiſhes: Whereas Chaſtity is circumſcribed by no ſuch Limits; but is as free as pure, depending upon nothing that is extrinſic, and Debtor for its Happineſs to nothing that is not itſelf.

**Vice requires what is impoſſible.**

I cannot here but reproach Vice for tying us, not only to Place, Times, and Numbers of Inſtruments; but which is worſe, for referring all our Endeavours to Deſigns that are either unfeaſible in themſelves, or at beſt, do become ſo becauſe of our Fancy, or Exceſs. Vanity is not ſatisfied without Applauſe from others; which being an Act of their free Will who beſtow it, doth therefore depend upon their Election: Whereas Virtue is ſatisfied with its own Teſtimony; and is ſatisfied with nothing that others ſay, except it be bottom'd upon what they are conſcious to themſelves to deſerve. Advancement proceeds not from him who deſires it, but he muſt expect it from another; and no Man can ſatisfy his own Luſt. O then happy Virtue! who art thy own Treaſure and Expectation; thou alone may'ſt dote upon thy ſelf without a Fault; and in thee only Self-love is no way criminal: Whereas Vice is uneaſy, becauſe it fetches its Satisfactions from Abroad; and is barren, becauſe it cannot find them at Home. Covetouſneſs muſt ſcorch in *Indies* its Suiters; it muſt freeze them in *Nova Zembla*; it terrifies them at Sea; and Shipwrecks them upon the Shore: Whilſt Virtue recommends to us, to ſeek our Happineſs in no foreign Pleaſure: And *Diogenes* finds without Danger in his Tub, what theſe Sailers purſue in their dangerous Bottoms. But Vice might plead itſelf leſs guilty, if its Deſign were only difficult; but Difficulty is not all: For Vice either requires what is impoſſible, or what, by not being bounded, may very eaſily become ſo. Covetouſneſs makes nothing enough, and propoſes not only what may ſatisfy, but what may be acquired. Ambition likewiſe will have every Man to be higheſt, which is impoſſible, becauſe there cannot be many higheſt; and the firſt Attainer leaves nothing to his implacable Rivals, but the Impatience of being diſappointed; which not only diſquiets their preſent Eaſe, but begets in them Projects of attacking him by whom they conceive themſelves vanquiſh'd: And theſe Deſigns being formed by Perſons whoſe Judgments are much diſordered by Intereſt, (which like fir'd Powder, flees out not always where it may) and againſt Perſons already ſecured by Power, Fame, Law, and other Advantages, they ripen into no other Iſſue, than a laſt Ruin to theſe who were ſo fooliſh, as not to ſatisfy their preſent Humour with their preſent Fortune.

Vice in Defect and in Exceſs are equally uneaſy.

PHILOSOPHERS have divided all Vices into theſe which conſiſt in Exceſs, and theſe which imply a Defect; the one ſhooting as far over the Mark as the other comes ſhort of it; and if we compare Virtue with either of theſe, we will find it more eaſie than either; for as to theſe which over-reach Virtue, they muſt be as much more uneaſie than it, as they exceed it; for having all in them which that Virtue poſſeſſes which they exceed, they muſt require either in Acquiſition or Maintenance, all the Pains that the exceeded Virtue extracts. Thus Prodigality requires all the Spending and Pains that Liberality needs; and running equally with all its Length, it begins to require more Pains and Travel where it outſhoots the other: And thus Prodigality beſtows not only enough as Liberality does, but it laviſhes out more than is fit, taking for the Standard of its Bounty, all that it hath to beſtow; and not either what itſelf can ſpare, or what its Object needs: Jealouſie pains itſelf more than true Love, with all thoſe Extravagancies, which are ſo unſufferable to the Party loved, and ſo diſquieting to the Lover himſelf, that Phyſicians have accounted this a Diſeaſe, and the Law hath made it a Crime. As to theſe Vices, which by being placed in Defect, ſeem to require leſs Trouble than the Virtue they fall ſhort of; as the others require more, becauſe of their Exceſs; yet ſo uneaſie is Vice, that even theſe, though they exceed not Virtue in their Meaſures, do yet exceed it in their Toil: For Nature deſigns Accompliſhment in all its Productions; and therefore frets, and is diſquieted at theſe immature Effects; and is as much more wounded by theſe than by virtuous Productions, as the Crafts are by being ſpoiled of their greener Fruits, or as a Woman is by her too early Birth. We ſee a Miſer more cruciate by his ſcanting Penuriouſneſs, than a noble Perſon by his generous Liberality: For theſe are oblig'd to keep themſelves out of theſe Occaſions of ſpending; a Task great enough, becauſe all Men endeavour, both out of Envy, and out of Humour and Sport, to draw them unto theſe Snares, and when they are within their own Circle, they are forc'd by that reſtleſs Vice, to deſcend to Thouſands of Tricks, which are as wearying as unhandſome. I have ſeen ſome ſo careful of their Eſtates, that they brook'd better to have their Names and Souls burden'd, than theſe; and to preſerve which, they were at more Trouble than any can have the Faith to believe, beſides theſe who had the Humour ſo to do. If to hold or draw with our full Force be a Trouble, both theſe are the Poſtures of Covetouſneſs, wherewith it is kept upon conſtant Guard, and in continual Employment; and if at any time they remit any thing of that Anxiety, they repine at their own Negligence, and imagin that they loſt as much as they hoped once to have gained. Fear is the Defect of Courage; but yet it is more uneaſy than Courage; and really This alone hath more Uneaſineſs, than all the Fraternity of Virtues; for Virtue is at worſt buſied about what is; but Fear is frighted at what is not, equally with what is.

Vices oppoſe one another; whereas each Virtue aſſiſts its Fellow.

VICE likewiſe is therefore leſs eaſy than Virtue, becauſe Virtue propoſes only one Aim, which is fix'd and ſtable; whilſt Vice and Fancy leave us to Undetermination, that is uneaſy as well as dangerous. When it hath preſt us, to make Armies fall as ſacrific'd to the Idol of our Ambition; and for humouring that Paſſion, to bring Cities as well as Men level to the Ground; then it will in the next Thought perſuade us even to laugh at our Ambition, and to exchange it for Love to a Miſtreſs or Companionry, as it once ſerv'd the otherwiſe great *Alexander*.

The Practice of one Virtue facilitates other Virtues.

AS Virtue makes good Neighbours; ſo all the Virtues are ſo far ſuch amongſt themſelves, that not only they interfere not with one another; but the Exerciſe likewiſe of the one, facilitates the Practice of the others: Thus whilſt we practiſe Temperance, we learn to be juſt; becauſe Temperance is the juſt Meaſure of enjoying and uſing all Contingents; and we learn by it to be patient; Patience being a Temperance in Grief, Sorrow or Affliction: Patience is likewiſe the Exerciſe of Fortitude; and Fortitude is a juſt Proportion of Courage, and a temperate Exerciſe of Boldneſs. And this occaſioned the Philoſophers to term this noble Alliance, the *Golden Chain of Virtue*; each being link'd with, and depending upon its Fellow. But if we turn the Proſpect, we will find, that tho' Diſſention be a ſpecial Vice ſo charactered; yet all Vices, have ſomewhat of their ill-natur'd Humour in them; and agree in nothing but in this, That each of them doth diſagree with each other, which makes the Practice of them both tedious and diſagreeable; for all of them conſiſting the one in Exceſs, the other in Defect, they cannot but diſagree; Exceſs and Defect being in themſelves moſt contrary: Thus Prodigality oppoſes Avarice, Cowardlineſs Courage, and Fondneſs Hatred; and as virtuous Perſons have a Kindneſs for one another, becauſe the Object of their Love requires, as well as admits Rivals; ſo Vice, endeavouring to engroſs what it purſues, makes Rivals altogether unſupportable. Ambition inciteth each of its Dependers to be chief; and yet allows only one of theſe many to enjoy what it makes all of them deſire. Thus Avarice's Task is to impropriate the Poſſeſſion of what was created, and is neceſſary to be diſtributed amongſt many Thouſands; and Envy will not only have its Maſter to be full of Applauſe; but will likewiſe ſtarve the Deſires and Merits of others; judging that itſelf cannot be happy if others be. Vice then muſt be leſs eaſy than Virtue, becauſe it hath more Enemies than Virtue; and becauſe the Virtues are more harmonious amongſt themſelves than Vices are.

Providence reſiſts Vice.

VICES not only make Enemies to themſelves; but by a Civil War (as a juſt Judgment upon them) they deſtroy one another; Providence intending thereby to hinder the Growth of what, tho' it proſper not well, yet is already too noxious to Mankind: And upon the ſame Principle of Kindneſs to what bears His Image, God Almighty, and His Providence, do deſign the Unſucceſsfulneſs of Vice, as being obſtructive of His Glory, as well as deſtructive to His Creatures, being equally thereto engag'd by a Love to His own Honour and Service, and by a Hatred as well to thoſe who commit Vice, as to the Vice which is committed. Thus God confounded thoſe Tongues which had ſpoke ſo much Blaſphemy againſt Him; whilſt they were endeavouring to raiſe a *Tower* as high as their Sins. And when *David* intended to ſpill *Nabal*'s Blood, God is ſaid to have ſtopp'd him from being an unjuſt Executioner, whom He intended to make a moſt juſt Judge. And ſince *Balaam*'s Aſs op'ned its Mouth to ſpeak this Truth, they muſt be more ſtupid than Aſſes, who will not believe it.

The Law makes Vice uneaſy.

THE Law likewiſe by its Puniſhments, contributes all its Endeavours to cruſh Vice, and to arreſt its Succeſs, forbidding by its Edicts, any Perſon to aſſiſt it; and making not only Aſſiſtance, but Counſel; not only Counſel, but Connivance; not only Connivance, but Concealment of it, to be in moſt Caſes ſo criminal, that all the Honours which Vice promiſeth, or the Treaſures it gives, cannot be able to redeem thoſe who are found to have ſlighted this Prohibition. Muſt it not then be difficult to be vicious, where Aſſiſtants and Connſellors are ſo over-awed, and the Intenders ſo terrified, that few will engage as Inſtruments? And theſe who do, are ſo diſorder'd by Fear, that vicious Projectors are as little to expect Succeſs, as virtuous Perſons are to wiſh it for them. And to evidence how much Oppoſition the Law intends for Vice; it not only puniſhes Vice with what it preſently inflicts; but it preſumes it ſtill guilty for the Future: *Semel malus ſemper præſumitur malus*; and upon that Preſumption, many vicious Perſons have ſuffer'd for that whereof they were otherwiſe innocent. Tho' Rebellion hath promiſing Charms, to allure the Idolaters of Ambition and Fame; yet the Law doth ſo far ſtand againſt it, that few will concur with the Contrivers, except ſuch Fools as have not the Wit to promote it, or ſome deſperate Perſons, with whom few will join, becauſe they are known to be diſcontent: And tho' Revenge reliſhes Blood with a pleaſing Taſte; yet the Severity of excellent Law cools much of that inhuman Heat; and leſſens the Pleaſure, by ſharpning the Puniſhment. Vice then muſt be uneaſy, ſeeing the Law oppoſes it, and renders its Commiſſion dangerous, as well as odious.

Men are in Intereſt obliged to oppoſe Vice, and ſo it is uneaſy.

MEN likewiſe join with God and the Law in a Confederacy againſt Vice; and tho' they too oft approve it in the Warmneſs and Diſorder of their Paſſions, yet in their Profeſſions and Conventions they laugh at it, and inveigh againſt it; and tho' the Preſſure of a preſent Temptation, overcomes them ſo far as to commit what they diſallow; yet they do but infrequently, and with ſo many Checks from within, as that its Commiſſion cannot be thought eaſy: Conſider, how amongſt Men, we hate even theſe Vices in others, which we are guilty of ourſelves; and how we even hate theſe Vices in others, by which we ourſelves reap no ſmall Advantage. *Alexander* glories to deſtroy that baſe Perſon, who had murder'd his greateſt Enemy *Darius*; and *David* is commended, for having cauſed to kill him, who but ſaid, That he had killed *Saul*. Who will employ one who is perfidious? And ſo uneaſy is Vice, that much Pains and Diſcourſe will not perſuade us to believe one who uſes to lie; whilſt we will ſoon believe what is really a Lie, from one that uſes not to abuſe our Truſt: Few Judges are ſo preciſely juſt, as not to think that they favour a virtuous Perſon; good Men do likewiſe reward ſuch as own an Intereſt ſo allowable; and wicked Men own ſuch as are virtuous, out of Deſign thereby to expiate their former Vice, and to perſuade the World, that they are not really vicious, tho' they be eſteemed ſo: So that ſeeing Reward as well as Inclination, and juſt Men as well as unjuſt, advance Virtue, and oppoſe Vice; Vice cannot but be more uneaſy than Virtue, which is all to be proved.

Vice makes us fear all Men.

I am from reflecting upon the Progreſs and Growth of Vice, convinc'd very much of its Uneaſineſs. If we look upon Rebellion, Revenge, or Adulteries, we find them hatch'd in Corners as remote from Commerce as thoſe Vices are themſelves from Virtue; and as black as the Guilt of their Contrivers; and almoſt as terrifying as the worſt of Priſons are to ſuch who are but in any Meaſure virtuous. None of the Contrivers dares truſt his Colleague; and which is yet worſe, none of them hath Courage enough to reflect upon what he is to do: He muſt be too bad to be ſucceſsful, who is ſo deſperately wicked, as not to tremble at the Wickedneſs he projects; and theſe Bleſſings which adorn the Face, when they are the Motions of Modeſty, become Stains and Blemiſhes, when they are ſent there by Fear, or a troubled Conſcience: And it is very pretty to obſerve, with how much Art and Pains, ſuch as are guilty of Vice, endeavour to ſhun all Diſcourſes, that can renew to them the leaſt Reflection upon their former Failings; and how they muſt oftentimes diſoblige their own Envy and Malice, in not daring to vent or reproach others with that Guilt, which might be eaſily retorted; and thus vicious Men have as many Maſters as their Vices have Witneſſes: And tho' they are bold enough to commit Vice, yet they oftentimes want the Courage to own it; and Servants, if conſcious to theſe Crimes, become thereby neceſſary to their Maſters; nor do wicked and vicious Perſons fear only ſuch as do, but (which is more extenſive) ſuch as may know their Vices; and tremble at its Memory, as if the Sun or Moon would divulge their Secrets; and by Accident, they have oft confeſs'd Crimes upon Miſtakes; and have made Apologies for that whereof they were not accus'd; which hath made the Confeſſors to be laught at for their Error, as well as hated for their Crimes.

**It is more natural to be virtuous than vicious.**

ANOTHER Argument to inforce, that Virtue is more eaſy than Vice, is, That ſeeing Nature is the Spring of all Operations, certainly that muſt be moſt eaſy, which is moſt natural; and when we would expreſs any Thing to be eaſy to a Perſon or Nation, we ſay, it is natural to them; and Miracles are uneaſy and difficult, becauſe they run the Counter-tract of Nature, being either above, againſt, or beſide its Aſſiſtance: But ſo it is, that Virtue is a more natural Operation than Vice, both becauſe it leſs infeſts Nature than Vice does; and becauſe Nature diſcovers more of a Bent to act viciouſly than virtuouſly; which are the only two Senſes in which any Thing is ſaid to be *natural.*

THAT Virtue of theſe Two prejudges Nature leaſt, is clear from this, that Sobriety cheriſheth it, when it is run down by Intemperance; Murder kills it; Gluttony chokes it; and Jealouſy keeps it not alive but to torment it; and generally whenever Nature is diſtreſt, it flies to Virtue, either for Protection, as to Courage, Juſtice, and Clemency; or for Recovery, as to Temperance, Induſtry, and Chaſtity: Few gray Hairs owe their Whiteneſs, except to that Innocence whoſe Livery it is; Rapin, Oppreſſion, and theſe other Vices, heightning their Inſolence againſt Man, to that Point, that he muſt ſerve them in being his own Cut-throat; to be commended for nothing elſe, ſave that they rid the World of ſuch, who came only into it, to deface that glorious Fabric, whereof the Almighty reſented ſo the Pleaſure of having created it; that he appointed a Day of each Seven to celebrate its Feſtivals. Are not ſome Sins ſaid to be *Sins againſt our own Bodies?* Not becauſe all are not ſo in ſome Meaſure; but becauſe ſome are ſo in ſo eminent a Meaſure, that the Apoſtle, who knew much of all Men's Inclinations, thought that their being ſo much ſuch, was enough to reſtrain ſuch Perſons from committing them, as were yet ſo wicked, as not to obey a Saviour who died for them. And why is it that Laws are ſo ſevere againſt Vice, but becauſe it deſtroys and corrupts the Members of the Commonwealth? I have oft, notwithſtanding the Precepts of Stoiciſm, which forbids me to be ſo effeminate, as to pity any Thing; and notwithſtanding the Principles of Juſtice, which forbids me to pity Perſons who are flagitious; yet been driven to that Exceſs of Compaſſion for the State of vicious Perſons, that I have no more remembred even the Wrongs that they have done me: To ſee the Pox wear out a Face which had been ſo oft fairded; and the Gout felter Feet, that as the Pſalmiſt ſays, *were ſwift to do Ill,* are but too ordinary Encounters to excite Compaſſion: But to ſee the Wheel fatned with the Marrow of tortur'd Miſcreants; and the Rack pull to Pieces their Receptacles of Vice; are great Inſtances how great an Enemy Vice is to Nature; under whoſe ill Conduct, and for whoſe Errors it ſuffers Torments, which are much ſooner felt than expreſt.

SINCE then Nature is ſo oppos'd by Vice, it cannot be itſelf ſo unwiſe, in the meaneſt of theſe many Degrees which we aſcribe to many Creatures whom it makes wiſe, if it diſpoſed not Mankind to entertain an Averſion for Vice, which is ſo much its Enemy. Shall the Sheep, the ſillieſt of all Animals, or the Earth, the dulleſt of all the Elements, flee from its Oppreſſors? And ſhall Nature, which ſhould be wiſer than theſe, becauſe it beſtows theſe Inclinations upon them, which makes them paſs for Wiſe, be ſo imprudent, as not to mould Men ſo, as to incline them to hate Vice, which ſo much hurts it? Is there any Vice committed, to which we may not find another impulſive Cauſe than Nature? And are not moſt Vices either committed by Cuſtom, by being miſtaken for Good, by Intereſt, or Inadvertence, as ſhall be ſhewed in the Cloſe of this Diſcourſe? And ſeeing Nature deſigns to do nothing in vain, it is not imaginable that it ſhould prompt us to Vice, wherein nothing but Vanity can be expected, or from which nothing elſe can be reapt. Theſe who are ſo injurious to Nature (becauſe it appears Nature hath been leſs liberal to them, of Underſtanding, than to others) as to faſten this Reproach upon it of inclining Men to Vice, do contradict themſelves, when they ſay, That Nature is ſatisfied with little, and deſires nothing that is ſuperfluous: Whereas all theſe Vices which conſiſt in Exceſs, do ſtretch themſelves to Superfluity; whilſt upon the other Side, theſe Vices which conſiſt in Defect, are yet as unnatural; becauſe in theſe the Committers deny themſelves what is neceſſary for them, and ſo are moſt unnatural: Nature deſiring to ſee every Thing accompliſhed in its juſt Proportions, and ſatisfied in its juſt Deſires.

Each Vice brings a ſpecial Diſeaſe.

All Vices have their own peculiar Diſeaſes, to which they inevitably lead; Envy brings Men to Leanneſs, as if it were fed with its Maſter's Fleſh, as well as with its Enemies Failings; Luſt, the Pox and Conſumptions; Drunkenneſs, Catarrhs and Gouts; and Rage, Fevers and Phrenſies; which is a Demonſtration of their Uneaſineſs and Incommodiouſneſs: And I might almoſt ſay, that thoſe Vices are like Frogs, Lice, and other deſpicable and terrible Inſects, generated and kneaded out of excrementitious Humours. Luſt is occaſioned by the Superfluity and Heat of the Blood; Drunkenneſs by a Dryneſs of the Veſſels; and Rage by the Corruption and Exuberancy of Choler. Conſider, how much the Frowns of Anger disfigure the ſweeteſt Face; how much Rage diſcompoſes our Diſcourſe; and by theſe and its other Poſtures, ye will find Vice an Enemy to Nature: So that in all theſe, Nature labours under ſome Diſtemper; and is diſtreſs'd in its Operation; and acts them not out of Choice, but as ſick Men riſe to hunt for what their Phyſicians deny them. And for all this it follows, That Vice is neither natural in its Productions, nor in its Tendencies; not being deſigned by Nature in the one, nor deſigning to preſerve Nature in the other.

I confeſs there is a Rank of Virtues, which are ſupernatural, ſuch as Faith, Hope and Repentance; but either there could be no Contradiſtinction of theſe from ſuch as I treat of, or elſe theſe of which I here ſpeak, muſt be natural. To deny ourſelves, if we will follow Chriſt; and what Fleſh and Blood did not teach *Peter*, to emit that noble Confeſſion of Chriſt's being the Son of the Eternal God, proves that ſome ſpiritual Truths are above the Reach of Reaſon; yet with Relation to thoſe other moral Virtues, that ſame inſpir'd Volume aſſures us, *That the Gentiles, who have no Law, do by Nature the Things contained in the Law, are a Law unto themſelves; which ſhew the Work of the Law written in their Hearts; their Conſcience alſo bearing Witneſs, and their Thoughts in the mean time accuſing, or elſe excuſing one another:* And elſewhere the Wicked are ſaid to be without *natural Affection*. Are not all Sins, even in the Dialect of Philoſophers and Law-givers, as well as in the Language of *Canaan*, termed unnatural? What is Paricide, Ingratitude, Oppreſſion, Lying, *&c.* but the Subverſion of theſe Laws, whereof our own Hearts are the Tables? Doth not Nature, by giving us Tongues to expreſs our Thoughts, teach us, that to diſguiſe our Thoughts, or to contradict them, is to be unnatural? And ſeeing the not-Acknowledgment of Favours, obſtructs the future Relief of our Neceſſities, it muſt be as unnatural to be ungrate, as it is natural to provide Supplies for our craving Wants.

*Rom.* 2. 14.

*Rom.* 1. 31.

The Horror of Conſcience makes Vice uneaſy.

I will not fully exhauſt the Miſeries that wait upon Vice, by telling you, that no Man who is really vicious, ſinneth without Reluctancy in the Commiſſion; but I muſt likewiſe tell you, That tho' all the preceding Diſadvantages were ſalved, yet the natural Horror which reſults from the Commiſſion of Vice, is great enough to render it a Miracle, that any Man ſhould be vicious. Conſcience can condemn us without Witneſſes, tho' we bribe off all Witneſſes from without; or tho' by Sophiſtry and Art, we render their Depoſitions inſucceſsful: And tho' Remiſſions can ſecure us againſt all external Puniſhments, yet the Arm of that Executioner cannot be ſtopp'd. And if ye conſider how Men become thereby inconſolable, by the Attendance of Friends, and the Advantage of all exterior Pleaſures, ye cannot but conclude that Vice is to be pitied, as well as ſhun'd; and that this alone makes it more uneaſy than Virtue, whereby the greateſt of Misfortunes are ſweetned; and outward Torments, by having their Proſpect turn'd upon future Praiſe and Rewards, render'd Pleaſures to ſuch as ſuffer them; and are look'd upon as Ornaments, by ſuch as ſee them inflicted, and draw Praiſes from ſucceeding Ages.

*——Hic murus ahenus eſto*
*Nil conſcire ſibi, nulla palleſcere culpa;*

was the Determination of a Pagan, who could derive no Happineſs from the Divine Promiſes, upon which we are oblig'd to rely for Rewards; which tho' they be too great to be underſtood by the Sons of Men, yet are not ſo great, but that they may be expected by us, when we ſhall be adopted to be the Sons of that God, whoſe Power to beſtow can be equal'd by nothing, but by His Deſire to gratify. After Succeſs hath crown'd vicious Deſigns, yet Vice meets with this Uneaſineſs of Remorſe, wherein the Souls of Men are made to forget the Pleaſure of Succeſs, and are puniſhed for having been ſucceſsful: And theſe will either not remember their Succeſs, in which Caſe they want all Pleaſure; or if they think upon it, that Thought will lead them back to conſider the Guilt and Baſeneſs to which they owe it, which will vex and fret them. Virtue afflicts at moſt but the Body, and in theſe Pains Philoſophy comforts us; but Vice afflicts our Souls; and the Soul being more ſenſible than the Body, (ſeeing the Body owes its Senſibleneſs to it) certainly the Torments of Vice muſt be greateſt. And this ſeems the Reaſon why our Saviour, in deſcribing the Torments of Hell, placeth *the Worm that never dies*, before *the Fire that never goeth out:* And that the Rebukes of a natural Conſcience, are of all Torments the moſt inſupportable, appears from this, that albeit Death be the moſt formidable of all Torments, (Men ſuffering Tortures, Phyſic, Contumelies, Poverty, and the ſharpeſt of Afflictions, to ſhun its Encounter) yet Men, in Exchange of theſe, will not only welcome Death, but will aſſume it to themſelves; adding the Guilt and Infamy of Self-murder, the Confiſcation of an Eſtate, and the infamous Wants of Burial, to the Horrors of an ordinary Death; and all this, to ſhift the preſent Gnawings of a Conſcience. The Horrors likewiſe of a guilty Conſcience do in this appear moſt diſquieting, that thoſe who have their Conſcience ſo burdened, do acknowledge, that after Confeſſion they find themſelves as much eaſed, as a ſick Stomach is reliev'd by vomiting up theſe Humours, whoſe Diſquietneſs makes ſuch as ſuffered them, rather ſick Perſons, than Patients; whereas whatever be the preſent Troubles which ariſe from Virtue, yet if they continue not, they are tolerable; and if they continue, Cuſtom and the Aſſiſtance of Philoſophy will leſſen their Weight; and at beſt, the Pain is but temporary, becauſe the Cauſe from which they deſcend is but momentary: If they be not ſharp and violent, they are ſufferable; and if they be violent, they cannot laſt; or at leaſt, the Patient cannot laſt long to endure them: Whereas theſe Reflections that diſquiet us in Vice, ariſing from the Soul itſelf, cannot periſh whilſt that hath any Being. And ſo the vicious Soul muſt meaſure its Grief by the Length of Eternity, tho' Vice did let out its Joys but by the Length of a Moment; and did not fill even the narrow Dimenſions of that Moment with ſincere Joy; the Knowledge that theſe were to be ſhort-liv'd, and the Fear of ſucceeding Torment, poſſeſſing much of that little Room.

Virtue is more pleaſant than Vice.

THE firſt Objection, whoſe Difficulty deſerves an Anſwer, is, That Virtue obliges us to oppoſe Pleaſures, and to accuſtom ourſelves with ſuch Rigours, Seriouſneſs and Patience, as cannot but render its Practice uneaſy: And if the Reader's own Ingenuity ſupply not what may be rejoin'd to this, it will require a Diſcourſe, that ſhall have no other Deſign beſides its Satisfaction: And really to ſhew by what Means every Man may make himſelf eaſily happy, and how to ſoften the appearing Rigours of Philoſophy, is a Deſign, which, if I thought it not worthy of a ſweeter Pen, ſhould be aſſiſted by mine; and for which I have, in my current Experience, gather'd together ſome looſe Reflections and Obſervations, of whoſe Cogency I have this Aſſurance, that they have often moderated the wildeſt of my own ſtraying Inclinations, and ſo might pretend to a more prevailing Aſcendant over ſuch, whoſe Reaſon and Temperament make them much more reclaimable: But at preſent my Anſwer is, That Philoſophy enjoins not the croſſing of our own Inclinations, but in order to their Accompliſhment; and it propoſes Pleaſure as its End, as well as Vice; tho' for its more fix'd Eſtabliſhment, it ſometimes commands what ſeems rude to ſuch as are Strangers to its Intentions in them. Thus Temperance reſolves to heighten the Pleaſures of Enjoyment, by defending us againſt all the Inſults of Exceſs and oppreſſive Loathing; and when it leſſens our Pleaſures, it intends not to abridge them, but to make them fit and convenient for us; even as Soldiers, who tho' they propoſe not Wounds and Starvings; yet, if without theſe they cannot reach thoſe Lawrels to which they climb, they will not ſo far diſparage their own Hopes, as to think they ſhould fix them upon any Thing, whoſe Purchaſe deſerves not the ſuffering of theſe. Phyſic cannot be called a cruel Employment, becauſe to preſerve what is ſound, it will cut off what is tainted; and theſe vicious Perſons, whoſe Lazineſs forms this Doubt, do anſwer it, when they endure the Sickneſs of Drunkenneſs, the Toiling of Avarice, the Attendance of riſing Vanity, and the Watchings of Anxiety; and all this to ſatisfy Inclinations, whoſe Shortneſs allows little Pleaſures, and whoſe Proſpect excludes all future Hopes. Such as diſquiet themſelves by Anxiety (which is a frequently repeated Self-murder) are more tortured, than they could be by the Want of what they pant after; that long'd-for Poſſeſſion of a Neighbour's Eſtate, or of a public Employment, makes deeper Impreſſions of Grief by their Abſence, than their Enjoyment can repair: And a Philoſopher will ſooner convince himſelf of their not being the neceſſary Integrants of our Happineſs; than the Miſer will, by all his Aſſiduouſneſs, gain them.

THERE are but Three Inſtances of Time, and in each of theſe vicious Perſons are much troubled; the Proſpect of uſual Inſucceſsfulneſs, Difficulties or Inconveniencies, do torment before the Commiſſion; Horror, Trembling and Reluctancy, do terrify in the Act; and Conſcience ſucceeds to theſe after Commiſſion, as the laſt, but not the leaſt of theſe unruly Torments. And as to the Pleaſures of Vice, it can have none in any of theſe Parcels of Time, beſide the preſent; which preſent is by many Philoſophers, ſcarce allow'd the Name of Time; and is at beſt ſo ſwift, that its Pleaſures muſt be too tranſient to be poſſeſſed. I confeſs that Revenge is the moſt enticing of all Vices; inſomuch that a wicked *Italian* ſaid, That God Almighty had reſerved it to Himſelf, becauſe it was too noble and ſatisfying a Prerogative to be beſtowed upon Mortals; yet it diſcharges at once its Pleaſure with its Fury; and like a Bee, languiſhes after it hath ſpent its Sting; and when it is once acted, which is oft in one Moment, it ceaſeth from that Moment to be a Pleaſure; and ſuch as were tickled once with it, are afraid of its Remembrance, and think worſe of it, than they did formerly of the Affront, to expiate which it was undertaken. Thirty Pieces of Silver might have had ſome Lechery in them, at *Judas*'s firſt Touch; but they behov'd to have a very unreſembling Effect, when he took no longer Pleaſure in them, than to have come the next Week to offer them back; and becauſe they were refuſed, to rid himſelf of his Life and them together.

The Pains of Vice may be concluded greater than theſe of Virtue, from this; That virtuous Perſons are in their Sufferings aſſiſted by all the World; vicious Perſons doing ſo to expiate their own Crimes; and virtuous Perſons doing the ſame, to reward the Virtue they adore; and if theſe Endeavours prove inſucceſsful, every Man by bearing a Share in their Grief, do all they can to leſſen it; but vicious Perſons have their Sufferings augmented by the Diſdain, and juſt Opprobries thrown upon them by ſuch as were Witneſſes to their Vices; and ſuch as had any Inclination for them, dare not appear to be their Well-wiſhers, leſt they be reputed Complices of their Crimes.

I need not fear ſo much Weakneſs in this my Theme, as to bring up a Thouſand of theſe Inſtances to its Aid, that lie every where obvious to the leaſt curious Obſervation: What is more laborious than Pride? wherein by robbing from others what is due to them, the Acquirers are ſtill obliged to defend their new Conqueſts with more Vigilance than Virtue needs? The proud Man muſt be greater than all others, and ſo muſt toil more than they all, his Task being greater than all their's jointly. And the jealous Man muſt never be ſatisfied, till he know not only what is Truth, but what he fears to be ſo; being moſt unhappy in this, that if he get Aſſurance of what he ſuſpects, then he is made really miſerable; or if he attain not to that Aſſurance, he muſt ſtill toil for it, and make himſelf miſerable by his Pains, till he become really ſo, by being inform'd of what at one Inſtant he wiſhes to be falſe, and endeavours to make true. Revenge is moſt painful, both in perſuading us that theſe are Affronts, which of their own Nature are no Affronts; and then in bringing on us much more Hazard than their Satisfaction can repay. For one Word ſpoke to us, which (it may be) the Speaker intended as no Injury, how many have, by murdering the Speaker, or ſome raſh Attempt, deprived themſelves of the Privilege of ſeeing their Friends without Horror; or of coming abroad without imminent Danger; ſkulking in Dens like Thieves; impriſoned for fear of Priſon; and dying daily to ſhun the Death they fear? Whereas *Socrates*, by laughing at him who ſpat in his Face, had then the Pleaſure to ſee himſelf at preſent ſatisfied; and did foreſee the Hopes of future Praiſes. Guiltineſs muſt ſearch out Corners; it muſt at all Rates ſecure Favourites; it muſt ſhun to meet with ſuch as are conſcious to its Guilt; and whenever two Men ſpeak privately in Preſence of ſuch as are vicious, they perſuade themſelves that ſomewhat is there ſpoke to their Diſadvantage; and like one who labours of a Sore, they muſt ſtill be careful that their Wound be not toucht.

To conclude then this Period, conſider, that every Thing that is uneaſy muſt be unpleaſant; and that Vice is more uneaſy than Virtue, appears from the whole foregoing Diſcourſe.

**Why Men are always vicious.**

I hope the preceding Diſcourſe hath cleared off all theſe Doubts, that can oppoſe this well founded Truth; leaving only this Objection here to be anſwered: If Vice be leſs eaſy, and leſs natural than Virtue; why do the greater Part of Mankind range themſelves to its ſide, leaving Virtue as few Followers, as it profeſſes to deſire Admirers? In Anſwer whereto, I confeſs that this Objection proves Men to be mad, but not Vice to be eaſy; even as when we ſee Men throw away their Cloaths, run the Fields over, and expoſe themſelves to Storms, leaving their convenient Homes and kind Family, we conclude ſuch as do ſo to be mad; but are not induc'd to believe that what they do is eaſy. And certainly Vice is a Madneſs, as may appear convincingly from this, that when we ſee others run to theſe Exceſſes, (which we thought Gallantry in ourſelves, when we were acting the like) we ask them ſeriouſly, What, are ye mad? And *Hazael*, when the Cruelty he was to (and did) commit, was foretold him by the Prophet, did with Admiration ask, *What? am I a Dog that I ſhould do theſe Things?* And the Prodigal, when he freed himſelf from theſe vicious Rovings, is ſaid to have *come to himſelf*; by which Word Madneſs is uſually expreſs'd. Men are ſaid to be mad, when they offer Violence to their Bodies; and it is a more advanc'd Degree of Madneſs, to offer Violence to our Souls; which we then do (beſides the ruining of our Bodies) when we are vicious. And to ſuch as prefer their Bodies to their Souls, I recommend the Survey of ſuch Bodies, as have waſted themſelves in Stews and Taverns, or have left Limbs upon the Field, where they laſt quarrelled after Cups, for Vanity, or Miſtreſſes

2 Kings 8. 13.
Luke 15. 17.

ſtreſſes. The ſecond Anſwer is, That Men miſtake oft-times Vice for Virtue; and are enticed to it by an Error in their Judgments, rather than any Depravedneſs in their Affections. Thus Drunkenneſs recommends itſelf to us, under the Notion of Kindneſs; and Prodigality under that of Liberality: Complacency likewiſe is the great Pimp of much Viciouſneſs to well-diſpoſed Perſons; and many are by it enticed to err, to gratify a Miſtake in their Friendſhip; for they are perſuaded, that Friendſhip and Kindneſs are ſo innocent and ſweet Qualities, that they cannot command, what are not juſt as themſelves.

CUSTOM alſo, as it is a Second Nature, ſo it is a Step-mother to Virtue; and whilſt we endeavour to ſhun the Vice of being *vain* and *ſingular*, we ſlip into theſe Vices, which are too familiar to be formidable; and which we would not have committed, if the Mode and Faſhion had not determin'd us thereto, againſt our firſt and pure Inclinations. Thus the *Germans* believe Drinking to be Kindneſs; and the *Italian* is, by the Cuſtom of his Country, induc'd not to tremble, but to love *Sodomy*. We have *Intereſt* likewiſe to blame, for much of that Wickedneſs, which we falſly charge upon Nature; for this bribes us to oppoſe what naturally we would follow: But above all, Want of Conſideration is the frequent Occaſion of many of theſe Diſorders; ſo that Virtue is not poſtpon'd by Choice, but by Negligence; neither would it be more difficult for us to be virtuous in many of our Actions, than it would be for us to conſider what we are about to do. And I may ſeal up this Period with the blunt Complaint made by a poor Woman, who after her Affection and Intereſt had forc'd from her many paſſionate Regretes againſt her Son's Debordings, concluded thus; Alas! my Son will never recover, for he cannot *think*: Therefore I muſt conclude, that ſeeing it is eaſy to think, it muſt be likewiſe eaſy to be virtuous.

These prove the Uneaſineſs alſo of private Quarrels and ill Humours.

IT is indeed hard for one who is drunk to ſtand upright, or for one who hath his Eyes cover'd with Mire to ſee clearly; and yet ſtanding upright, or ſeeing clearly, are not in themſelves difficult Tasks: Juſt ſo Virtue is eaſy in itſelf, tho' our Pre-engagement to the contrary Habit, rather than to the Vice itſelf, renders its Operation ſomewhat uneaſy; whereas, if we had once imbrued our Souls with a Habit of Virtue, its Exerciſe would be far eaſier to us than that of its contrary; for it would be aſſiſted by Reaſon, Nature, Reward, and Applauſe; all which oppoſe the other. He who becomes temperate, finds his Temperance much leſs troubleſome, than the moſt habitual Drunkard can his Exceſs, who can never render it ſo familiar, but that he will be conſtrain'd to make Faces, when he quaffs off a tedious Health; and will at ſometimes find either his Quarrels, the betraying his Friend's Secret, or his Crudities to importune him. No Lyar hath ſo much accuſtom'd himſelf to that Trade, but he will diſcover himſelf ſometimes in his Bluſhes, and will be oft diſtreſſed to ſhape out Covers for his Falſeneſs; whereas he who is free from the Bondage of that Habit, will always find it ſo eaſy, that he will never hear a Lye, without admiring with what Confidence it could have been forg'd.

WHEREAS to know the Eaſineſs of Virtue, we need only this Reflection, That every vicious Perſon thinks it eaſier to conquer the Vice he ſees in another. He who Whores, admires the Uneaſineſs and Unpleaſantneſs of Drinking; and the Drunkard laughs at the fruitleſs Toil of Ambition; which ſhews that Vice is an uneaſy Conqueſt, ſeeing the meaneſt Perſons can ſubdue it.

THO' Truth and Newneſs do of all other Motives, court us ſooneſt to Complacency, and that my preſent Theme may pretend to both; yet ſo ſtudious am I of Succeſs, where I have a Tenderneſs for the Subject for which I contend, that for further Conviction of its Enemies, I muſt recommend to them to go to the Courts of Monarchs; and there learn the Uneaſineſs and Unpleaſantneſs of Vice, from its ſplitting thoſe in Oppoſitions and Factions, which afford the reaſonable Lookers-on as diſagreeable a Proſpect, as that of a ſhipwrackt Veſſel. And when Faction has once diſmembred a Society, is it not ſtrange to ſee what Pains and Anxiety muſt be ſhew'd by both Oppoſites, to diſcover and ruin each others Projects? Other Men toil only to make themſelves happy; but thoſe muſt labour likewiſe to keep their Oppoſites from being ſo; they muſt ſeek Applauſe for themſelves, and muſt ſtop it from their Enemies; they muſt ſhun all Places where theſe are entertained, and all Occaſions which may bring them to meet, tho' Inclination or Curioſity do extremely bend them to go thither; they muſt oppoſe the Friends of their Enemies, tho' they be deſirous, and oblig'd upon many other Scores to do them good Offices; they grow pale at their Appearances, and are diſordered at what Praiſe is given thoſe, tho' beſtowed upon them for promoting that public Good, wherein the Contemners ſhare for much of their own Safety; and it is moſt ordinary to hear ſuch factious Zealots ſwear, that they would chuſe rather to be deſtroy'd by a public Enemy, than preſerv'd by a Rival: From all which it is but too clear, that all vicious Perſons are Slaves; which tho' the uneaſieſt of States, yet to ſhun a Loſs of ſuppoſed Liberty, moſt Men refuſe to be virtuous. If we go to Phyſicians, we will find their Shambles hung round with the Trophies of Vice. For Temperance, Chaſtity, or the other Virtues, ſend few thither: But Wantonneſs repays there its one Moment's Pleaſure with a Year's Cure; and makes them afraid to ſee that diſfigur'd Face, for whoſe Repreſentation they once doted upon their flattering Mirrors. There lie ſuch Priſoners, as the drunken Gout hath fetter'd; and there lie louring ſuch as Gluttony hath oppreſs'd. Let us go to Priſons and Scaffolds, and there we will ſee ſuch furniſh'd out with the Envoys of Injuſtice, Malice, Revenge, and Murders. Let us go to Divines, and they will tell us of the horrid Exclamations of ſuch, as have upon their Death-bed ſeen muſter'd before them, thoſe Sins, which how ſoon they had their Vizards of Senſuality and Luſt pulled off, did appear in Figures monſtrous enough to terrify a Soul which took Leiſure to conſider them.

*Hi ſunt qui trepidant, & ad omnia fulgura pallent.* Juvenal.

AND tho' the Conſciences of Soldiers have oft-times their Ears ſo deafned with warlike Sounds, or welcome Applauſes, that they cannot hear; and their Eyes ſo cover'd with their Enemies Gore, that they cannot ſee theſe terrifying Shapes of inward Revenge; yet, if we believe *Lucan*, neither could the Wrongs done to *Cæſar* ſo far legitimate his Fury; nor the preſent Joy, or future Danger, ſo far divert him from reflecting upon his by-paſt Actions; nor could the Want of Chriſtianity (which enlivens extremely theſe Terrors beyond the *Creed* of a *Roman*, who believ'd that Gallantry was Devotion) ſo far favour his Cruelty; but that he and his Soldiers were, the Night of *Pharſalia*'s Battle, thus diſturb'd. *Lucan*, Book 7.

*But furious Dreams diſturb their reſtleſs Reſt,*
Pharſalia'*s Fight remains in ev'ry Breaſt;*
*Their horrid Guilt ſtill works; the Battle ſtands*
*In all their Thoughts, they brandiſh empty Hands*
*Without their Swords: You would have thought the Field*
*Had groan'd, and that the guilty Earth did yield*
*Exhaled Spirits, that in the Air did move,*
*And* Stygian *Fears poſſeſt the Night above;*
*A ſad Revenge on them their Conqueſt takes;*
*Their Sleeps preſent the Furies hiſſing Snakes,*
*And Brands; their Countrymen's ſad Ghoſts appear:*
*To each the Image of his proper Fear.*
*One ſees an old Man's Viſage, one a young;*
*Another's tortur'd all the Evening long*
*With his ſlain Brother's Spirit; their Fathers Sight*
*Daunts ſome: but* Cæſar's *Soul all Ghoſts affright.*

The Character of a Philoſopher, and his Eaſe.

BUT that I may reſt your Thoughts from the Noiſe and Horror of theſe Objects, let me lead them into a Philoſopher's Cell or Houſe; (for Virtue is not like Vice, confin'd to Places) and there ye will ſee Meaſures taken, by no leſs noble nor leſs erring Pattern, than Nature. His Furniture is not the Offſpring of the laſt Faſhion; and ſo he muſt not be at the Toil, and keep Spies for informing him, when the ſucceeding Mode muſt cauſe theſe be pull'd down; and needs not be troubled, to fill the Room yearly of that contemn'd Stuff he but lately admir'd. He is not troubl'd that another's Candleſtics are of a later Mould; nor vext, that he cannot muſter ſo many Cabins or Knacks as he does. He ſpends no ſuch idle Times as is requiſite for making great Entertainments; wherein Nature is oppreſt to pleaſe Fancy; and muſt be, by the next Day's Phyſic, tortur'd to cure its Errors: His Soul lodges cleanly; neither clouded with the Vapours, nor cloy'd with the Crudities of his Table: He applies every Thing to its natural Uſe; and ſo uſes Meat and Drink, not to expreſs Kindneſs (Friendſhip doing that Office much better) but to refreſh, and not to occaſion his Weakneſs. His Dreams are neither diſturb'd by the horrid Repreſentation of his laſt Day's Crimes, nor by the too deep Impreſſions of the next Day's Deſigns, but are calm as the Breaſt they refreſh, and pleaſant as the Reſt they bring. His Eyes ſuffer no ſuch Eclipſe in theſe, as the Eyes of vicious Men do, when they are darkened with Drunkenneſs, or exceſſive Sorrow; for all his Darkneſſes ſucceed as ſeaſonably to his Recreations, as the Day is followed in by the Night. In his Cloaths, he uſes not ſuch as require two or three Hours to their laborious Dreſſing; or which over-awe the Wearer ſo, that he muſt ſhun to go abroad to all Places, or at all Occaſions, leſt he offend their Luſtre; but he provides himſelf with ſuch as are moſt eaſy for Uſe; and fears not to ſtain theſe, if he keep his Soul unſpotted: He conſiders his Body and Organs, as the Eaſement and Servants of that reaſonable Soul he ſo much loves; and therefore he eaſes them, not upon Deſign to pleaſe them, but to refreſh them; that the Soul may be thereby better ſerv'd; and if at any Time he deny theſe their Satisfaction, he deſigns not thereby to torture them: For Gratitude

The Character of a Philoſopher, and his Eaſe.

obliges him to repay better their Services: (and a Man ſhould not be cruel even to his Beaſt) But he does ſo, leſt they exceed theſe Meaſures, whoſe Extent Virtue knows better to mark out than they; or elſe he finds that, during the Time he miniſters to theſe Appetites, he may be more advantagiouſly employ'd in enjoying the pure and ſpiritual Pleaſures of Philoſophy. But leaving this Outer-court, let us ſtep into a Philoſopher's Breaſt, (a Region as ſerene as the Heaven whence it came) and there view how ſweet Virtue inſpires gentle Thoughts, whoſe Storms raiſe not Wrinkles, like Billows in our Face, and blow not away our diſobliged Friends. Here, no mutinous Paſſion rebels with Succeſs; and theſe petty Inſurrections of Fleſh and Blood, ſerve only to magnify the Strength of Reaſon in their Defeat. Here, all his Deſires are ſo ſatisfied with Virtue, as their Reward, that they need, nor do not run abroad, begging Pleaſures from every unknown Object: And therefore it is, that, not placing his Happineſs upon what is ſubject to the Empire of Fate, capricious Fortune cannot make him miſerable; for it can reſume nothing but what it hath given: And therefore, ſeeing it hath not beſtow'd Virtue and Tranquility, it cannot call it away, and whilſt that remains all other Loſſes are inconſiderable. And as few Men are griev'd to ſee what is not their own deſtroyed, ſo the virtuous Philoſopher, having always conſider'd what is without him as belonging to Fortune, and not to him, he ſees thoſe burnt or robb'd with a diſintereſted Indifferency: And when all others are allarm'd with the Fears of enſuing Wars and Invaſions, he ſtands as fixt (tho' not as hard) as a Rock, and ſuffers all the foaming Waves of Fate and Malice to ſpend their Spite and Froth at his Feet. Virtue, and the Remembrance of what he hath done, and the Hopes that he will ſtill act virtuouſly, are all his Treaſures; and theſe are not capable of being pillaged; theſe are his inſeparable Companions, and therefore he can never want a divertiſing Converſation: And ſeeing he is a Citizen of the World, all Places are his Country; and he is always at Home, and ſo can never be baniſhed; and ſeeing he can ſtill exerciſe his Reaſon equally in all Places, he is never (like vicious Perſons) vex'd, that he muſt ſtay in one Place, and cannot reach another; like a ſick Man, whoſe Diſeaſes make him always tumble through all the Corners of his Bed. He is never ſurprized, becauſe he forecaſts always the worſt; and as this arms him againſt Diſcontents, ſo if a milder Event diſappoint his Apprehenſions, this heightens his Pleaſure. He lives without all Deſign, except that one of obeying his Reaſon; therefore it is that he can never be miſerable, ſeeing ſuch are only ſo, who are croſs'd in their Deſigns; and thence it is, that when he hears that his Actions diſpleaſe the World, he is not troubled, ſeeing he deſign'd not to pleaſe them; and if he ſee others carry wealthy Pretences to which he had a Title, he is little troubled, ſeeing he deſign'd not to be rich. The Frowns or Favours of Grandees alter him not, ſeeing he neither fears the one, nor expects Promotion from the other. He deſires little, and ſo is eaſily happy; ſeeing theſe are without Controverſy happy, who enjoy all they deſire; and that Man puts himſelf in great Debt, who widens his Expectations by his Deſires: Thus, he who deſigns to buy a neighbouring Field, muſt ſtraiten himſelf to lay up what will reach its Price, as much as if he were Debtor in the like Sum; and *Deſire* leaves ſtill an Emptineſs which muſt be filled. He finds not his Breaſt invaded (like ſuch as are vicious) by contrary Paſſions; Envy ſometimes perſuading, that others are more deſerving; and Vanity aſſuring, that none deſerves ſo much. His Paſſions do not intereſs him with extreme Concern in any thing; and ſeeing he loves nothing too well, he grieves at the Loſs of nothing too much; Joy and Grief being like the contrary Motions of a Swing, or *Pendula*, which muſt move as far (exactly) to the one Side, as it run formerly to the other. He looks upon all Mankind as ſprung from one common Stock with himſelf; and there is as glad to hear of other Mens Happineſs, as others are to hear of their Kindred and Relations Promotion. If he be advanc'd to be a Stateſman; whilſt he continues ſo, he deſigns more to diſcharge well his preſent Truſt, than to court a Higher; which double Task burdens ſuch as are vicious; and having no private Deſign, if the Public which he ſerves, find out one fitter for the Employment, he is well ſatisfied; for his Deſign of ſerving the Public is thereby more promoted: And if he be preferr'd to be a Judge, he looks only to the Law as his Square, and is not diſtracted betwixt the Deſires to be juſt, to pleaſe his Friends, to gratify his Dependers, and to advance his private Gain. The Philoſopher is not rais'd by his Greatneſs above, nor depreſs'd by his Misfortunes below his natural Level: For, when he is in his Grandeur, he conſiders that Men come to him but as they go to Fountains; not to admire its Streams, (tho' clear as Criſtal) but to fill their own Pitchers; and therefore he is neither at much Pains to preſerve that State, nor to heighten Men's Eſteem of it; but conſiders his own Power as he doth a River, whoſe Streams are always paſſing, and are then only pleaſant when they glide calmly within their Banks. Injuries do not reach him; for his Virtue places him upon a Height above their Shot; and what Calumnies or Offences are intended for him, do but like the Vapours and Fogs that riſe from the Earth, not reach the Heaven; but fall back in Storms and Thunder upon the Place from which they were ſent. Injuries may ſtrike his Buckler, but cannot wound himſelf, who is ſenſible of no Wounds, but of thoſe his Vices give him. And if a Tyrant kill his Body, he knows his immaterial Soul cannot be ſtabbed, but is ſure it will fly as high as the Spheres; (nothing but that Clog of Earth hindring it to move upward to that its Centre) and that from thence, he will with great *Pompey* (in *Lucan*) ſmile down when he ſhall ſee with illuminate Eyes his own Trunk to be ſo inconſiderable a Piece of neglected Earth. And to conclude; The Philoſopher does in all his Actions go to the ſtraiteſt Way; which is, becauſe of that, the ſhorteſt, and therefore the eaſieſt.

WHEN I have conſtellate all theſe towring Eulogies, which Gratitude heaps upon its Benefactors; which fooliſh Youths throw away upon their Miſtreſſes; and which Flatterers buzz into the depraved Ears of their Patrons; when I have impoveriſh'd Invention, and empty'd Eloquence of their moſt flowry Ornaments; when I ſhall have decocted the Pains of a whole writing Age, into one Panegyric, to beſtow a Compliment upon Virtue, for the Eaſe it gives us, and the Sweets of its Tranquility, I ſhall have ſpent my Time better, than in ſerving the moſt wealthy or recreating Vice; and yet I ſhall oblige Virtue by it leſs, than by acting the leaſt Part of what is reaſonable; or gaining the ſooneſt reclaimable of ſuch as are vicious; and therefore I ſhall leave off to write, that I may begin to act virtuouſly, tho' one of my Employment may find a Defence for writing moral Philoſophy, in the Examples of *Cicero*, *Du Vaire* that famous *French* Preſident, the Lord *Verulam*, and Thouſands of others.

I have (to deal ingenuouſly) writ theſe Two Eſſays to ſerve my Country, rather than my Fame or Humour; and if they prove ſucceſsful, Heaven has nothing below itſelf, wherewith it can more bleſs my Wiſhes: But if theſe ſucceed not, I know nothing elſe wherewith I would flatter my Hopes; and ſo whatever be the Event of this Undertaking, (as my Reſolutions ſtand now form'd) *Adieu for ever to Writing*.

# A
# Conſolation againſt Calumnies:
## SHEWING
## How to bear them eaſily and pleaſantly.

[*Written in Return to a Perſon of Honour, and at his Deſire ſubjoin'd to the foregoing Diſcourſe, becauſe of the Contingency of the Subjects.*]

*My* LORD,

THO' my Friendſhip pay its Incenſe no where with ſo much *Devotion*, as when it bows to your Merit; and tho' your charming Letter had a Bait hung at its each Line, yet I am equally afraid and aſham'd to return, in Anſwer to either, that deſired *Conſolation*, which may ſhew very much Vanity in me to undertake, and very little Friendſhip to be able to perform. For either your Miſfortunes are not ſo pointed as ye repreſent, and then I muſt ſhew your Weakneſs when I detect the Defects of what conquers you; or, if they have Powers reſembling the Greatneſs of theſe Complaints which ye form of them, then it will ſhew too much Diſunion in our Friendſhip (pardon the Levelingneſs of that Word, ſeeing ye have authorized what it expreſſes) to be able to comfort you, when you are not able to comfort yourſelf; and not to be diſcompoſed by the ſame Abſences of Spirit and Courage that obliges you to crave that Aſſiſtance, which my Modeſty or Sympathy ſhould make me decline to offer. Yet ſeeing ye poſſibly crave this, to try rather my Obedience than to ſupply your Neceſſities; I will expoſe my own real Defects, to help theſe imaginary ones in you: And this being the laſt Thing I am ever to print, I ſhall think my Reputation expires nobly, when it dies a Martyr in your Quarrel.

THE Misfortune you complain of is, That your Name is loaded with Miſreports; and that your Innocence doth not protect you againſt that Injuſtice: And albeit I am ſorry to ſee ſo noble a Name as your's ſo ill lodg'd, as in the venemous Mouths of the indiſcreet World; yet I am glad to hear that your Fortunes are ſo full, as that ye find no Incommodity, but what is ſo foreign, and what may be ſo eaſily removed.

BE pleas'd therefore to conſider, that tho' ye imagin all the World talks of you, yet that is your, and not their Error; for few have either Time, Convenience or Humour, to enquire into, or hear ſuch Reports as theſe which trouble you: And I know by Experience, that where Men fall in your Misfortunes, or under any Affront, they conceive all they meet or know conſider nothing ſo much as their Caſe; whereas I myſelf have met ſuch Perſons, without any leſſening Thoughts of them, and without any Change in my Humour towards them, beſides what was wrought by a Pity to ſee reaſonable Men ſlip into ſuch an Error: It is the Nearneſs of Concern which induces Men to believe this; and ſo they ſhould conclude, that ſeeing others are not ſo concerned in theſe Miſinformations, they will not apprehend them with the ſame Feelings. Every Man imagins his own Diſeaſe greateſt, and admires why others are not ſenſible of his Sufferings; whilſt theſe admire why he ſees not his own to be much leſs than he imagins. And as Self-love makes us imagin, that all the World hears of our Advantages; ſo it is an equal Error to believe, that all Men are inform'd of our Misfortunes; and I have regretted to my Friends (who of all others ſhould have known beſt my Misfortunes) what they knew not, but from my own Apologies.

OF theſe few who hear ſuch Reports, Reaſon ſhould oblige us to believe, that fewer believe them: For Reaſon teaches us to preſume Men to be juſt; and really they ſo are, except they be byaſs'd by Prejudice or Intereſt; whereas if they be juſt, they will little credit ſuch Diſcourſes; it being ſo indiſpenſible an Eſſential of Juſtice, not to condemn ſuch as we have not heard to defend themſelves againſt what they are accus'd of, that tho' God could not but know what *Adam* had done when he had ſinn'd in *Eden*; yet He would not ſentence him, till He cited him to appear in his own Defence; *Adam, Where art thou?* And when the Cries of *Sodom*'s Sins were become as great as the Guilt was which occaſion'd them; yet God ſays, *We will go down and ſee.*

IT were likewiſe Injuſtice to condemn Men upon the Depoſitions of ſuch as ſhall have no Warrant for what they talk, but *common Fame*; which is ſo infamous a Witneſs, that it hath been convicted of a Thouſand Millions of groſs Lies, and ſtands condemned in the Regiſters both of ſacred and prophane Story. And ſo unworthy is the Offspring of this common Whore, that ye will ſcarce find one in an Age, who will own it for his; and as if every Man condemned it, even theſe who relate theſe Diſcourſes will ſtill diſown to be Authors of them: And I may ſay of them, as the Laws ſay of Baſtards, that *Patrem demonſtrare nequeunt*. Why then ſhould we think, that juſt Men will believe, what even unjuſt Men are aſham'd to maintain; and what is told with ſo much Caution and Secrecy, as may convince ſuch to whom it is told, that the Relater dares not undergo the Trial? The other Warrants of their Diſcourſes are the Teſtimonies of ſuch, as Men may ſee by the feveriſh Zeal of the Relaters, that they are too much intereſs'd to be believ'd; and when we hear ſuch Diſcourſes, we ſhould examin, Why was the Relater at the pains to diſperſe theſe Informations? Which if we do, we will find, that Intereſt or Prejudice does prompt them; and ſo in believing theſe, we give the Informer Reaſon to laugh at our Simplicity, in being ſo eaſily prompt by him, (which may juſtly give him Ground to prefer his Wit to our's) and we become but the Executioners of his Revenge and Malice: Should not, and will not reaſonable Men think, that theſe who are ſo officious as to report ſuch Diſcourſes, wherein they are not intereſs'd, will be ſo unjuſt as to make, as well as tell ſuch Calumnies? And theſe who are Buſy-bodies in intereſſing themſelves in ſuch Tattles, may be Liars in forging what they want. None ſhould be believ'd, but ſuch as are virtuous; and ſuch will never be Authors of Miſreports, or curious to talk of other Men's Affairs; for virtuous Perſons will be aſham'd to have it thought, that they ſpend their Time ſo meanly, as to have Leiſure to hear or enquire into what does not concern them: And as the Law, ſo Men ſhould always ſuſpect Witneſſes, who offer themſelves to depoſe without being commanded or interrogate. Wiſe Men will likewiſe examine, upon what Ground the Relater founds himſelf; and if they do not, they are unjuſt; or if they do, they will eaſily find that the weakeſt Preſumptions make the ſtrongeſt of his Arguments; and in place of making you criminal, your Accuſers will thus make themſelves ridiculous. Who will condemn upon Preſumptions, and upon ſuch as are only Preſumptions to Perſons ignorant and malicious? What may be, may not be; and therefore 'tis bad Logic to infer, That ſuch an evil Thing is done, becauſe it may be ſo; for the Concluſion ſhould follow the weakeſt Propoſition; and therefore we ſhould rather conclude, That ſuch an Evil is not done, becauſe it may be that it is not done. No rational Man ſhould judge of any Action, whereof he knows not the Deſign of the Actor; for ſome Actions are good or evil, according as the Deſign is. St. *Jerome* went to Taverns, to obſerve and reform; which was a Virtue in him, though it was a Crime in others; and therefore, ſeeing we know not other Men's Deſigns, we ſhould not cenſure their Actions. One Circumſtance alſo will vary the Caſe; and ſeeing few Men know all Circumſtances of other, Men's Actions, it is Raſhneſs to cenſure what but may be vicious; and Injuſtice to be raſh in cenſuring, ſeeing what we cenſure may be virtuous. Another Ground which perſuades me, that few believe what is diſadvantagious to another Man's Honour, is, That though Fame and Life be but paralell'd in Law, yet in Honour Fame is much dearer than Life, becauſe it laſts longer than Life, and becauſe Life without it is a Torment; but it without Life is ſo much a Happineſs, that more die for Fame than by Courage. Seeing then we need not fear that juſt Men will pronounce againſt our Life without impregnable Evidences, why ſhould we fear that they will pronounce againſt our Honour, upon foundleſs and ſlight Miſreports? It is likewiſe Men's own Intereſt not to believe ſuch Diſcourſes of others, leſt they thereby eſtabliſh a Precedent againſt themſelves; for will not they think that the next Turn may be their's; and that being Mortal as you, they are liable to the ſame Accidents; and that if ſuch Diſcourſes ſhould receive Acceſs, their Innocence and Pains are eaſily diſappointed? And therefore I hope ye will think, that common Intereſt is a ſufficient Security for your Fame amongſt wiſe Men; and that upon that Score, prudent Men will not believe ſuch Reports, as juſt Men will not upon the former: It is alſo moſt ordinary to find, that ſuch as have been once cheated, will be more cautious for the future; Brutes themſelves being ſo wiſe, as to beware of that Snare where they were once entrapp'd. It is then moſt probable, that ſeeing moſt Men have once, and many too often been cheated with Miſreports, having been induced to wrong their Friends hereby, and their Relations; that ſuch therefore, even amongſt theſe who can be unjuſt, yet will be ſo no more; and that we will be ſecured by the Experience, tho' not by their Virtue.

As to theſe who will talk to your Diſadvantage, I ſhall claſs them thus; Some will out of Raillery, ſome will through Miſinformation, ſome by Intereſt and Malice. Thoſe who talk out of Raillery, deſerve not your Malice; nor ſhould their Diſcourſes fret you, ſeeing their Humour is generally known to deſign rather Jeſt than Truth; and ſo what they ſay, may divert others as a Treat of Wit, but cannot wrong you as a diſobliging Truth, no more than *Virgil* can be believ'd a Fool, becauſe he is antic in burleſque Verſe; and ſeeing theſe uſe you, as they uſe their Friends and themſelves, ye ſhould be no more angry than the King is, when he ſees his Face poſted up for a Sign to a Country Tavern. Scripture and Devotion ſuffer with you on this Account; and becauſe the fineſt Things are moſt univerſally known, therefore they are moſt ordinarily the Subject of ſuch Entertainment; that being the Object thought only worthy to rail at, which deſerves not to be ſo uſed; and Men being uſed to make that appear ridiculous, which is not ſo in itſelf.

These who talk to your Prejudice through Miſinformation, receive but ſo ſlight an Impreſſion, as will make them ſpeak but faintly, and as will not hinder them from being eaſily remov'd from their received Intelligence; and after they are reclaim'd by your Friends, or a ripen'd Information, they will judge it a Duty to expiate their former Error, by confeſſing to the World their former Injuſtice; ſo that by one of thoſe Penitents more will be regain'd, than can be debauched by Twenty Miſinformers; Men being generally more inclin'd to believe ſuch as have experienc'd Both, than ſuch as pretend only an Acquaintance with One of the oppoſite Sides.

As to ſuch who ſpeak out of Malice, they do either preſs their Deſign with ſuch Vehemency, as they may eaſily be ſuſpected; or elſe they over-act themſelves by telling ſo improbable Untruths, that they are eaſily diſcovered: Few likewiſe are unacquainted with the Humour of ſuch; and God has in a Manner put *Cain*'s Mark upon them, that they may not be believ'd. Malice cannot conceal itſelf, no more than it can the Faults of others; and the Authority of ſuch is ordinarily of ſo little Advantage to the Cauſe they manage, that it hangs Contempt upon a Report, that they ſpread it: And how ſoon it is known to have begun at them, it leaves off to be either regarded or believed.

Those whom Intereſt perſuades to talk of you, as being Rivals to either your Fame or Love, do ſoon diſcover themſelves and their Paſſion; and by that Diſcovery they ſecure you: For after that, the Hearers conſider more their Intereſt, than your Crimes; and in place of hating you, becauſe of that alledged Guilt, they pity and favour you, as a Perſon who is ſo perſecuted. Others do feed ſuch Miſreport, not becauſe they rival you, but becauſe they would have you to rival them; deſigning to have you loaded with the like Guilt with which themſelves ſtand charged; and expecting either to divert thereby the public Noiſe, and make you the Seat of that War; or hoping to leſſen their own Guilt by ſharing it with you: Theſe you ſhould pardon, even as we pardon thoſe who grip us when they are like to drown; neither need ye fear ſuch Informers, ſeeing their Intereſt is known; and therefore none will believe them but ſuch who are ſimple; as that their Belief is not worthy your Pains or Anger.

Having thus cleared off many of thoſe, whom your Lordſhip ſuſpected as Enemies; my next Chapter ſhall be to comfort you, againſt what Impreſſion thoſe who remain can leave on you. In purſuance whereof, my firſt Concluſion ſhall be, that nothing can be Arbiter of your Fate, but what hath Power to make you happy as well as miſerable; by the Application whereof, and of the Rule of Contraries, pardon me to aſſure you, that except ye thought the Rabble might have made you happy, making you great or famous, ye had never fear'd or courted their Suffrage; and ſeeing they are ſo miſerable and unconſtant a Crew, what an empty and unfix'd Happineſs muſt that be which ye expected? The Way then not to value common Reports is, not to value what Favours the Multitude can do you; that Happineſs which ye purſue amongſt them, your own Breaſt, and it only, can beſtow: And as nothing that is not ſpiritual, can make your Spirit happy; ſo nothing can wound a Spirit, that is nothing itſelf but Breath and Air: And I aſſure you, that theſe detract too much from the Nobleneſs of Man's Soul, who imagine, that there is any Thing elſe under the Sun, whereupon his Happineſs or Unhappineſs doth depend; for all exterior Enjoyments do no otherwiſe enrich or empoveriſh it, than theſe Rivulets which diſgorge themſelves into that Baſon of the Ocean, do by their Acceſs or Receſs fill or empty its ſtill equal Waters. How can Man be ſaid to be Lord of all the Creation, if his Happineſs does depend upon Riches, Territories, or any Thing without him? And therefore it was nobly concluded by *Epictetus*, That what is without us, and does not depend upon our Choice, ſhould not affect us.

And therefore, ſeeing Reports cannot reach us, they ſhould not grieve us; unjuſt Calumnies fall no otherwiſe upon a wiſe Man, than Hail upon a ſtrong Houſe; whoſe Fall cauſeth greater Noiſe than Prejudice. It is true, that theſe may hinder us from being preferr'd; but a virtuous Perſon knows, that his Happineſs lies not in Preferment, and ſo he values no more what can obſtruct that, than a covetous Man does the Loſs of what may promote his Knowledge; or the Amorous what cannot diſappoint his Love. A virtuous Man may by Want of Preferment, be ſtopp'd from doing what Good the Diffuſiveneſs of his noble Humour would ſtretch towards others: But his Country is only a Loſer in this, and not he; for he pleaſes himſelf in the doing what Good is within his preſent Reach; and in being willing to do more, if Occaſion offer'd.

I confeſs that Miſreports do ſometimes grieve our Spirits; but it is our Fancy, and not thoſe, who have that Aſcendant over us; as is clear from this, that the ſame Words ſpoke by a Friend or Fool, will not trouble us, which would enrage us if they ſlipt from any other Perſon; and till we know what is ſpoke of us, what is ſpoken does not trouble us; which ſhews that not our Enemies, but we wound ourſelves: And ſeeing they never trouble us, but when, and at what Proportion we do value them; it is clear that not theſe, but our own Reflections do grieve us. For if theſe grieved us, the Meaſures of our Grief would be ruled by any Thing in us; and all Affronts and Injuries ſhould be to all equally diſquieting; whereas now they yield to our Humours; nor is a jovial, ſerene Spirit troubl'd like a Melancholian, whoſe Humour gives much of that black Tincture to our Croſſes which ſo affright us. The Way then to aſſure ourſelves againſt Miſreports, is, not by informing all that great Maſs of our Acquaintances, or by ſhunning what diſpleaſes others; (for what will perſuade them that they have a Right to judge us) but the nearer Cut is to tame our own Affections; and bring them ſo under Rod to our Reaſon, that nothing may offend us, but what offends it; even as the Way to preſerve a Body from Diſeaſes, is to purge away theſe noxious Humours which corrupt the beſt of Aliments.

Let us conſider that Men are either juſt, or unjuſt; if juſt, we need not fear their Reproaches, for they never reproach Innocency; and we ſhould not fear to have our Guilt reproach'd; if unjuſt we ſhould not fret; becauſe it is natural to them to reproach even the Innocent; and we have as juſt Reaſon to think ourſelves unhappy, becauſe Dogs bark at us; or the Winds and Storms ſtop our Journeys. This requires Submiſſion, but not Grief; and is a Misfortune to them, but not to us. And as we ſhould conform ourſelves to the Laws of the Place where we live; ſo ſeeing the Decrees of Providence have appointed the Wicked to perſecute the Juſt; it is Reaſon to obey, not only becauſe we cannot help it, but becauſe our Maker hath commanded it. Such as calumniate us, do, in ſo doing, ſhew either

Ignorance or Malice; and that being the worſt of Ills, they prejudge themſelves more than us; and we have our Revenge in their Offence. Fear not that their Malice will be conſtant if it be vigorous; for it muſt want in Length what it grows to in Height; and ſome freſh Object will divert them from toothing upon you; or at leaſt, their natural Inconſtancy will make them ſtagger from what they are at; and they will ſooner fix no where, than fix long any where; and like a Swing, they will probably run as far in the other Extreme of admiring you, as they did to that of ſpeaking to your Prejudice; and as thoſe upon whom the Plague breaks, need never fear a Relapſe; ſo your ſurmounting this Report will ſecure you againſt all future Invaſions.

MEN ſhould do generous Things, not for Eſteem but for Virtue; and I may ſay they are then moſt generous, when they meet not with Applauſe; for then they make the World their Debtors, but when the World applauds them they pay them: And whereas they uſe the World in the one Caſe, as a Prince does his Subjects; the World uſes them in the other Caſe, as a Man doth his Merchant or Servant.

NOTHING that is not in our Power ſhould grieve us; and ſo it holds truer in Philoſophy than Policy, that *quiſquis eſt faber ſuæ fortunæ*; a wiſe Man's Inclinations are his Stars; and nothing can make him unhappy, but what can pollute theſe. Seeing then we are not anſwerable for other Men's Follies, why ſhould their Miſreports (which are the chiefeſt of theſe) trouble us? And if it be made arbitrary to them to grieve us, what a precarious Happineſs is ours, which is ſubject to the Caprice of ſuch as are capricious, ignorant, and malicious; to eſcape one of which three, is as impoſſible as to pleaſe them all. No Man is worſted in his Eſteem, becauſe another commits a Fault; why then ſhould I be grieved as if I were guilty, becauſe another Man is ſo guilty, as to calumniate me? And it is too much Compaſſion in me to be ſorry for him who wrongs me.

THERE is no Man ſo fooliſh, as to purſue a Prize not worthy of his Pains; or to grapple with one, who is not worthy to be defeated. Conſider then that your Adverſaries acknowledge, that they fear your Worth when they endeavour to leſſen it by Calumny; knowing, that they dare not enter the Liſts with you upon equal Terms; and therefore they call the World, by this *common Fame*, to their Aſſiſtance; which imports, that nothing leſs than a Multitude can overcome ſo heroic a Spirit. No Place is undermined, but what is too ſtrong for the Aſſailant's open Force; and no Man was ever painfully malign'd, but ſuch as were of ſo noble an Humour, that nothing but Malice join'd with Pains could ruin. Levelling is the natural Effect of Man's Pride; and as no great Soul will deſcend to conſider his Inferiours; ſo ſuch as Fate hath plac'd below you, do naturally deſign either to riſe to your Height, or to pull you down to their own Stature: And hence it is, that your Endowments making the Firſt unpracticable, Self-intereſt makes the Second neceſſary: And the Liberty of Repining is a charitable Allowance, which ſhould be indulg'd to thoſe, to whom Providence having deny'd what we poſſeſs, we ſhould, in Recompence of that Partage, ſuffer ſome Expreſſions from them; which, when granted, does no ways make up that Loſs. The Conſideration whereof made that generous Prince, *Henry* the Fourth of *France*, ſay, when he heard that his Subjects talk'd of him with more Liberty than Juſtice; That he could not but pardon them, ſeeing they had nothing elſe to recompence their not being Kings of *France*. It were Injuſtice in you to deſire both the Price, and the Thing whereof ye have the Price: So that ſeeing ye poſſeſs that Happineſs which deſerves public *Envy*, it were unjuſt that ye ſhould not ſuffer it, and unmerciful that ye ſhould not ſuffer a. Word to paſs with the Loſers.

CONSIDER likewiſe, that all Mankind is born to Miſery, that is a Law, not a Puniſhment; and Envy is too common to be a Misfortune: Who eſcapes it in ſome Meaſure, but ſuch as never attempt any Thing that was worthy of Conſideration? And who thinks Death a Misfortune, ſince all muſt ſubmit to it? So that I may ſay to your Lordſhip, That nothing can cure this better, than to wear about your Arm the Names of Three Perſons, who have paſs'd through this Valley of Tears, without being ſoil'd by ſome Drops of Calumny; and to find theſe Three, will be as hard as to find the Philoſopher's Stone. Men ſhould not repine then, becauſe they are purſu'd by ſome Trouble; but they ſhould conſider, whether their Trouble be greater than that of other Men: And by this Rule we will find, that they eſcape eaſily to whoſe Share of this general Taxation, nothing falls but Miſreports. For ſuch as lie entomb'd in Priſon, or are ſtarv'd in Poverty, to be relieved; and which is leſs, the Ambitious for Preferment, or the Vindictive for ſatisfying his Revenge, would allow the World to talk of them at their own Rates: So that your Torment is but their Choice; and ye do at the ſame Altars complain of what they would beg from them.

NO Merchant eſteems himſelf miſerable, becauſe he owes ſome Debt; but he compares his Debt and Credit, and is ſatisfied, if more be owing to him than he owes to others. Do then, my Lord, conſider what Advantage ye poſſeſs; and think not that Providence deals churliſhly with you, when ye find that even Malice muſt find more Things to admire in you, than it can find to carp at; for to have but one Trouble is a Happineſs, ſeeing if ye wanted all, ye would be a God; and it is ſufficient Happineſs to poſſeſs that Quiet, which differs but by one Remove from His. Number your Friends, and I am confident ye will find theſe to ſurpaſs the Number of ſuch, as dare ſay they are your Enemies: But tho' they were fewer than your Enemies, yet be not ſo unjuſt to your Friends, as to think that one Friend is not worth a Thouſand Enemies. Wiſe Men number not, but ponder Vices; but ye may ſecurely do both. Will not a Courtier value the Opinion of his Prince, and a Lover the Eſteem of his Miſtreſs, above all the Suffrages of all the Remanent of Mankind? And ſhould not a virtuous Perſon content himſelf with the Approbation of God Almighty? And, which is next with the Eſteem of a Friend, whoſe Knowledge and Virtue makes him all theſe to ſuch as rightly rate Friendſhip.

*——Sat, amico te mihi fœlix.*

His Friendſhip is a conſtant Purchaſe, but the Multitude's Applauſe is uncertan and painful; and theſe ſhould rather be laugh'd at who court it, than they who want it.

CONSIDER ſeriouſly, whether it be not more eaſy and pleaſant to be enjoying yourſelves with a generous Friend, than by running up and down the World, gaining ſuch as ſerve for nothing, but to ſay, *You are a brave Gentleman*; which if it were a fine Thing, they would not have it to beſtow: For it is not reaſonable to think that Providence would depoſite fine Things in ſuch Hands; and it chuſes its Servants ill, if theſe be its Stewards.

I having then ſpoken formerly to you as a Philoſopher, let me uſe the Stile of a Gentleman; and in that tell you, That the World hath no Right to judge you; you are a Peer, and ſhould not be judg'd by Commons: Laugh at them when they uſurp, and let not your Melancholy be the Executioner of their Sentence. It is alledg'd, that no Beaſt dares purſue a Man, if he hold his Face undauntedly to it: Theſe purſue not Men but Cowards; and the Rabble knows not when ye err, but becauſe ye bluſh. Do not then by your Anxiety wrong Innocency, and eſtabliſh not a Preparative by your yielding, whereby other virtuous Perſons may be oppreſs'd; but be ſo charitable even to thoſe unjuſt Creatures who calumniate you, as to reclaim them from that Humour, by laughing them out of it; for I aſſure you, they will uſe you as Men do Children, who continue to hold out their Fingers to them, when they find it vexes them. No Man will loſe his Pains; and upon this Account ye will find, that ſeeing Men calumniate you becauſe they think to vex you, they will give themſelves no longer that Trouble, than they find they are able to give it you.

THE Example of theſe *Bethſhemites*, who fell the Sacrifice of their own Sin, for prying into the Boſom of the Ark, forbids my Eyes to be ſo ſacrilegious, as to look inwardly into the Deſigns of God Almighty, (whereof it was but a Type) in raiſing that Duſt wherewith your Name ſeems to be at preſent ſomewhat ſullied: And ſeeing it is unjuſt to judge of theſe Men's Actions, with whoſe Deſigns we are not too intimate, it were unmannerly to repine at God's Diſpenſations, whoſe Actions are fitted more for our Wonder than our Enquiry. But yet I may at a pious Diſtance judge, that Providence hath deſign'd theſe Reports rather for Trophies, than Trials to your Courage; intending in your Caſe to teach the World, that it is as eaſy for a generous Soul to conquer, as to complain of Calumnies: And ſo I hope your Repute ſhall riſe more glorious after this Reſurrection. Do then, my Lord, retire from under the Empire of *Fame*, to the Sanctuary of Friendſhip; where generous Souls, by mingling together, become themſelves greater. And from that ſecure Poſt, conſider, how the happy Angels admire to ſee us, who are deſign'd to be Sharers of their Happineſs, ſo fooliſh as to be vain of Fame, or vex'd when we want it; ſeeing they poſſeſs theſe Joys for which we pray, and yet value not a far more noble Fame than that after which we pant. Ye are innocent, and may adore your Maker; which completes the Pleaſures of of theſe bleſſed Spirits: And what can be wanting to one who poſſeſſes ſo much? Conſider likewiſe, how theſe Hummings, and this Noiſe of us poor Mortals, outlive not the preſent Age: For who knows what was ſaid of the Nobleſt Ladies who lived in Queen *Elizabeth's* Court, much leſs in the Country during her Reign? And Hiſtory ſcorns to preſerve ſuch ridiculous Fopperies, as have no ſurer Foundations than Rumor or Malice: But tho' it did, yet a little Time ſhall conſume us and them. And therefore I ſhall finiſh this Letter as *Virgil* doth his Reflection upon the Battles, Toil, and Noiſe of the Bees;

*Hi motus animorum, atque hæc certamina tanta,*
*Pulveris exigui jactu, compreſſa quieſcunt,*

FINIS.

# THE MORAL HISTORY OF FRUGALITY, With its oppoſite VICES,

*Covetouſneſs*, } and { *Prodigality*,
*Niggardlineſs*, } and { *Luxury*.

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## TO The Univerſity of *Oxford*.

*FINDING ſuch various Opinions concerning the firſt and fundamental Rules of Juſtice, urged with great Animoſity, and that the Laws of Nations were alledg'd by all Sides; I reſolved, after having ſtudied the* Roman *Laws, and the Municipal Law of our own Nation Forty Years, to ſpend ſome Time in enquiring ſeriouſly into the Laws of Nations. For this End I retired into your Famous Univerſity, whoſe Library the Learned and Curious* Selden *has enrich'd with Books on theſe Subjects, beyond what is to be found in any other in* Europe: *Nor could it be, that any Thing could have been added to his Excellent Collection, if your extraordinary Care, and this laſt Age, had not furniſh'd you with many Books, which either had eſcap'd him, or he could not know: But after I had with all the Diligence I could, inſtructed myſelf, as far as I thought was poſſible, I clearly* *found, that theſe Debates were not ſo much occaſion'd by the Laws of Nations, as fed by* Luxury *and* Avarice, *which of late have given Authority to that which ſome Men think a more obliging Law, call'd* Conveniency: *And therefore I reſolved to attack likewiſe this powerful Enemy of Law and Juſtice; and I now preſent my Undertaking to you, not only becauſe it was firſt form'd within your Univerſity, but becauſe I know that you of all Men, with greateſt Reaſon, think yourſelves rather Stewards than Proprietors of Benefits, being you reckon the Wants of thoſe who are in Diſtreſs amongſt your principal Debts; and becauſe that to ſupply theſe is the greateſt Convenience a ſelf-doomed and illuminated Chriſtian ought to ſtudy. And after I had calculated what you have of late beſtowed upon the Exil'd* French *Proteſtants, the Fugitive* Iriſh, *and the Starving Clergy of your own Profeſſion in* Scotland; *beſides the particular Briefs poured in daily upon you for Alms to your own Countrymen, whom Accidents have runied; I could not but admire, how even* Frugality *itſelf could have made you live with that Neatneſs I obſerved among you. I am to lay up the other Marks of Eſteem I have for your Learning, and that Elogy which is due to your Libraries, whereof each of your Colleges has one, which might almoſt ſupply the Want of a* Bodleian *any where elſe, until I complete, by the Helps I found amongſt you, the Obſervations I am now writing upon the* Digeſts, *and ſome illuſtrious Queſtions, which have in this laſt Age employed and divided the beſt Lawyers and Stateſmen in* Europe, *but eſpecially in* Britain. *And who, reſiding among you, could ſee in your Libraries the Fame of Learn'd Men of all Nations ſtill ſo freſh, or could converſe with many of your Own now living, who have made profound Learning even uſeful and witty, without being forced, by a noble Emulation, to leave all other Pleaſures, that he might retire into your Libraries, or his own Cloſet, there to purchaſe ſome Share of that Improvement, which every private Man's Breaſt concurs with the World to eſteem? I am*

Your moſt obliged,

and humble Servant,

GEORGE MACKENZIE.

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## *The Copy of a Letter ſent together with the Dedication.*

Mr. *Hindmarſh,*

I Have ſent you the Dedication to the Univerſity of *Oxford,* which the Author of the Hiſtory of *Moral Frugality,* now deceaſed, deſigned for that Book. If there be any Thing in it unworthy of that Society, or the Author, it muſt be imputed to the fatal Diſtemper of Body which he languiſhed under, when he wrote it. And tho' it falls far below what that Univerſity might have juſtly expected from him, and he was inclin'd to have ſaid of them; yet as it is, I allow you to print it; becauſe the World may thereby know, the high and juſt Eſteem, that Sir *George Mackenzie* retained, even to his Dying-day, of that Famous Society.

London,
*May* 16.
1691.

*SIR,*

*Your Servant,*

ARCH. COCKBURN.

THE

# THE
# *Moral Hiſtory of* Frugality.

## DISCOURSE I.

*Sect.* 1. The Occaſion of writing theſe Diſcourſes.

WHEN I conſider how many have had their Affections warm'd by pious Sermons, how many moral Philoſophers have convinc'd thoſe who have read them, and yet how few have been reform'd by Either; I begin to think, that there muſt lie ſome ſtrange hidden Engine in the Heart of Man, which is able to pull back even thinking Men, from improving theſe Impreſſions: And that which ſeems to be one of the chief Occaſions of this is, That Men are become ſo poor, by the general *Avarice* and *Luxury* which now unreaſonably tyrannize over the World, that they are tempted to be wicked, to ſatisfy their imaginary fantaſtic Neceſſities. Thus we are uncharitable, becauſe we want Money for our imaginary Wants: We are diſloyal, to get it by Rebellion; for ſupplying theſe, Men betray their Country, King, Friends and Maſters, to get Employments whereon to live, and then betray their Truſt in theſe Employments, that they may be able to live without them. And thus *Luxury* and *Avarice* offer not only the Temptations, but furniſh the Excuſes; when they perſuade us to yield to them. They tell us, that Charity muſt begin at Home; that we muſt prefer ourſelves to our Friends; and that Neceſſity is exempted from Law. And whilſt Preachers, Philoſophers and Friends, are arguing from the Principles of Religion, Reaſon and Honour, they by an Influence, as latent but ſtronger than that of the Stars, draw Men's Attention from conſidering the Force of theſe Arguments, to conſider what Charms are in Riches, and the Eaſe which Riches procure; and ſo Men are not Proſelytes, becauſe they are not Hearers.

THEREFORE, to ſecure us againſt this reigning Diſtraction, and thoſe Temptations, let us embrace ancient *Frugality*, under whoſe Empire Vice was of old curb'd with great Succeſs; and which, by freeing us from Poverty, ſecures us againſt all the Snares which it occaſions. For if I can once bring myſelf to live on a Little, and to enjoy that Little with as great Pleaſure as others follow their Recreations, why ſhould I ruin my Soul or Mankind, that I may get what *Frugality* will perſuade me to be ſuperfluous? And if I once be convinc'd by this faithful Counſellor, that a great Eſtate is a great Snare, I will not pay down for it my Honour and Quiet, as a competent Price. I heard a *Dutch* Ambaſſadour tell King *Charles* the Second, That he had ſpent only a Hundred Guilders in Meat and Drink in *Holland* during a whole Year after he had been Ambaſſadour in moſt Courts; nor had he ever been in better Health, or Company. And when the King ask'd, Why he had done ſo unuſual a Thing? He anſwer'd, To let his Countrymen ſee, that one needed not betray or injure their native Country to get whereon to live; which, as it was the Deſign of this his Conduct, is now the Deſign of my Book.

*Sect.* 2. The Enemies of Frugality.

THIS friendly, wiſe, and convenient Virtue of *Frugality* has Two Capital Enemies, *Avarice*, and *Luxury*; the one whereof ſurfeits it, and the other ſtarves it; the one cheats us by repreſenting a great Eſtate as too little; and the other, by repreſenting a little Eſtate as too great. But if theſe Idols, *Avarice* and *Luxury*, were once thrown down in the High Places, we ſhould no more ſee Churchmen ſacrificing to them their Religion, Judges, the Laws, Stateſmen, their Honour, and moſt Men their Quiet and Tranquillity. And ſince Intereſt has got ſuch an Aſcendant over Mankind, that it hath brought Law and Virtue within its Power, and under its Dominion, nothing now ſeeming reaſonable or legal, but what it recommends; 'tis fit, by this Method I now propoſe, to make it conſiſtent with Virtue; and I hope ſo to manage my Theme, as to render it ſubſervient to that Virtue, with which it has ſeem'd to be ſo long at Variance.

IT may ſeem, that ſome Grains of *Avarice* and *Luxury* are mixt oft-times by the Great Phyſician with Virtue, as Poiſon is with the beſt Medicaments, to make them active and uſeful; and as ſome Pride heightens true Courage, and ſome Jealouſy makes Prudence more cautious, ſo without *Avarice* Merchants would not toil to bring us Neceſſaries, nor Soldiers defend even the juſteſt Quarrels; and a little *Luxury* is now requiſite to diffuſe Riches among the Indigent: But when theſe Vices exceed their Allowance, and ſet up for themſelves, then is Virtue oblig'd to curb them, who having been call'd in as Auxiliaries, deſign to turn Conquerors: Yet I cannot allow myſelf this Way of thinking; for beſide that it does too much Honour to Vice, who cannot juſtly ſay, that *Luxury* and *Avarice* are requiſite to excite Virtue; for when they tend to what is good, they change their Nature with their Deſign. But to ſet this Thought in its true Light, we may ſay, that *Frugality* has all the Activity by which *Avarice* deceives us, and can give all the true Pleaſure and Eaſe by which *Luxury* recommends itſelf; and it is not to be leſs eſteem'd than Prodigality, becauſe it does not dazzle us with a falſe Magnificence, as that does; no more than true Courage is to be leſs valu'd than Bragging, or Eloquence than bombaſt Floridneſs.

*Sect.* 3. God's Deſign to maintain the World by Frugality.

TO enable us to underſtand the better how much *Frugality* is founded upon the Principles of Religion and Reaſon, and how weak Enemies *Avarice* and *Luxury* are upon due Examination, it is fit to trace them from the very Creation. And thus we will find that God Almighty having created the World, to the End Men might live, admiring His Providence, and taſting His Goodneſs; it was juſt that all whom He brought to it, ſhould be ſupplied in it; and that Men being to Him as our Families are to us, it was unjuſt for any of the Family to hoard, or to eat up the Portion of many others; and incredible, that He would ſuffer any of them to want. In order to the better maintaining this His great Deſign, He did limit our natural Neceſſities within very narrow Bounds: We need little Meat, few Cloaths; and He made all our generous Inclinations point outwards towards the ſharing with our Neighbours, what ſhould be convenient for them. Liberality was given Man, that he might ſupply the Want of Meat and Drink in his Neighbours; Courage, that he might thereby ſupply their Want of Power; Compaſſion, that he might in their Miſeries afford them Conſolation; Juſtice, that they might defend one another againſt the Oppreſſion of thoſe who deſired too much, *&c.* His Divine Wiſdom has for the ſame End imprinted an Abhorrence upon our Minds againſt *Avarice*, *Niggardlineſs*, *Prodigality*, and *Luxury*, as Pyrates, and the common Enemies of this juſt and equal Diſtribution; and has enamoured us of *Frugality*, as its Protector and Bulwark. For this ſame End alſo God at firſt made all Things common, and they continued ſo, till Mankind multiplying upon the Earth, it was fit that Propriety ſhould by a Diviſion be introduced, to the End the Earth might be the better cultivated, and ſo made the more uſeful for many. But leſt the Proprietor ſhould think that by this Diviſion all others were to be excluded from any Share in it, the ſame Divine Providence made him need the Help of very many others, to the end they might be alſo provided for; and made him ſee, by the Uncertainty of Human Affairs, that this Propriety was ſo ill ſecured, that it was neceſſary for him to accuſtom himſelf to live upon that little to which he might probably be reduced; and that it was fit to ſupply others, becauſe he might need one Day to be ſupplied by others. And leſt ſome ſhould be unmindful of this Uncertainty, He made Glory, and even *Prodigality* and *Luxury* uſeful, to draw ſuperfluous Riches from thoſe who would not otherwiſe have parted with them, and He made it as a Duty upon Man to believe himſelf only a Steward.

To the End alſo that Man might be the more ſenſible, that this equal Diſtribution was His general Deſign in all the Creation, He let him ſee Inſtances of it every where, and even in Brutes, who are guided merely by Inſtinct, and have not that luminous and generous Guide of right Reaſon. The *Lion* and *Vulture*, the moſt ravenous of all Beaſts, have no Store-houſe; and tho' the Ants have, yet that proceeds from Inability to travel in Winter, and not from a Deſire to leave any Remnant beyond the Year: Thus God has given to the Beaſts of the Field that Moderation by Inſtinct, which Man, created to adore Him, is to beg from Him, in theſe Words, *Give us this Day our daily Bread.* So that *Frugality* is the true Mathematic of Chriſtian Morality, and there can be nothing more againſt Nature, than *Avarice* and *Luxury*.

*Sect.* 4. That Frugality was the Baſis of all Virtue and Government amongſt the *Jews*.

NOTHING can recommend this *Frugality* more, than that in the Common-wealth of the *Jews*, of which God Almighty was Contriver and Governour for many Years, *Frugality* ſeems to have been its chief Baſis; and to this End God multiplied them to a vaſt Multitude, and pent them up in very narrow Bounds; they us'd no Taylors, Cooks, nor Paſtry-men. *Abraham*, who had rather an Army than Family of Servants, makes his Wife bake Bread for his Gueſts, *Gen.* 18. 6. Each Family furniſhed itſelf all Sorts of Tradeſmen; and in place of Lordſhips, each contain'd himſelf within his Field, in which the Judges, and even the firſt Kings, laboured. *Gideon* was threſhing in his Barn, when the Angel call'd him to deliver the People, *Judg.* 6. 11. When *Saul* got the News of the Invaſion of *Jabeſh Gilead*, he (tho' a King) was leading two Oxen, 1 *Sam*. 11. 5. Thus their Servants did not encourage their Lazineſs, but aſſiſt their Induſtry. The Simplicity of their Diet appears from *Eſau*'s being tempted with a Diſh of Pottage, *Abraham*'s feaſting the very Angels, by bringing himſelf a Kid from the Flock, *Gen*. 18. 6. at one Time; and a Calf at another, with Bread bak'd under the Aſhes. *Boaz* treated his Miſtreſs *Ruth* (who was gleaning) by allowing her to dip her Bread with the Servants in the Vinegar; and tho' *Rebecca* feaſted *Iſaac* with well-ſeaſon'd Veniſon, yet that was only one Diſh, made for a Prince, on a great Deſign, and when his great Age required ſomewhat to recover rather a loſt Appetite, than pamper a ſtrong one. Their chief Pleaſures were, that Innocence which grew from *Frugality*, and that Health which is the natural Effect of a ſimple Diet. Their Aſſiduity in Labouring excluded Houſe-games, and well-labour'd Fields allow'd no Hunting, Hawking, or other Field Exerciſes. We read of no Feaſts among them, ſave thoſe that were rather Rewards of their Induſtry, than the Contrivances of their *Luxury*. Such as thoſe which they had at their Reaping, Vintage, *&c*. And the only Feaſt we read of, made by *David*'s Children, even after he was exalted to be King, was at their Sheep-ſhearing.

Sect. 5
Our Saviour made it a Standard and Bulwark in His Goſpel.

NOR did God, under the New Teſtament, leave off His great Deſign of inſtructing Men to live ſoberly; but on the contrary, *Luxury* and *Avarice* having grown up amongſt the *Jews*, as Tares amongſt the Wheat, after the Almighty Himſelf had left off to cultivate them by His own immediate Hand; He thought it again neceſſary to repreſs and root out theſe Weeds, and to ſow amongſt them new and freſh Seeds of Sobriety and Moderation. In order whereunto, He ſent His Son to be born in the Houſe of a frugal Artiſan, and to work with him at his Trade, until He thought fit Himſelf to come abroad to work out the Work of our Salvation. That Idleneſs might want a Pattern in our great Maſter, He choſe alſo for His Diſciples and Courtiers, Men as poor as a Trade could ſuffer them to be. He commanded them, and all others, to pray only for their daily Bread; excluding in the Word *Daily*, the covetous Wiſhes of thoſe, who lengthen their Deſires beyond thoſe plain Neceſſities that are inconſiſtent with *Luxury*. And ſo great a Deſire had He to ſecure Man againſt theſe two great Tyrants, that He not only by His Example and Doctrine diſcredits and forbids them, but He deſcends from being a Legiſlator, to reaſon with Mankind againſt them. And He reaſons upon no Subject more frequently, nor ſtrongly, than againſt avaricious Anxiety: *If you be* (ſaith our Saviour) *the Children of God, will He not care for His own Children, ſince you who are wicked care for your's?* God clothes the Lillies and Flowers of the Field, more glorious than *Solomon*, tho' they are to be cut down the next Day; and feeds the Fowls of the Air; adding, *Are you not better than they?* He ſhews in the Parable of the five Loaves and two Fiſhes, how eaſy it is for Him to provide for His own Family; His Omnipotency being a ſufficient Granary for thoſe that depend upon Him. By teaching us that we are Stewards, not Proprietars, He ſhews how miſerable thoſe are that lay up their Treaſures where the Moth can eat, or the Thief break thro' and ſteal. And by that terrible Sentence, *O! thou Fool, this Night thy Soul ſhall be taken from thee*; He has left a dreadful Impreſſion of the Uncertainty of thoſe Riches, which are too oft preferr'd to the Heaven that is loſt for them. Stop here, O my Soul, and read with Aſtoniſhment, that dreadful Sentence pronounc'd by the infallible Judge; and join to it another, wherein theſe who preferred their Riches to the diſtreſs'd Members of *Jeſus Chriſt*, are condemn'd to Torments which ſhall endure as long as they could have wiſh'd their Riches to have done: *When I was hungry, you did not feed me*, &c.

Matth. 6. 19, 20, 21.

Sect. 6.
This Doctrine was continued by the Apoſtles and Primitive Church.

THE bleſſed Apoſtles, ſufficiently illuminated by the Divine Power and Goodneſs for ſo great a Work as the Converſion of the World, continued to preach this excellent Doctrine, calling *Avarice* Idolatry, and in that one Word comprehending a greater Satyr againſt it, than all that ever the Philoſophers taught; but very conſequentially to the Doctrine of their great Maſter, who aſſured His Diſciples, that they could not both ſerve God and Mammon. In them alſo we find that judicious Leſſon, to uſe the World as if we uſed it not; not fooliſhly throwing away Riches, as the Philoſophers did, leſt they might be thereby tempted; nor hoarding them up as Miſers do; but ſuffering them to flow on gently, and in their natural Courſe, for the Good of others; and keeping a looſe Hand on them, leſt our Hearts being too much united to them, ſhould not be united by Love to God Almighty, who declares Himſelf irreconcilable with Mammon: And to make this great Doctrine go the more eaſily down, and give it a more pleaſant Reliſh, they aſſure us, that the chief Ornaments of reaſonable Creatures are, Mercifulneſs, Patience, Innocence, Charity; and not large Territories, ſwelling Treaſures, ſplendid Titles, fine Cloaths, nor thoſe other gaudy Trappings, which are no Part of us, and conſequently cannot be the Standard by which we are to be meaſured.

THE World having been debauch'd by the *Roman* Luxury, as that was fed by their Spoils, Mankind was, under *Nero*, *Heliogabalus*, and ſome other of the *Roman* Emperors, deprav'd beyond what we can believe. And even at that time, when all their Philoſophers could gain very few Proſelytes to Virtue, the Apoſtles and their Diſciples were able to make many Thouſands to Chriſtianity, and to refine them to a Degree of Moderation, Sobriety and Innocence, which theſe Philoſophers themſelves admir'd far more than others did them; and certainly thoſe numerous and entire Converſions, were infallible Proofs of the Verity of that Religion which they taught; and the Primitive Chriſtians were as great Miracles themſelves, as any that were wrought amongſt them. If we propoſe then thoſe admirable Patterns to ourſelves we ſhall find, that moſt of the Rich among them did work with their own Hands, to avoid thereby that Idleneſs which brings on Luxury, Curioſity, Backbiting, and many other Vices, which are inconſiſtent with the Chriſtian Religion; and all the Poor were commanded to work, that they might thereby have to pay their Debts, and do Works of Charity; they ſubdued their Bodies by Faſting, and their Spirits by Humility; nor would they have been Soldiers, but becauſe the Severity of Military Diſcipline among the *Romans* at that Time, did oblige them to the Sobriety and Activity, which overcame *Avarice* and *Luxury*, as well as their Enemies; they did ſeldom eat ſave once a-day, but then never fed upon what *Luxury* prepared, nor diverted themſelves with what it invented; they valued not Health itſelf, but that they might ſerve God with it; nor Riches, but becauſe they might be uſeful to the Poor.

*Caſſ. de Sp. Aced. c. 7. Conſtitut. Apoſt. l. 4. Tertul. Apol. c. 3. 7.*

NEVER any Man wiſh'd more earneſtly to be rich, than I to have liv'd in thoſe glorious Times, and to have ſeen thoſe great Triumphs over *Luxury* and *Avarice*. But we may correct the uſeleſs Wiſh, by the juſt Remedy of reading and meditating much upon what they have left for our Inſtruction in their excellent Writings, and above all, by living as they did; for without doubt, the moſt pleaſant, and moſt comfortable Proſpect of Virtue, would be to ſee it in our Actions; and the moſt joyful Image of Innocency, would be to ſee it graven upon our Hearts

*Sect. 7.* How the other Commonwealths were founded on Frugality, as *Lacedemon*, *Rome*, *Holland*.

THOSE Commonwealths, or Societies of Men, which grew up from Conſent, and were not the Product of popular Faction and Fury, did found themſelves upon Sobriety, as their true Baſis; that being the kindly Nurſe of Equality, and nothing contributing more to make the common Treaſure rich for the public Safety, than that private Citizens ſhould ſatisfy themſelves with what is neceſſary. They juſtly concluded, that as the Body natural muſt periſh, if the Blood does not circulate; ſo alſo the Riches of the Commonwealth become uſeleſs, or rather corrupted, when they ſtagnate by being hoarded in the buried Treaſury of private Men. They made alſo many Laws againſt *Luxury*, and the Severity of their Military Diſcipline and Cenſures exceeded yet thoſe Laws. *Cato* was more celebrated for his frugal Severity, than *Cæſar* or *Pompey* for their Conqueſts: The *Roman* Poets and Hiſtorians vie one another in their Expreſſions of Eſteem of him; and *Lucan* gives this Character both of *Frugality* and him:

*-----Hi mores, hæc duri immota Catonis*
*Secta fuit, ſervare modum, finemque tenere,*
*Naturamque ſequi, patriæque impendere vitam,*
*Nec ſibi, ſed toti genitum ſe credere mundo.*
*Huic epulæ viciſſe famem, magnique penates*
*Summoviſſe hiemem tecto, pretioſaque veſtis*
*Hirtam membra ſuper Romani more Quiritis*
*Induxiſſe togam, Veneriſque huic maximus uſus,*
*Progenies: Vrbi pater eſt; urbique maritus:*
*Juſtitiæ cultor, rigidi ſervator honeſti:*
*In commune bonus, nulloſque Catonis in actus*
*Subrepſit, patremque tulit ſibi nata voluptas.*

Which *May* has tranſlated thus:

*Theſe were his Manners, this ſowre* Cato's *Sect,*
*To keep a Mean, hold faſt the End, and make*
*Nature his Guide, die for his Country's Sake,*
*For all the World, not him, his Life was lent,*
*He thinks; his Feaſts but Hunger's Baniſhment;*
*His choiceſt Buildings were but Fence from Cold;*
*His beſt Attire rough Gowns, ſuch as of old*

*Wa*

*Was* Roman *Wear; and nothing but Deſire*
*Of Progeny in him warm'd* Venus *Fire.*
*Father and Husband both to* Rome *was he,*
*Servant to Juſtice and ſtrict Honeſty.*
*For th' public Good; in none of* Cato's *Acts*
*Creeps ſelf-born Pleaſure, or her Share exacts.*

But I read not of any Laws made againſt *Avarice*, ſince the Tenth Law in the Decalogue; of which the Reaſon may ſeem to be, that the great Irregularity of Covetouſneſs ariſes from the inordinate Love to Riches, which being a latent Act of the Mind, can be known to none ſave God; and therefore it can be puniſhable by no Laws, but thoſe which are made by Him who is the Searcher of Hearts; and the Contempt which follows *Avarice*, is in itſelf a ſufficient Temporal Puniſhment.

To underſtand the Progreſs of *Frugality*, and its oppoſite Vices, in the other unhallow'd Nations, we muſt recur to the more ancient Hiſtories of the World, where we'll find that Nature endeavour'd to pleaſe thoſe who were ſituated in deſert Countries, ſuch as the *Scythians*, with the Thoughts of their being ſecure by their *Frugality* againſt the Invaſions of thoſe who were tempted to Robberies by the Expectation of Spoil; and thus their Ambaſſadors diverted *Alexander* from the Hopes of conquering them, telling him, That he could gain nothing but Blows by invading them, who had no Pleaſure in any Thing but in defending their Native Country, and whoſe Courage had never been effeminated by *Luxury*, nor ſtain'd by Rapine. In other Nations, where Plenty was able to corrupt, their Lawgivers did moſt induſtriouſly turn all the Edge of their Laws againſt *Luxury*, making *Frugality* the Fundamental Law of their Government; as we ſee in *Lacedemon*, which *Rome* afterwards did imitate; and *Rome* has in this of late been imitated by *Holland*. But I find this Difference between the *Frugality* of *Lacedemon*, *Rome* and *Holland*, that the great Deſign of *Lycurgus* in *Lacedemon*, was to wean his ambitious and factious Countrymen from too ardent a Deſire of coming into the Government, that thereby they might enrich themſelves: And therefore he did allow no Salary to Stateſmen ſave Fame; and preferr'd none to be ſuch, but they who ſhew'd a Contempt of Riches. The *Romans* recommended *Frugality* and the Contempt of Riches, becauſe they found nothing was ſo neceſſary for a warlike Nation, as the Love of Glory; and nothing was ſo great a Rival, or rather an Enemy to Glory, as *Avarice*: They alſo conſider'd juſtly, that *Frugality* harden'd Men into a Temper of being Soldiers. The *Hollanders* practiſed at firſt *Frugality*, rather thro' Neceſſity than Choice; but finding thereafter, that it was probable they might enlarge their Territories by Commerce, as the *Romans* did by Conqueſt, they recommended *Frugality*, as that which could beſt enlarge their Trade; and thus they, by ſailing their Ships with fewer Men, and feeding theſe Men and their Manufacturers too, leſs ſumptuouſly than other Nations do, have been able to out-ſell them; their Merchants and Tradeſmen likewiſe living leſs prodigally than other Merchants, are able to lay out more of their Stock in Trade, and to ſell at eaſier Rates: Nor do ſo many of them break as elſewhere; and the breaking of one Merchant who hath liv'd ſumptuouſly, endangers Twenty. By this *Frugality* likewiſe they are able to contribute, and do contribute more freely to the paying of Taxes, than any other Nation; for Men part freely with that without which they may live. So that *Frugality* is amongſt them, not only a Nurſe to their Trade, but a Bulwark to their Country: Yet I cannot but blame them for making *Frugality*, not only the Chief of their Virtues, but a Sharer in their Religion; they having few Merchants or Tradeſmen, who do not ſell and work freely on the *Sunday*; and One of them excus'd it to me, by telling, That he was worſe than an Infidel who provides not for his Family; and from this Politic has ariſen poſſibly that great Faction in *Holland*, who oppoſe the Morality of the *Sabbath*.

As to the Management of public Employment, *Holland* and *Venice* have always thought it unjuſt to defraud thoſe who are able to ſerve the Public, of neceſſary Subſiſtance: For ſometimes the abler Stateſmen have not whereupon to live; but on the other Hand, the greateſt Men among them have very mean Salaries, which are neither able to feed their Luxury, nor raiſe their Avarice. They laugh at Monarchies, and ſay, They beſtow ſo large Salaries upon their Miniſters, that they are generally diverted from the public Affairs, by following thoſe Pleaſures with which vaſt Salaries do daily tempt them; and thus they uſe the Public, as thoſe Coachmen do, who otherwiſe ſkilful enough, yet if they have too much good Liquor, they overturn their Maſters in the plaineſt Ways.

*MAHOMET* deſign'd to found a new Empire as well as Religion, and made his Religion ſubſervient to his Empire, teaching his *Muſſelmen* or Believers, that they ſhould be ſav'd accordingly as they ſhew'd Zeal for enlarging his Kingdom; and by an entire and blind Obedience to the Emperor's Command, they might ſave their Souls in ſending their Heads. In Recompence of which ſevere Obedience, he allow'd them Plurality of Wives here, and promis'd them new Scenes of carnal Pleaſures for ever hereafter: So that he ſeem'd (contrary to all other Inſtitutions) to found his upon *Luxury*; but yet no Society is oblig'd to ſtudy the Contempt of Riches ſo much as they: For the End that their Treaſury might only be rich, *Mahomet* oblig'd them to believe that all belong'd to the Emperor, and that no private Men had Property; perſuading them, that when the Treaſury was rich, all private Men were ſecure; and that by extending the Limits of the Empire, every Man who was vigorous and active in the Conqueſt, had the Opportunity thereby of making himſelf great and rich. Which hath made me very oft admire how human Nature could allow Men to believe a Point that was ſo ſtretch'd; but *Mahomet* ow'd his Succeſs in this more to the Brutality of his Followers, than to the Solidity of his own Reaſon. And if we conſider more narrowly his Principles, we will find that he did not chiefly deſign to gratify their *Luxury*, but to teach what was uſeful to his own Intereſt: For he allow'd them Plurality of Wives only to compenſate, and make them inſenſible by this impious Liberty, of the great Prejudice he had done them in robbing from them their Liberty, and Property; but he diſcharg'd them the Uſe of their delicious Wines, becauſe it might diſable them at any Time from going about their public Employments. It appears at firſt difficult to reconcile their being ſo avaricious with the Want of Property; for Reaſon teaches us to value little that of which we cannot be ſecure: But we muſt conſider, that no Vice looks further than the preſent Time; thus *Avarice* is every where unſecure of its Prey, as well as among the *Turks*; and this Inſtance of the *Turks* is enough to prove, how far *Avarice* makes us toil beyond what we ought to do; however it wants not its own Colours there; for it perſuades them, that 'tis good once to be in poſſeſſion of Riches; that none can take them away ſave the Emperor; and that he can have no Temptation to take them from any, ſave ſuch as are factious, and Traitors.

TO return to my former Deſign, I continue to obſerve, That Men having no Defence againſt theſe Vices, ſave the Uſe of their Reaſon, as ſoon as this Reaſon was bribed by *Avarice*, or made drunk by *Luxury*, it ranged itſelf on the Side of thoſe Vices, and then frail Man was ſoon overcome by his own Auxiliaries; which a more refined Sort of Men call'd the Philoſophers perceiving, they run to the Aſſiſtance of Reaſon, and they gain'd indeed many Proſelytes, tho' they could not gain entire Countries. And after others had made a great Progreſs in *Greece*, *Pythagoras* made one in *Italy*; and his Recommendation and Eſteem of Frugality retains yet great Vigor amongſt the *Brachmans* in *India*, as *Confucius*'s has done amongſt the *Chineſe* for many Ages. And the ſame Doctrine was tranſmitted by them to the *Druids*, the joint Prieſts and Philoſophers of our Northern Regions; who made Silence and Frugality the Nurſes and Supports of all Virtue. *Lycurgus* diſcharg'd the Uſe of all Gold and Money, and made his Iron Coin ſo unpleaſant and unportable, that (as he thought) no Man would be covetous of it. He ordered all Men to eat in common and publicly, that none might live more deliciouſly than others. The *Roman* ſumptuary Laws ſet Limits to Extravagancy, and their ſevere Cenſors were eſteem'd in their Magiſtracy according as they puniſh'd the Tranſgreſſors of theſe Laws. Some of the Philoſophers threw away their Riches leſt they ſhould be tempted by them; and others of them did in their Cynic Way not only bark againſt Riches, but vainly glory in ſordid and naſty Poverty. By which Laws and Philoſophy, the leſs attentive Part of Mankind may think themſelves better guarded againſt theſe Vices, than by the Precepts of either the Old or New Teſtament: But theſe Lawgivers, not knowing the Heart of Man ſo well as He who made it, fram'd Laws that were inconſiſtent with true natural Reaſon, or at leaſt ſubdued Nature only for a Time, but could not reform it. They gain'd few Proſelytes but either by the Novelty of their Doctrine, or by a Love to Singularity, or from a hid Deſign of making the People believe, That if they were brought into the Government, they would not rob and ſqueeze the Riches of their Subjects.

Sect. 8 The Ancient Heroes and Philoſophers were admir'd for this Virtue.

THE Heroes who condemned *Avarice* and laugh'd at *Luxury*, never failed of being univerſally admired, and having their Memories celebrated, (the great and peculiar Reward of Virtue.) We find that *Epimanondas* the *Theban*, by being buried at the public Expence, (after he had been Maſter of all the Subſtance of the Commonwealth, and not having wherewith to bury himſelf) was more eſteemed, than thoſe who had all the Riches in the City. Nor does the *Roman* Hiſtory remember with ſo much Applauſe the Triumph of any of their Generals, as it does the Generoſity of *Fabricius*, who when he was tempted by *Pyrrhus* King of *Epirus* to betray his native Country, overbalanc'd that King's Gold by his own more ſolid Virtue. I ſhall not contend much for the Sincerity of the Heathen Philoſophers; but ſure I am, that their profeſſing Enmity to Riches and Prodigality, does fully evince that the moſt ambitious Mind can find nothing worthier of its Imitation; nor could Nature teach the Vulgar any Thing that they could more eaſily believe, than that he deſerv'd moſt to be admir'd, who valued himſelf leaſt upon his Riches. We have many Sects of theſe Philoſophers, who put Virtue under the Tuition of Sobriety; ſuch as the *Pythagoreans*, *Stoics*, and even

*Epicurus* himſelf taught, That he who could live upon Bread and Water, was equal to *Jupiter*; and he expreſs'd ſo much Joy in his Sobriety, that it burſt forth into Raptures. They do all in their Diſcourſes againſt *Avarice* and *Luxury* overflow, as *Rivers* do, when they are ſwell'd with too great Abundance: And in thoſe *Paſſions*, expreſſed themſelves with a natural Force and Zeal, which was thought inimitable by Hypocriſy: And their refuſing the Employments and Riches which they cried out againſt, was concluded to be a very probable Argument of their Sincerity. They admir'd the wiſe Gallantry of one of the *Athenian* Philoſophers, who when he was reproached as railing only at Riches, becauſe he could not command them; left his Philoſophy for ſome Time, and turning Merchant, enhanſed the whole Trade of the City: But then divided what he gained moſt generouſly betwixt the Commonwealth and the Poor; deſigning to gain nothing by his Trade, but the Belief that he was in earneſt a Philoſopher. Nor can I forget *Phocion*'s generous Anſwer to the Ambaſſadors of *Alexander*, who having brought him a great Sum of Money, he aſk'd, Why *Alexander* ſent him that vaſt Sum of Money? And when they had anſwer'd, That he had ſent it to ſhew his Eſteem of his great Virtue; he replied, That he hoped *Alexander* would ſuffer him to enjoy that Virtue for which he eſteemed him, and which he had never gain'd by *Riches*. And tho' the Philoſophers were very exceſſive in their Contempt of Riches, and contradicted thereby Nature as well as the Multitude; (which made them in the End as ridiculous, as the Vices truly were which they contemned) yet certainly God did think fit to ſend theſe Philoſophers into the World a little before His *Son*, to convince Men, that the Vices which He was to curb by His Goſpel, were abhorr'd by thoſe whom they honour'd with the Names of Wiſe Men, and Lovers of the Truth.

# COVETOUSNESS.

## DISCOURSE II.

*Sect.* 1. **The firſt Riſe of Covetouſneſs, and how Men were tempted to it by the Conveniency of Property.**

WHEN Nature began firſt to yield to Vice, and to be miſled by blind Appetites, it yielded to Ambition in the *Angels*, to Vanity in *Eve*, and to Revenge in *Cain*: But it did coſt Vice many Ages before it could prevail ſo far as to perſuade Men to toil and ſweat beyond Neceſſity, or to believe that to be neceſſary which was ſuperfluous; ſo far were theſe contrary to Nature: Nor had it ever been able to corrupt reaſonable Men without diſguiſing its Deſigns; and therefore it firſt repreſented to them that Men growing numerous and unjuſt, it was fit to divide that Land which they inhabited; pretending that the Earth which God had given them would be daily beautify'd by thoſe to whom each Portion ſhould fall, and every Man remaining content with his own Share ſhould want all Pretext of oppreſſing his Neighbour. This Property became afterwards ſo charming, and Men were ſo pleas'd with what they had, that by a fatal Miſtake they concluded the more they had, they would be the more pleaſed; and ſo that which was deſigned to bound our Appetites, did enlarge them.

THUS *Avarice* was the firſt of the Two Extremes which attacked *Frugality*; and as the Number of Men increaſed upon the Face of the Earth, it increaſed with them; for its Pretences grew thereby much ſtronger, becauſe it was ſo much the abler to perſuade Men that by how much the Multitude of Sharers grew, the Shares muſt leſſen by the ſame Meaſure: And that they would not be able to ſupply their Neceſſities without making laborious Proviſions for them. And when Men grew very numerous, *Avarice* thought it Time to ſuggeſt to them, that if they multiplied by the Proportions formerly obſerved, the Earth which was already ſcarce able to ſupply them, would ſhortly become abſolutely inſufficient. Tho' *Avarice* had thus got ſome Footing in the World, yet becauſe Commerce was then only entertained by Exchange, it could make no conſiderable Progreſs, till Men for their own Deſtruction had digged up Gold and Silver, thoſe Metals which have deſtroyed more than Iron or Steel; and then it getting ſomething that was durable, and might be hoarded up, toil'd to Exceſs: But even that Money it laid up, being thereby barren, was ſo much the leſs deſirable; therefore it ſuggeſted to Men the taking Bonds and Obligations, with eating Uſury. And thus *Avarice* grew up to its full Perfection.

Sect. 2. The Diſguiſe under which *Avarice* inſinuates itſelf, ſuch as its Promiſes to gratify Men's Paſſions, and ſupply their Neceſſities.

*AVARICE* in the next Place borrowed new Forces from the Experience of Mankind; for as Time ran on, 'twas eaſy to obſerve that Favour and Security were to be bought by Money; and from this it ſuggeſted that it was *inculpata Tutela*, and one of the wiſeſt Duties of Self-defence to hoard up Riches, as the Means whereby Men could ranſom themſelves from all Dangers. It borrowed alſo Aſſiſtance from all the Paſſions, and when it found any Man too ſtrong for it by his innate Reaſon, it transformed itſelf into the Likeneſs of his Favourite Inclinations, and did like the Ivy with the Oak creep up to a Height to which it could not naturally have riſen. And thus when it found a Man incline to Ambition, it endeavour'd to perſuade him, that without Money all his generous Thoughts would turn Crimes; that it only could raiſe him Soldiers, becauſe Men muſt venture their Lives for that without which they cannot ſupport them: That this would hire them new Counſellors by making his Intereſt their's, and that the making of Peace and War was more its Prerogative, than of *Kings* and *Princes*; who tho' they vainly founded their Power upon their Right of Blood and the Juſtice of their Laws, yet they ow'd it only to their Treaſures; nor had the Faces of Emperors ſo much Influence any where as upon their Coins. And thus *Avarice*, like the Smoke which it truly reſembles, raiſed itſelf amidſt the towring Flames of Ambition.

WE ſee Riches prove the moſt ſucceſsful of all Gallantries: For let whinning Lovers talk what they pleaſe of their Chains, the ſtrongeſt ones are made of Gold; and *Jupiter* himſelf could not otherwiſe win *Danae*, than by deſcending on her in a golden Shower. What cannot be expected from the Force of *Gold*, when it not only becomes the beſt of all the Paints and Beauty-Patches that Ladies can uſe, but is miraculouſly able in our Matches to make the Croooked ſtreight, and the Blind ſee? In vain is Blood pretended to, except this make it circulate; and Men's Parts are look'd on as airy Notions when a Competitor appears, who hath ſuch ſolid Advantages as Lands and Riches. I have with Contempt and Diſdain conſider'd the Omnipotency of *Mammon*, in commanding the moſt beautiful and haughty *Ladies* to humble themſelves to the *Sons* of thoſe who had got their Eſtates by Infamy, and had themſelves Souls that were unworthy of any other Bodies, than thoſe deformed ones, which every one abhorr'd, but the bought Bride, and her bribed Relations.

IF any Man deſign to purſue his Revenge, *Money* will furniſh him a Murderer; or if he reſolve to improve himſelf in Arts and Sciences, he muſt owe his Education, Travels, Books, and Inſtruments to his Riches; and poſſibly he may buy a Poem, Play, or other Book which may afterwards make the Stock of his Reputation. He who wants Children muſt adopt Riches in their Place, and after he has comforted himſelf againſt the Miſeries of old Age, by being courted by all who either expect Succeſſion, or Legacies, he at laſt thinks he can perpetuate more his Name by leaving a great Eſtate, than by leaving a Son, tho' recommended by the beſt Parts and Education; having obſerved in the long Courſe of his Life, that a great Eſtate is more eſteem'd than generous Qualities. I have known *Avarice* inſinuate itſelf with ſome, as 'twere only a pleaſant Effect of the Love of Proportion and Harmony; and thus he who wants only two or three Hundred Pounds of Ten Thouſand a Year, or he who has a whole Barony, except ſome few Acres belonging to a poor Neighbour, can be as little at Eaſe till he get theſe, as he whoſe fine Lodging wants ſome Rooms to complete its Symmetry: Which falſe Colour did tempt King *Ahab* to covet that Vineyard which he got to the Deſtruction of his *Queen* and *Kingdom*. It inſinuates itſelf on Gameſters as an innocent Love of Divertiſement, and perſuades them that their Anger for loſing proceeds not from an Eſteem of the Money they have loſt, but from the Shame of being overcome. It perſuades the Lazy, that if they come once to an Eſtate they need not be afraid of loſing any Thing by their Slothfulneſs. And thus it promiſes to be a Hedge to that ſoft and nice Humour. It perſuades thoſe who are in Debt, that any Thing is lawful which may pay it. I was pleas'd once to hear a Lady ſay, that ſhe abhorr'd Privateering ſo much, as a Kind of public Robbery, that ſhe would no way ſuffer the Money ariſing from the Prizes in which ſhe had Intereſt, to enter into her Pack; that is to ſay, ſhe would buy no Land with it for her Heir, but deſign'd with it only to clear her Debts. A nice Way indeed of reconciling Covetouſneſs with Honour, Law and Conſcience. Yet I could not but regret to hear another Lady whom I eſteem'd much more, ſay, Oh, that my Debts were paid; to the End I might have the great Pleaſure of doing Works of Charity: To which my Anſwer was, Madam, Sell a little of the Land you lately bought, and pay thoſe Debts, and yet ye ſhall have remaining Thrice as much Land as ever you expected.

Sect. 3. It gets Aſſiſtance from Men's different Temperaments.

*AVARICE* borrows ſometimes a Mask from a Man's Temperament; it perſuades eaſily the Melancholy, that he may ſtarve, and that in laying up Riches he only provides for Nature; without which he is as much a Self-murderer as if he ſhould cut his own Throat; *Nam qui alimenta negat, necat.* And for the ſame Reaſon we ſee the older Men grow, they grow the more covetous, becauſe the more melancholy; for not being able to gain as they did when they were young, they think they ſhould ſupply this by Niggardlineſs and Avarice, and reſolve to gain Eſteem by it, ſince they can by no way elſe. Upon which Conſiderations the *Eloquent Apoſtle, Heb.* 12. 1. deſigns *Avarice* by theſe Words, *And the Sin which doth ſo eaſily beſet us*; for the *Greek* Words, εὐπερίςατος ἁμαρτία may be better tranſlated, the well circumſtantiated *Sin*, or the Sin which hath the fair Pretences; and in this *Avarice* is the moſt dangerous of all Sins, that others occaſion Remorſe by their Heinouſneſs, but *Avarice* precludes it; for few or none are ever convinced that it is a Sin, and ſo cannot repent for it.

THOUGH theſe be the Diſguiſes under which it oft-times recommends itſelf to us, as the Product of Reaſon; yet it is too well known, that *Avarice* is ſometimes ſo abſurd, that it ſeems to have more of a Diſeaſe than a Vice in it; and to be rather a total Want of Reaſon than a Corruption of it. But alas! it is ſuch a Diſeaſe as comes not by Fits, as other Vices do; for the Drunkard may be quenched, and the Leacher is ſoon drain'd, but the Miſer and covetous Man is always tortured. And in this it differs from other Diſeaſes, that thoſe who are ſick of it, deſire never to be cured; and therefore it reſembles more a Madneſs, which makes Men admire and value themſelves, even in that wherein all Men elſe ſee they are diſtracted. For there are Men truly mad, who talk reaſonably enough on all Subjects, ſave on that one, in which they are diſtempered; not unlike an excellent Lute, having all its Strings well tun'd, ſave one, but the leaſt Defect is ſufficient to diſconcert all the Harmony. Nor does *Bedlam* itſelf lodge greater Varieties of Madmen, than *Avarice* produces; for ſome will be ſo mad as to ſtarve themſelves, and the very Heir to whom they are to leave their plentiful Eſtate. And ſome have paſt by their ſtarving Relations, to leave it to one who had no recommending Qualities, ſave that he would ſucceed him in his Humour, as well as his Eſtate, and keep together the beloved Treaſure: And ſome who would not leave Six-pence to the Poor, have left their whole Eſtate to Perſons who have bribed them out of it, by inconſiderable Preſents (for Bribing is the only Flattery that can prevail on the Avaritious;) and though they would not give a Shilling for an eloquent Panegyric, have yet left it all to ſuch inſipid Flatterers, and have ſuffered their Eſtates to be taken away by Proceſſes, or expoſed to public Enemies, rather than ſecure them by a timely and prudent Expence againſt either. I have alſo admired to find, that Men who are ſure of no Property, as in *Turkey*, and it may be nearer, ſhould of all Men be moſt avaritious, though it is probable that they toil for their Tyrants, rather than Heirs, and yet the counterfeit Happineſs of Griping, is irreſiſtible. So that *Avarice* ſeems only to ſport itſelf with its Votaries, and to uſe them as the Devil does Witches.

Sect. 4. It is propagated by Imitation and Example.

*AVARICE* having thus corrupted the Reaſon of Mankind, this Corruption propagates itſelf by Imitation and Example; for as *Avarice* ariſes often from a diſtempered Judgment, like to the Hemlock ſpringing out of Mud; ſo it is ſometimes copied by Imitation, as a Picture is drawn by a Face. And I muſt here obſerve, that Parents have a moſt ſpecial Obligation to be virtuous beyond others; for Children whilſt young, do eaſily, like ſoft Wax, receive Impreſſions from their Example, becauſe of the Reſpect they have to them, and their being conſtantly in their Company. So that Parents ſhare in their Children's Crimes without leſſening the Children's Guilt, by bearing this Share. The being likewiſe meanly bred, does oft-times by a fixed Habit draw over ſome Men's Inclinations to this Byaſs; and though they reſcue themſelves from Poverty, they are not able to recover from that vicious Habit.

Sect. 5. It is aſſiſted by the reſpective Countries where Men live.

THERE are likewiſe ſome Countries, in which, by general Cuſtom, Vice ſeems to be authorized; as Drunkenneſs in *Germany*, Revenge and Jealouſy in *Italy*; the Induſtry of *Holland* inclines Men ſomewhat to *Avarice*; the Pride of *Scotland* to Prodigality; and the Plenty of *England* to Luxury: In which Caſes, Reaſon is rather prevented, than corrupted or perſuaded. Nor durſt either Prodigality or Avarice undertake to corrupt Nature and Reaſon ſo highly, if they had not the Aſſiſtance of general Example, to which Men, by a falſe Modeſty, think they are in Reaſon obliged to ſubmit: And oft-times a general Cuſtom paſſes for Nature, in ſuch as underſtand not, or have no Mind to underſtand the Difference, and to examine wherein the Copy differs from the Original. I confeſs, that rich and trading

Nations, ſuch as *England*, may be allow'd greater Scope to Sumptuouſneſs; as Men who have great Revenues, without the leaſt Imputation of Luxury, do live proportionably to what they poſſeſs, without being cenſur'd by any reaſonable Man for ſo doing.

Sect. 6. Its laſt Eſſay was to tempt Churchmen; and how.

THE *Church* hath alſo concurred to its Aſſiſtance; and Avarice having gained even ſome Churchmen to be its Chaplains, (who love Eaſe, and concluding Riches neceſſary for procuring it) that they might more eaſily convey them into their own Channel, have endeavoured to make Riches as neceſſary for other Men's Salvation, as they thought they were for their own Eaſe. And tho' we poor Mortals think them only Snares, yet they have of late become the beſt Antidote againſt Sin; and a Man may as well by them purchaſe a Place in Heaven as in Earth, and as eaſily free himſelf from Purgatory as Poverty: Or, if any Man deſigns to ruin the State, by raiſing Factions and Rebellions, Money alone can furniſh him, from the Altar, with the beſt Trumpeter of Sedition. It is no wonder we Laics accuſe Churchmen of *Avarice*, ſince they tax one another with this Vice. Thoſe who ſeparated from the Church of *Rome*, objected that *Avarice* had kindled the Fire of Purgatory, invented Maſſes to ſave Men by Money from its Flames, had wrought falſe Miracles, &c. Thoſe who ſeparated from the Epiſcopal Churches, pretended that Biſhops had arrogated that Superiority, to make thereby great Benefices neceſſary. Thoſe who ſubdivided from *Presbytery*, cried out againſt Soul-ſelling Stipends; and all thoſe Churches may probably conjecture, that thoſe Diſſenters cry down Stipends, out of a Deſign to excuſe themſelves from the Payment of them. Nor is Covetouſneſs able to debauch private Churchmen, and ſet particular Sects at Variance with one another; but 'tis ſubtile enough in ſome collective and reformed Meetings of the Clergy, to influence the Deciſion of general Caſes of Conſcience, tho' (I confeſs) with a Delicacy peculiar to itſelf. It will ſuggeſt, that the Clergy are to be reſcu'd from Contempt, and ought to have wherewith to maintain, not only themſelves, but Hoſpitality, and Foundations of Charity. From which humbler Thoughts, Cardinal *Palavicino* in his Hiſtory of the Council of *Trent*, riſes by an inſolent Flight, to defend all the Magnificence of the Church of *Rome*, under Pretence that Mankind is govern'd by Senſe, as well as by Reaſon; and therefore they muſt ſee in the Church, and its Miniſters, what may draw Reſpect from the outward, as well as from the inward Man. It paſſes for pure Devotion in that Church, to hook into its Patrimony all they can, (tho' by as palpably forg'd Donations as *Conſtantine*'s was;) and it would be judg'd Sacrilege, to quit what is once acquired. Nor ſhall you find in all your Travels any more covetous, and thereby greater Oppreſſors, than ſome, who having left the World to retire to Religious Houſes, are made by them their Procurators. But tho' theſe Conſiderations may ſufficiently juſtify the liberal, but ſuitable Proviſions, which have been beſtow'd on the Church of *England*, for promoting Charity and Learning; yet they can never, with *Palavicino*, vindicate the exceſſive Sums brought in by thoſe Indulgences to the Treaſures of the *Romiſh* Church, which occaſion'd the dreadful Wars of *Germany*: And they extremely condemn thoſe Impropriators, who have made not only the Preachers, but the Goſpel itſelf contemptible, by denying a Competency to them who ſerve at the Altar.

AT which Inconſiſtency of Deſigns, occaſion'd by the natural Force of Covetouſneſs (which can be diſguiſed, but never mortified) I have frequently been aſtoniſhed. In ſecular Meetings alſo, it can perſuade not only the Hearers, but the Speakers themſelves, to go along with whatever it dictates: And it will inſinuate itſelf at laſt ſo far, that a Man will really believe himſelf Public-ſpirited, when at the Bottom his chief Inclinations ariſe from private Intereſt, which we now, by a kind and gentle Word call *Convenience*; which is, in Effect, a Combination of Luxury and Avarice, each whereof finding themſelves too weak apart to encounter the Strength of Reaſon, have moſt remarkably in this Age join'd their Forces together, and aſſum'd the inſinuating common Name of *Convenience*. *O, Happy Orator!* Teach me thy Art of Perſuaſion, and beſtow thy Bags upon thoſe who delight to trudge under them; but if I could perſuade as thou canſt, I would endeavour to reſcue Mankind from thy Tyranny; for if thou, bewitching Convenience, be made the Standard, farewel for ever to the Glory of Martyrdom, to the Loyalty of Subjects, to the Dutifulneſs of Children, and to the Ties of Friendſhip.

HAVING thus ſeen *Avarice* condemned by Nature, by the great Author of it, by all the great and wiſe Societies of Mankind, and by that ſame general Agreement of Men, which hath taught us that our Souls are immortal.

HAVING ſeen the Original and Progreſs of *Frugality* and *Avarice*, and the ſeveral Maſks under which *Avarice* has cheated us: It will be fit to proceed to conſider the Remedies and Arguments whereby we may ſecure ourſelves againſt its Influence.

*Sect.* 7. Arguments and Remedies againſt *Avarice.*

THE true Way to wean us from *Avarice*, is firſt to find out, what does in our Breaſt incline us to it. And if it be that we may be eſteem'd, we ſhall eaſily find this but a Cheat, becauſe none but the Avaritious themſelves eſteem other Men for being rich; and we may be as well in love with Cheating, becauſe thoſe who value that Craft and Subtilty are pleaſed with ſuch as are Maſters in it: But if we can once perſuade ourſelves that Riches are not to be admired, and are rather given to Men for Eaſe than for Eſteem, we ſhall be clearly convinced, that this is but a faint Colour to excuſe it: And when Men in Trade or Employments die very rich, the Generality of Mankind concludes, That they have taken a Latitude of gaining by any Means, or are guilty of the Folly of having defrauded themſelves of Neceſſaries, to lay up ſo much as might corrupt their Heirs by Luxury. It has been frequently obſerved, that the Children of avaritious Men, have proved more luxurious or prodigal, than others; which proceeds either from their abhorring of Avarice, becauſe they found themſelves when they were young oppreſſed by it; or becauſe finding their Parents much reproached with it, they thought themſelves obliged in Honour to ſhun that Vice which occaſioned this Reproach: Or elſe having conceived an Opinion when they were young, that their Parents were very rich, as all avaritious Men are thought to be, they concluded they might allow themſelves to ſpend the more freely. But upon the whole Matter, I muſt conclude that *Indian* wiſe who laugh'd at the *Europeans*, who toil exceſſively to make their Children exceſſive lazy.

I doubt not but ſome Men have been deſirous to gain Money by their Employment, becauſe the Want of Practice is look'd upon as Want of Parts: But I have obſerved few who deſerving to be eſteem'd for Parts, have miſſed it from the wiſer Sort, becauſe they wanted Practice: And thoſe, and not the Multitude, are the true Judges. Nor is that Wit or Learning which gains Money the true Meaſure of Eſteem; being rather the mechanic Part of true Senſe, given by Nature to us for maintaining our Bodies, than the ſublime Part beſtowed by Heaven for adorning our Souls. We have few Monuments at this Day of the rich Lawyers among the *Romans*, that gained great Eſtates, but we retain ſtill great Eſteem for thoſe who contemned them. And have we not ſeen ſome rich Men among ourſelves, who having gained even to Envy, died more neglected and ſcorned, than they whom Poverty had ſtarved, and who now are remembred for nothing but as Inſtances of Folly and Madneſs? That can never paſs for Wit, nor deſerve Eſteem among reaſonable Men, which naturally tends ſo far to debaſe our Reaſon: Nor did the Illuſtrious *Turenne* (to inſtance likewiſe the Brave) want that Eſteem which the greateſt Miſers in the World would have coveted, though he never valued that Money which they admire, having died without being Maſter of Fifty Pound, tho' he could have been Maſter of far more than thoſe Miſers durſt have wiſhed. Fame is the Heritage of the Virtuous, and Eſteem is a Rent that all Men muſt pay them. Such as think that by Riches they can ſecure themſelves againſt Danger, have certainly forgot how many Avarice has made a Prey; nor did ever any ravenous Creature chuſe to devour the lean. Men look on the avaritious as Pirates, againſt whom Intereſt arms all Mankind; and though Drunkards love Drunkards, yet the Avaritious hate all who are ſo, as Men do thoſe Rivals who are preferr'd by their Miſtreſs. Money may indeed ſupply the Want of Innocence, when Men are accuſed: But few Tyrants or Robbers are content with a Part when they may have the Whole: And when *Darius* offered to *Alexander*, all on this Side of *Euphrates*, *Alexander* laughed at it, and deſired him to offer ſomething to him which he could not take. Tyrants alſo and Stateſmen are invited to rob avaritious Wretches, becauſe they can commit this Crime with the Applauſe of the far greater Part of Mankind, who are glad to ſee thoſe robbed, who robb'd them; or who at leaſt hindred Riches to circulate for the Supply of the Poor and Needy. But the Knaves whom Money defends, are thoſe only whom the Love of it has made Knaves; and it were better not to be tempted to the Crimes that Avarice occaſions, than to be defended by the Treaſure which it lays up; ſince it may, and oft-times does fail to defend, and at beſt but ſecure ſome few againſt the many Evils which it occaſions.

THE beſt Plea that *Avarice* can make, is, That it provides againſt thoſe Neceſſities which otherwiſe would have made us miſerable; but the Love of Money deſerves not the Name of Avarice, whilſt it proceeds no farther: And it is then only to be abhorr'd, when it cheats and abuſes us, by making us believe that our Neceſſities are greater than they are; in which it treats us as Fools, and makes us Slaves: But it is indeed moſt ridiculous in this, that oft-times after it has perſuaded Men that a great Eſtate is neceſſary, it does not allow them to make Uſe of any ſuitable Proportion of what they have gained; and ſince nothing can be called Neceſſary but what we need to uſe, all that is laid up cannot be ſaid to be laid up for Neceſſity. And ſo this Argument may have ſome Weight when it is preſs'd by Luxury; but it is ridiculous when it is alledg'd by Avarice.

I have therefore oft-times admired, how a Perſon that thought it Luxury to ſpend Two Hundred Pound, toil'd as a Slave to get Four Hundred a Year for his Heir: Either he thought an honeſt and virtuous Man ſhould not exceed Two Hundred Pound in his Expence, or not; if he thought he ſhould not, Why did he bribe his Heir to be luxurious, by leaving him more? If he thought his Heir could not live upon ſo little, Why ſhould he who gain'd it, defraud himſelf of the true Uſe?

*Sect.* 7. Arguments and Remedies againſt Avarice.

I know ſome who preſerve themſelves againſt *Avarice*, by arguing often with their own Heart, that they have twice as much as they expected; and more than others who they think live very contentedly; and who did bound their Deſigns in the Beginning with moderate Hopes, and refuſe obſtinately to enlarge, leſt they ſhould thus launch out into an Ocean that has no Shore.

To meditate much upon the Folly of others who are remarkable for this Vice, will help ſomewhat to limit it; and to rally him who is ridiculous for it, may influence him and others to contemn it. I muſt here beg rich and avaritious Men's Leave, to laugh as much at their Folly, as I could do at a Shepherd who would weep and grieve, becauſe his Maſter would give him no more Beaſts to herd: Or at a Steward, becauſe his Lord gave him no more Servants to feed. Nor can I think a Man, who having gain'd a great Eſtate, is afraid to live comfortably upon it, leſs ridiculous than I would do him, who having built a convenient, or it may be a ſtately Houſe, ſhould chuſe to walk in the Rain, or expoſe himſelf to Storms, leſt he ſhould defile and prophane the Floor of his almoſt idolized Rooms. They who think that they are obliged to live as well as others of the ſame Rank, do not conſider that every Man is only obliged to live according to his preſent Eſtate. And therefore this Neceſſity will alſo grow with our Eſtates; and this Temptation rather makes our Neceſſities endleſs, than provides againſt them. And he, who having a paternal Eſtate of an Hundred Pound a Year, will not be ſatisfied to live according to it, will meet with the ſame Difficulty when he comes to an Eſtate of Ten Thouſand Pound; and like the wounded Deer, he flies not from the Dart, but carries it along with him. We are but Stewards, and the Steward ſhould not be angry that he has not more to manage; but ſhould be careful to beſtow what he has; and if he do ſo, neither his Maſter nor the World can blame him.

*Sect.* 8. The Cruelty of Covetouſneſs.

THE next Cure againſt Avarice, is, To conſider what abominable and dreadful Effects it produceth in the World; how, like the evil Spirit that poſſeſſed the poor Wretch ſpoken of in the Goſpel, it drags him up and down through Deſerts and Mountains, throwing him ſometimes into the Fire, and ſometimes into the Water. No Climate ſo hot, nor cold, no Sea ſo boiſterous, nor Shore ſo rocky, but the avaritious Man muſt venture upon it. And after he has gained ſomething at the Price of ſo much Toil and Slavery, it barbarouſly ſtarves, and tyrannouſly denies him the Uſe of his own. As if God deſigned to puniſh thoſe Sinners ſo, that He will let all the World ſee them want the Uſe of that for which they have damn'd themſelves. There can be nothing more inhumane than Avarice, when it perſuades Men to enter into Plots and Factions, that they may augment their Eſtates; and yet will not allow them to beſtow ſuch a Portion of theſe upon their Deſigns, as may ſecure themſelves by making the Villany ſucceſsful: And we have ſeen of late, Men of vaſt Fortunes, forfeit them, and their Lives too, rather than contribute what was inconſiderable, but abſolutely neceſſary for the Succeſs of their Enterprize. Many alſo are perſuaded, as it were to bury themſelves alive in Mines, and Coal-pits; or to Sacrifice many of their Years, by living in ſuch Places as *Scanderoon*, exchanging Life itſelf, which is moſt deſirable, for Money, that tyrannous Idol. Envy, that cruel Torturer of the Soul, deſerves a Place amongſt the Executioners which attend Avarice: For moſt Men's Avarice proceeding from comparing themſelves with others; this muſt neceſſarily beget Envy; and Envy forces Men to toil till they be as rich as thoſe they envy. I confeſs, that Ambition raiſes alſo Envy; but in the Ambitious, it refines itſelf into a noble Emulation, and forces thoſe who are poſſeſt with it, to do what may exalt them to an equal Height with others: And this requires Liberality, Clemency, *&c.* But the Envy of the Avaritious, depreſſes the Spirit to that Earth, with which he is, by a Love to it, united; and makes him ſtarve the Poor, bribe, cheat, and oppreſs; that he may be as rich as thoſe who occaſioned this Paſſion. The Envy that ariſes from Ambition, cannot always keep a Man on the Rack; for the Occaſion fails, tho' the Inclination remain: But in this alſo, Avarice is the moſt diſquieting of all Vices, and Paſſions; that every Thing that it ſees, or hears, both kindles and feeds its Flame.

In vain do we expect Juſtice, if Judges weigh Money againſt Arguments, or if Witneſſes value Gain more than an Oath. In vain do Kings and Commonwealths fortify their Towns, if Avarice govern them. Nothing is ſecure that can be bought, nor is Religion itſelf ſecure at the Altar, if its Prieſts can be brib'd.

Such as would ſhun Covetouſneſs, ſhould ſhun the aſpiring to great Dignities, which ſeems to make Avarice rather a Debt, than a Vice; and perſuade Men, that the robbing others to maintain their Grandeur, is a Duty, not a Sin; and that he who maintains not his Honour, forfeits it. And thus Men ſupport Avarice by Pride, and varniſh it with the deceiving Luſtre of Generoſity.

It contributes not a little to our being avaritious, that, when Children, we are bred to an Eſteem of Money, before we can underſtand any Thing: And therefore this Impreſſion laſts with them, even after their Underſtanding is gone. For we ſee, that Men in *Bedlam* are always asking Money; and that when avaritious Men are on their Death-bed, paſt the Senſe of every Thing elſe, yet they ſtill graſp at their Money and Bonds. Parents ſhould likewiſe carefully conſider in breeding their Children, what their Genius or Temper is: For there are ſome Trades which incline more to one Vice than another. As for inſtance; the being a Lawyer, is thought to incline them to *Avarice*, becauſe in that Employment Men are always treating and contending about Riches; and are oft-times, by defending unjuſt Acquiſitions, tempted to think the Guilt contracted by them very ſmall; Familiarity leſſening always Guilt on ſuch Occaſions. And therefore, if a Man find his Child inclined to love Money, he ſhould breed him to no Trade that can inflame his Deſires. And a Lawyer, engaged once in the Employment, ſhould, and I am ſure ſome do, balance this Inconveniency, by the high Eſteem they have for Juſtice, whereby they can only ſecure Fame and Property, the Two moſt deſirable of all Things: And the great Experience they have above others of the Uncertainty of Riches and Eſtates, ſhould convince them, moſt of all Men, of the Folly as well as Guilt of this Vice. Soldiers are generally inclined to *Luxury*, becauſe they are not frequently in Buſineſs relating to Eſtates and Commerce: And in the Interludes of their Dangers, they are inclined to recreate themſelves even to Exceſs, to compenſate the Toil they have ſuffer'd, and the Riſques they have run. On the other hand, a Child inclined to *Luxury* ſhould rather be bred a Lawyer. And tho' this be not the proper Place of ſpeaking againſt *Luxury*, yet the Contingency of the Matter obliges me to ſay, that Soldiers, of all Men, ſhould ſhun moſt *Luxury*; for it ſoftens too much, makes Men too lazy, and ſucceeding Dangers the more intolerable. The proper Sanctuary againſt both theſe Vices, ſhould be the Employment of Churchmen; and we ſhould fly for Protection againſt theſe to the Horns of the Altar: Yet, as I have formerly obſerved, the World is much inclin'd to be jealous of their Avarice, tho' they, of all Men, ſhould, and I hope do ſhun it moſt. For he who preaches againſt *Avarice*, and yet acts it, is no more a Preacher, but a Mountebank; nor can his Diſcourſe convince, whoſe Example diſſuades; moſt Men being more led by Senſe than by Reaſon. By this Vice alſo, Churchmen fall under that Contempt, which overturns their Church, and in Conſequence takes away their Benefice. And this Vice cannot but doubly augment their Torments to all Eternity.

Upon the whole Matter then; Men ſhould conſider moſt of all Things the Education of their Children, as the only Way to make them happy, which is all the avaritious Deſign: And this is not to be done by providing too much, but by making them to be content with every Thing. One who is bred up in ſolid Virtue, will not probably ſpeak, or do what may forfeit his Eſtate; as he will not endanger it, or his Health, by Women, and Drinking: He will think the Little that is left him, enough; and his Frugality will make it ſo, if it do not find it ſo.

We need no Eloquence but ſolid Reaſon, to charge the avaritious Man with Theft, in ſtealing from the Commonwealth the true Uſe of thoſe Riches, which are neceſſary for the Support of the Common Treaſure, the Neceſſities of the Poor, and the Increaſe of Commerce; which made *Timandridas* the *Lacedemonian* chide his Son, who valued himſelf for having ſpent nothing, as having thereby defrauded his Country, his Neighbours, and the Poor. We may likewiſe charge him with Murder, (as I formerly inſtanced) for he takes away the Life of the Poor, who refuſes the Means of ſupporting it: And Men feel too much, not to find that *Avarice* tempts its Slaves to invade their Neighbours in Time of War, killing all thoſe who intercept their Prey; and murdering, in time of Peace, by Proceſſes, thoſe from whom they can expect any Eſtate. It makes Men at laſt Atheiſts, by perſuading them that God is not able to ſupply their Neceſſities; and they are really ſo, when they truſt it, and not Him. Idolaters they alſo are, becauſe they worſhip Riches as their only Deity.

*Sect.* 9. Devotion affords the ſtrongeſt and beſt Remedies againſt Avarice.

To raiſe our Thoughts higher than thoſe Moral Arguments, we may eaſily diſcern how much ſtronger Helps Chriſtianity affords us, than we can expect from the Heathens, or thoſe Thoughts which Nature ſuggeſts: For we have immediate Promiſes from an Omnipotent God, that thoſe who depend on Him ſhall never want. And to aſſure them the more of His Care, He calls the Poor His Children, His Family; and has wrought Miracles to relieve their Neceſſities; by which Advantage no Heathen Philoſopher could have ſecured Men againſt the Fear of Want, which is a ſtrong Temptation to *Avarice*. And againſt which the *Apoſtle* very wiſely guards us, *Heb.* 13. 5. *Let your Converſation be without Covetouſneſs, and be content with ſuch Things as you have*; *for He hath ſaid, I will never leave thee, nor forſake thee.* And becauſe this immoderate Care ſtretches itſelf to our Poſterity, that ſame God hath deſir'd us to leave our fatherleſs Children upon Him, and declares Himſelf the Father of the Fatherleſs, and Husband of the Widow.

*Sect.* 10. The Chriſtian and *Pagan* Philoſophy compared, as to their Remedies.

We may alſo ſee by Chriſtianity, the Purity that is required in its Believers, beyond what the moſt ſpiritual Heathens could imagine. For they condemned only the outward Effects of *Covetouſneſs*, when they prevail'd againſt a Man's Reaſon, and proceeded ſo far as to wrong the Society in which he lived, or the Neighbours whom he injur'd, by Theft, Robbery, or Oppreſſion. But Chriſtianity deſigning to make the Heart a Temple for the Holy Ghoſt, and Man an Heir of Heaven, it did therefore command him to keep his Heart pure from that Concupiſcence and Covetouſneſs, which polluted or diſorder'd the Inclination, without wronging any elſe, ſave the Perſons in whom theſe Deſires were raiſed. And thus, he who deſires to have a great Eſtate, without deſiring any other Man's; or who wiſhes that his Neighbour's Lands or Moveables were his, even for a Price, is condemned by Chriſtianity, as guilty of Covetouſneſs and Concupiſcence, and as one who has not learned that noble Leſſon, *To be content with his own Condition, whatever it be.* An Accompliſhment, which the Great Judge of all Things requires in thoſe whom He will own for His Servants. And for our better underſtanding the Heart of Man, it will be fit to diſtinguiſh Three Degrees in this Irregularity. The Firſt is that, whereby the exterior and ſenſible Object, entring in by the Senſe into the Fancy, does ſo ſuddenly move the Appetite, that the Judgment has no Leiſure to perceive, much leſs to make Reflections upon it. And there can be no Irregularity in this Degree, except we have fail'd to accuſtom our Judgment and Reaſon to be watchful, as it ought to be, over the very firſt Motions of our Appetite, and to obſerve continually (as a good Centinel) what enters in by the Ports of our external Senſes.

The Second Degree is, When the Object makes its Impreſſion upon the Appetite, and raiſes Commotions, whereby the Judgment takes a wrong View of the Object, tho' afterwards the Judgment overcomes; yet this Diſorder deſerves the Name of a vicious, or irregular Affection: Not unlike to that Diſorder a Rider is put in, when his Horſe boggles at any ſudden Object with which the Beaſt is ſurprized, and which, tho' his Rider overcome without Difficulty, yet it ſhews, that he has not ſufficiently managed the Horſe he has taken in Charge.

The Third is, When this Commotion in the Appetite laſts ſo long, and prevails ſo much, that it makes the Judgment doubt which Party it ſhould take; and becomes like to a Rider, who keeps his Saddle, but with Difficulty. In this Degree, St. *Paul* repreſents Man's Reaſon and his Covetouſneſs wreſtling againſt one another. I confeſs, that *Ariſtotle* acknowledges, that there are ſome Appetites in a Man repugnant to Reaſon, which indeed he blames: And that *Plato* (before him) taught in his eloquent Way, that the Chariot of Reaſon was drawn by two Horſes, whereof one was black and reſty, diſobeying the Reins of him who govern'd them. *Seneca* alſo numbers thoſe Appetites which oppoſe our Reaſon, among the culpable Paſſions: But none of them diſcover'd the Irregularity of the firſt Two Degrees; and the beſt of them ſaw only the Irregularity of the Third with ſo dim an Eye, and thro' ſo thick Clouds, that St. *Paul* had Reaſon to aſſert, That if the Law (meaning the Moral Law of God) had not ſaid, *Thou ſhalt not covet*, Man had not perceived the Sin that lies in ſimple Concupiſcence. And whereas the Heathens did only forbid theſe immoderate Cares as inconvenient, our holy Religion goes higher, not only in its Purity, but in its Penalty. For all Anxiety, as to ourſelves, or Covetouſneſs, either relating to ourſelves or Neighbours, are forbid upon Pain of diſpleaſing a kind Father, and an infinite God, and becomes uneaſy, by the cutting and ſevere Reproach of a terrified Conſcience. Whereas, among moſt Heathens, the Conſcience did take no Notice, nor thunder out its Terrors upon ſuch ſpiritual and inward Delinquencies.

# *PARSIMONY*

# AND

# *NIGGARDLINESS.*

## DISCOURSE III.

*Sect.* I. The Origin and Progreſs of *Parſimony* or *Niggardlineſs.*

THERE is, I confeſs, a Difference betwixt *Avarice,* and exceſſive *Parſimony,* or *Niggardlineſs,* that wrings from others what is their's; this only exceeds in ſparing too much what is one's own; the one riſes purely from a Fear of Want, and therefore in the firſt Ages of the World it was ſcarce known; the other from a Deſire to heap up, tho' uſeleſly; the one is a kind of Self-defence, the other an Invaſion; and therefore the one is the worſt, the other amongſt the beſt of Neighbours; for as the Miſer checks us when we exceed in our Expence, ſo he is moſt unwilling to wrong us, leſt he thereby encourage others to wrong him. The Niggard is, generally ſpeaking, a better Subject than the Avaritious, for he is afraid to loſe what he has; whereas the Avaritious loving more what he wants than what he has, hazards the preſent in Expectation of a greater Advantage.

NIGGARDLINESS oft-times grows up rather from Education than any vicious Inclination, and I have ſeen ſome become parſimonious by living near Prodigals, having Occaſion daily to abhor their Extravagancies, and to be terrified at the Miſeries to which they have ſeen them reduced by theſe Extravagancies. Men expreſs their Abhorrence of this Vice, in calling ſuch as are maſter'd by it, Miſers; as if they were the moſt miſerable of all Men: But yet they muſt have ſome Pleaſure in it, elſe they would not be ſo aſſiduous and diligent about it; certainly they think, to ſpare is to gain; and therefore they wonder why others who take ſuch Pains to gain, ſhould laugh at them for taking Pains to ſpare. Nor do they ſee that they want any of theſe Things, for providing of which others take Pains to heap up Money, or that they ſhould toil to get Money to entertain others; and upon theſe Grounds it is, that we find the Parſimonious to be generally proud, thinking they ſhall never need to depend upon any. But yet Parſimony is to be pitied, ſince it exceeds, for it muſt proceed from a too high Value of Riches, and ſo argues a Blindneſs in our Reaſon. And it employs too much of that Time which might be better beſtow'd, ſtarving both Charity and Friendſhip, the greater Duties, as well as Comforts of our Life. Yet it may ſeem a more excuſable Vice than *Avarice*; for *Avarice* ſtill promiſes to employ the Money that it tempts us anxiouſly to ſeek, in the Service of Charity and Generoſity; but after we have got the Money, Parſimony will not allow Men to employ it, no not on their own Neceſſities, tho' the Niggard (God knows) is himſelf a great Object of Charity; which made *Horace* account it a Madneſs rather than a Vice.

> *Parcus ob hæredis curam nimiumque ſeverus*
> *Aſſidet inſano*——

*Sect.* 2. Some Expreſſions of Scripture compared with the Poets upon this Subject.

THE Scripture aſſures us, that Riches take the Wings of the Morning and fly away. They do not wait till others come and take them from us, but they naturally tend to fly about, and therefore they run away with ſo much Haſte, as deſerves to be called taking of Wings, and they leave us ſo ſoon, that this Haſte is called the Wings of the Morning; and when they have taken Wings, I imagin I ſee them loking back with Contempt, and laughing at thoſe who thought to have ſecur'd them and kept them Priſoners. Let us then endeavour, with the wiſe Apoſtle, to learn to be content in all Conditions, expecting more permanent Riches and Treaſures: Imitated in this by *Horace,* who reflecting on the Inſtability of Fortune, had the ſame Thought from his Fountain, as moſt of the Heathens borrow from the Scripture;

> *Fortuna ſævo læta negotio, &*
> *Ludum inſolentem ludere pertinax,*

*Tranſmutat incertos honores,*
*Nunc mihi, nunc alio benigna.*
*Laudo manentem: ſi celeres quatit*
*Pennas, reſigno quæ dedit; & meâ*
*Virtute me involvo, probamque*
*Pauperiem ſine dote quæro.*

I muſt remark by the Way, the different Genius of *Virgil* and *Horace*, which, appears in this, as well as with Relation to all Morality: *Virgil* loves Virtue as a Part of Devotion,

*Aude hoſpes contemner opes, & te quoquo*
*dignum,*
*Finge Deo.* ——

*Horace* loves it as conducing to his Eaſe, as we ſee in this and many other Paſſages in his Satyrs condemn it eaſily. *Juvenal* in his, rails at it bitterly, and troubles himſelf almoſt as much in writing againſt it, as Covetouſneſs could have vexed him; like *Seneca*, who grows angry in writing againſt Anger.

The Scripture ſpeaking againſt Covetouſneſs, compares it to an evil Eye, which makes the Body dark, *Matth.* 6. And *Horace* tells us, that an honeſt Man,

*Oculo irretorto ſpectat acervos.*

The Scripture calls *Avarice* Idolatry. And the Poets alluding to this, ſay,

*Præſentemque ſemper poſſidet area Deum.*

*Sect.* 3. That the ſpecial Humors in Morality, and their various Mixture, are not yet fully enquired into; an Inſtance whereof is given on this Subject.

One of the chief Pleaſures and Arts of Moral Philoſophy lies, in conſidering the various Mixture of Paſſions and Vices with one another; as to which *Plutarch* himſelf has not been ſpecial enough, contenting himſelf with obſerving who were covetous, who prodigal, &c. But to give ſome Glances of this, upon which I will poſſibly beſtow an Eſſay apart; it is obſervable that many in the late Civil Wars, who were known Niggards, beſtow'd frankly their Eſtates in the Service of King *Charles* I. Many who would not beſtow an Hundred Pound in the Education of their Heir, do beſtow with Delight many Thouſands in building the Houſe they are to leave him; and that beautiful young Lady who allow'd a Favour to a rich old niggardly Exciſe-man in *France*, to get Money to preſerve her Father's Life, has left it dubious what Name this Tranſgreſſion deſerved. The different and contrary Effects produced by the ſame Vice or Paſſion, are Proofs of this: As for Inſtance, a mere Niggard ſtarves his Cauſe; for he dares not beſtow ſo much as one Shilling upon Hope itſelf; whereas if Niggardlineſs be quickened by ſome Degrees of Avarice, no Man is a franker Client than the Niggard; for he knows Money is a better Fee, than the good Dinner the Luxurious thinks a ſufficient Reward. It is ordinarily obſerved, that a Niggard's Feaſt is the greateſt; and the Reaſon ſeems to be, that they deſign thereby to convince the World, that their Parſimony proceeds not from their over-valuing Money. But in my Opinion they, as Painters not uſed to paint, miſtake Proportions more than others do; or it may be they ſeldom treat without Deſign of Gain; and ſo their Entertainments are Bribes and not Feaſts.

# *LUXURY.*

## DISCOURSE IV.

*Sect.* 1. The Riſe and Progreſs of Luxury.

One might reaſonably have thought, that as the World grew older, Luxury would have been more ſhunned. For the more Men multiplied, and the greater their Dangers grew, they ſhould have been the more eaſily induced to ſhun all Expence, that they might the more ſucceſsfully provide againſt thoſe Inconveniencies. But yet it proved otherwiſe, and Luxury was the laſt of all Vices that prevailed over Mankind; for after Riches had been hoarded up, they rotted as it were into Luxury; and after that

Tyranny and Ambition had robbed many poor Innocents, Luxury, more cruel than they, was made uſe of by Providence, to revenge their Quarrel: And ſo triumphed over the Conquerors. Thus when *Rome* had by Wit aud Courage ſubdu'd the World, it was drowned in that Inundation of Riches, which theſe brought upon it.

*Sect.* 2. The Diſguiſes under which Luxury inſinuates itſelf.

THIS Vice has its own Masks and Diſguiſes too, for it transforms itſelf into Virtue, whilſt like that it runs faſter from Avarice, and laughs more loudly at it than Liberality itſelf does, and to that height that it ſeems to be angry at Liberality, as being only a kind of Niggardlineſs. It pretends to keep open Table to thoſe who ſtarve, and to have an open Purſe always for Men of Merit. Beauty and Learning are its Penſioners, and all manner of Divertiſements are ſtill in his Retinue. It obliges the Peaceable to favour it, as an Enemy to every Thing that is uneaſy: And it engages Men of Parts to ſpeak for it, becauſe whilſt it laviſhes the Treaſures others have hoarded up, it feeds the Hope and Expectations of ſuch as were provided by Nature of nothing, but a Stock of Wit. And there being ſeldom other matches betwixt Liberality and Prodigality, but ſuch as are to be meaſured by exact Reflexions upon the Eſtates of the Spenders, it ſometimes praiſes that as Liberality, which ought to be condemned as Luxury. And even where the Tranſgreſſion may be diſcerned, the bribed and intereſted Multitude will not acknowledge, that Liberality by exceeding its Bounds has loſt its Name. Some alſo from the ſame Principle authorize this Vice, by the Pretext of Law, crying out, That every Man ſhould have Liberty to diſpoſe of his own, as he pleaſes; and by the good of Commerce, ſaying with a ſerious Face, That Frugality would ruin all Trade, and if no Man ſpend beyond his Meaſure, Riches ſhould not circulate; nor ſhould virtuous, laborious, or witty Men find in this Circulation, Occaſions to excite or reward their Induſtry. And from this probably flows the Law of *England*'s not interdicting Prodigals, denying him the Adminiſtration of his own Eſtate, as the Laws of all other Nations do.

*Sect.* 3. Some devout and virtuous People think Luxury now neceſſary to ſupply the Decay of Charity.

I know alſo ſome very devout Men, who would perſuade us, that it is not fit to decry Luxury too much in this Age, becauſe it entertains and feeds ſo many poor Artiſans, and others who would ſtarve without its Aſſiſtance, having no other Trade, but the making Perfumes, Laces, Embroideries, and ſuch Things, which Frugality contemns as Baubles, or abhors as Poiſons. And though when Charity had in the Youth of Chriſtianity, Vigor enough to perſuade Men to entertain the Poor as Members of the ſame Body with them: Yet God ſeems now to permit Luxury to throw away that Money amongſt the Poor, which Charity cannot perſuade them to give. Others again recommend Luxury as that which occaſions the ſharpning of Wit, and the beautifying of the Univerſe; for thoſe who have Wit, ſtudy Painting, Architecture, Sculpture; and by theſe the Rich adorn the World, and make it a more glorious Inſtance of His excellent Skill, who firſt formed it, and beſtowed thoſe excellent Talents on Men for improving it. That ſame God alſo has made Jewels, Perfumes, and many other Things which He muſt allow to be uſed by Luxury, ſince Frugality knows no uſe for them. But the great Advocate for Luxury, is Self-Love, that Orator which never fails to perſuade. And it ſuggeſts to us, that the greateſt of our Concerns ſhould be for ourſelves, and that a reaſonable Man ſhould think all thrown away, which he ſpends not to pleaſe himſelf. And which he can no way do ſo well as by gratifying all his own Appetites and Inclinations with the full Enjoyment of all they can deſire; the Public Good, and Charity, being meer Notions invented by Philoſophers and Divines, to make us ſhare with them that Money, which when they have once got, they laugh at us for parting with.

I confeſs that all the Arguments that plead for Avarice, ſeem to conclude at laſt in Favour of Luxury; for to what purpoſe ſhould a Man lay up Money, except he uſe it? And Nature would not allow one to toil much for it, if it were not, that he promiſed to himſelf to live one Day ſoftly and pleaſantly, on the Fruits of theſe Labours: And on the other hand, Luxury never approves any Argument or Deſign that Avarice can bring; for it is ſo much taken up with the preſent Pleaſure of uſing what it has, that it will allow itſelf no Time to foreſee, or toil for what it may want.

MANY who have been very prodigal and luxurious, have afterwards turned very avaritious; whereas they never gained one Proſelyte from Avarice. And I have known ſome who have ſpent a very prodigal and luxurious Youth, throwing away the Little they had, who ſo ſoon as they grew rich, became ſo fond of it, that they could not part with what was ſufficient to ſupply their Neceſſity. And when I asked them, Why they run from one Extreme to another, in ſpight both of Reaſon and Cuſtom? They anſwered, That what formerly they had was not worth their Care; and therefore they ſpent it in Hopes thereby to gain more. In which we may ſee a new and different View of the Genius of Avarice and Luxury, and the Motives whence they riſe.

*Sect.* 4. The Difference betwixt Prodigality and Luxury.

AS Avarice differs from Parſimony, ſo does Prodigality from Luxury; for Prodigality is a profuſe ſpending on others, but Luxury, upon one's ſelf. In Prodigality a Man ſeems to value every Man more than himſelf, becauſe he prefers them, defrauding himſelf of Neceſſaries, to beſtow upon them. In Luxury a Man prefers himſelf to all others, robbing and cheating them by all Arts and Devices, to get thereby Superfluities to feed himſelf and his Luſts. For which Reaſon, and ſince alſo the Scripture ſpeaks ſo much againſt Luxury, and not againſt Prodigality, it may ſeem ſtrange, why the Laws are ſo ſevere to Prodigals, in interdicting and forbidding them the Adminiſtration of their own Eſtates, without putting any Reſtraint upon the Luxurious: Whereas it ſeems that the Prodigal is leſs an Enemy to the Commonwealth than the Luxurious; ſeeing he is ready to prefer his Fellow-citizens to himſelf; and generally they who get the Prodigal's Means have more Wit than he, and can make better uſe of what they get from him; and ſo ſhould by the Laws be preferr'd to him. But I think the Reaſon of this is, That the Law fears, that after he hath diſſipated his own, he may fall a Burden on the Society: And therefore it conſiders him as a generous Kind of Idiot, and ſo puts him under Tuition, as it does an Idiot. And thus it cares for him more than for the Luxurious; and it were to be wiſh'd, that by the ſame Compaſſion it provided alſo Tutors for the Niggard, who is in greater Danger to be ruin'd by himſelf, than the Prodigal by others. To which nothing can be anſwered, but that the Law thinks this Churl unworthy of its Care; and that the Commonwealth would loſe little tho' he ſhould ſtarve himſelf.

SINCE Self-love is Man's chief Counſellor, it ſeems that Men are more naturally inclin'd to Luxury than Prodigality; as they are inclin'd to love themſelves better than their Neighbours. But yet on a more ſerious Reflection it will appear, that even Prodigality has Self-love to plead for it; becauſe Ambition, which is a more violent Paſſion than Senſuality, drives a Man to Prodigality, as that whereby he may raiſe his Reputation by buying that Fame, of which only he is greedy.

*Sect.* 5. Arguments againſt Luxury; as firſt, That it is inconſiſtent with that equal Diſtribution whereby God ſupports the World.

THE great Arguments that weigh with me againſt Luxury, are Firſt, That Luxury diſorders, confounds, and is inconſiſtent with that juſt and equal Oeconomy, whereby God governs the World as His own Family, in which all Men are but Children, or Servants; for as the Avaritious hoards up for one, that which ſhould be diſtributed among many; ſo in Luxury, one vicious Man ſpends upon himſelf what ſhould maintain many Hundreds; and he ſurfeits to make them ſtarve. This is not to be a Steward, but Maſter. Nor can we think that the wiſe and juſt Judge of all Things, will ſuffer in His beautiful World, what the moſt negligent and imprudent among us, could not ſuffer in his private Family.

THE Second Argument is, That Nature ſhould be Man's chief Rule in Things relating to this World; and Reaſon, his great Director under God in making uſe of that Rule, and the Eyes (as it were) by which we are to ſee how to follow it. By this Nature teaches us how to proportion the Means to the End, and not to employ all the Inſtruments whereby ſuch an End may be procur'd, but only ſuch as are neceſſary, and ſuitable for the procuring of it; which Proportion Luxury neither underſtands nor follows; and therefore we muſt conclude it unnatural and unreaſonable; and that Frugality is the true Mathematics of moral Philoſophy: And by this we may condemn not only ſuch as *Senecio* was in the *Roman* Hiſtory, who delighted to have his Cloaths and his Shoes, twice as large as were fit for his Body and Feet; which the Luxurious laugh'd at, with others; but even ſuch as keep twice as great Tables, build twice as great Houſes, pay twice as many Servants as are fit for them, are as mad as he. For tho' that Diſproportion be not ſo very perceptible as the other, becauſe the Bulk of a Man's Eſtate is not ſo eaſily meaſur'd and known as that of his Perſon; and becauſe there are twice as many Fools of this Kind, as there are of the other: So that Reaſon is outvoted, tho' it cannot be anſwered; yet the Folly is the ſame every where; and in this it is more dangerous, that *Senecio* wrong'd only himſelf, whilſt they oft-times wrong and ruin both their Poſterity and Neighbours. To convince us that Luxury is a great Defect in our Reaſon, we ſhall ordinarily find that young Men, Fools and Women, are moſt given to it. Thus I have ſeen a Man, otherwiſe judicious enough, much ſurpriz'd, when it was repreſented, that his Building (tho' it ſeem'd to him and many others to carry no great Diſproportion to his Eſtate) yet would in Forty four Years (which is but a ſhort Time) equal his Eſtate, allowing the Intereſt of his Money to equal the capital Sum in the Space of Eleven Years and an half, which it did by Law; for 100 *l.* forborn for Forty eight Years, at 6 *per Cent.* compound Intereſt, amounts to 1734 *l.* 4 *s.* 2 *d.* And how many may forbear 100 *l.*? And this Sum in Ten Years, which is but a very ſhort Time, will amount to 2774 *l.* 12 *d.*

by ſimple Multiplication without compound Intereſt. And very few conſider the Extravagancy of this Age, in which Houſes and Furniture go out of Faſhion, as Hats or Shoes do. Nor does the Expence of Building contain itſelf within the Walls; for it obliges a Man to a ſuitable Way of Living, there being nothing more ridiculous, than to ſee one, who lived in a Palace at Home, travel and lodge Abroad with ſuch Equipage, and in ſuch Inns, as Men who live in ordinary Houſes do. We ſhould therefore be very proportionable in our Expence; for that which widens a Man's Fancy in any one Thing, makes it extravagant in all Things; as they who uſe their Stomachs to too much of any one Meat, will make it craving as to all others. Whereas on the other Hand, that which ſhould enamour Men of Frugality, is, that it accuſtoms us to Reaſoning, and Proportion; obſerving exactly the leaſt perceptible Proportions, and the ſmalleſt Conſequences. Which makes me call to mind the remarkable Story of the *Holland* Merchant, who having married his Daughter to a luxurious rich Citizen, to the great Diſſatisfaction of his Wife, ſhe came the next Day to the Bride and Bridegroom, and offered them the Egg of a Turkey-Hen, and deſired her Daughter to uſe herſelf in exactly looking to the Product of that Egg, to conſider the great Things which Frugality can do in other Matters. But her Husband and ſhe having laughed at the Leſſon, the Mother improved ſo far the Egg, that within Twenty Years the Advantage of it, and the Luxury of that married Couple grew ſo faſt, that they needed the meaneſt Aſſiſtance, and the Product of the Egg afforded a comfortable one; for with the conſiderable Sum that was gathered by it, they ſtocked themſelves anew, and by the Help of the (formerly ſlighted) Leſſon of not deſpiſing the meaneſt Things, raiſed themſelves again to a very conſiderable Eſtate. And if any Man will but conſider yearly, what he ſuperfluouſly ſpends, and how much that would multiply in proceſs of time, he will eaſily perceive, that what he ſpends in the Conſequence, is vaſtly greater than appears to him in the firſt Calculation: As for Inſtance, if a Man who may ſpend 500 *l. per Annum* does ſpend 600, this ſmall Error of 100 *l.* a Year will amount in 44 Years at 6 *per Cent.* to the Sum of 1373 *l.* 6. *s.* and odd Pence. And though a Man thinks it ſcarce worth his Pains, to manage ſo as to preſerve 100 *l.* he muſt be very luxurious, who thinks it not worth his Pains to gain the Sum of 1373 *l.* And it is a great Defect in our Reaſon, that thoſe Ills which follow by neceſſary Conſequence are diſpiſed as mean, becauſe the Conſequences themſelves are remote. And as that is the beſt Eye, ſo that is likewiſe the beſt Reaſon, which ſees clearly at a great Diſtance. Another great Error that Luxury tempts us to, by not reaſoning exactly, is, That it makes us calculate our Eſtates without deducing what is payable out of them to the Poor, to the King, and to Creditors, before we proportion our Expence. Whereas we ſhould ſpend only what is truly our own; and the Law to prevent Luxury tells us, that *id tantum noſtrum eſt quod deductis debitis, apud nos remanet:* That is only our's which remains with us, after our Debts are deduced. Nor will a proportional Part of our Eſtates anſwer the Equivalent of our Debts. For if I owe 100 *l.* a Year, no Part of my Eſtate that pays me 100 *l.* a Year will pay it; for many Accidents may hinder me to get my own Rent, but no Accident will procure an Abatement of my Debt. And this leads me to conſider, that Frugality numbers always the Accidents that may intervene amongſt other Creditors; and the wiſe *Hollander* obſerves, that a Man ſhould divide his Eſtate in Three Parts, upon one Third he ſhould live, another Third he ſhould lay up for his Children, and the laſt he ſhould lay by for Accidents. There are few Men who do not in their Experience find, that their whole Life being ballanced together, they have loſt a Third Part always of their Revenue by Accidents. And moſt Families are deſtroyed by having their Children's Proviſion left as a Debt upon them. So that a Man ſhould at leaſt endeavour to live upon the one half; and leave the other half for his Children.

For that Egg might produce a Turkey, which might multiply into many: And the Price of theſe might purchaſe Swine, Cows, &c.

THE next Argument that diſcredits Luxury with me, is, That it occaſions many and great Inconveniencies, both to him who labours under it, and to the Commonwealth under which he lives.

*Sect.* 6. The other Argument is, That Luxury is moſt inconvenient for the luxurious Man himſelf, and the Society wherein he lives.

THE luxurious Man oppreſſes that Nature which ſhould be the Foundation of his Joy; and, by falſe Reaſoning, he is made by this Vice to believe, that becauſe ſome Eaſe and Aliments are pleaſant, therefore the more he takes of them, the more he will be pleaſed. And the firſt Proofs by which he is convinced that he is cheated in this, are thoſe Gouts, Gravels, and other Diſeaſes, into which thoſe Vices, when they are ſwell'd, overflow, and deſtroy that Ground, which a gentle Watering would have refreſh'd. Then he begins to underſtand that Mediocrity is the golden Rule, and that Proportion is to be obſerv'd in all the Courſe of our Life.

LUXURY alſo makes a Man ſo ſoft, that it is hard to pleaſe him, and eaſy to trouble him: So that his Pleaſures at laſt become his Burden. Luxury is a nice Maſter, hard to be pleaſed: *Res eſt ſevera Voluptas,* ſaid he who knew it beſt: Whereas the frugal and temperate Man can, by faſting till a convenient Time, make any Food pleaſant; and is by travelling, when it is convenient, harden'd ſufficiently, not to be troubled by any ordinary Accidents. The Luxurious muſt at laſt owe to this Temperance, that Health and Eaſe which his falſe Pleaſures have robb'd him of; he muſt abſtain from his Wines, Feaſtings and Fruits, until Temperance has cured him. And I have known many, who after they have been tortur'd by the Tyranny of Luxury, whilſt they had Riches in Abundance to feed it, became very healthful and ſtrong when they fell into that Poverty which they had ſo aborr'd: Some whereof have confeſs'd to me, that they never thought themſelves ſo happy, and that they were never ſo well pleas'd, as ſince they had eſcap'd the Temptations of that dangerous Vice. Luxury does not more ruin a Man's Body, than it debaſes his Mind; for it makes him ſervilely drudge under thoſe who ſupport his Luxury; in pimping to all their Vices, flattering all their Extravagancies, and executing the moſt dreadful of their Commands. I have oft-times remark'd with great Pleaſure, that in Commonwealths, where to be Free was accounted the greateſt Glory, nothing reign'd ſave Frugality, and nothing was rich ſave the common Treaſure. But under thoſe Monarchies which have degenerated into Tyranny, Care is taken to have thoſe who get the public Pay ſpend it luxuriouſly, to the End, that thoſe they employ may ſtill want, and ſo may be oblig'd to that contemptible Slavery, to which none would bow if they could otherwiſe live. It is alſo very obſervable, that thoſe who dwell in the richeſt Countries, which encline Men to Luxury, ſuch as *Greece* and *Italy*, are poor, and Slaves; whereas the hard Rocks of *Switzerland* breed Men who think themſelves rich and happy. I heard, that a Churchman call'd that the beſt Religion, which was able to entertain a Coach and ſix Horſes; but I am ſure, that if the Maſter who was in it knew that he had made himſelf a Raſcal to get the Coach, he could not be ſo eaſy in it, as if he walk'd on Foot with his Innocence. I like well his Reply, who, being tempted to comply with what his Conſcience could not digeſt, ſaid to him who tempted him, I can contentedly walk on Foot, but you cannot live without a Coach: I will be adviſ'd by my Innocency; conſult you with your Grandeur. Rulers can beſtow Treaſures, but Virtue only can beſtow Eſteem; and all the Reſpect that is beſtow'd upon a vicious Man, is no more to be valued, and is as ridiculous as a Copy of Verſes (writ for Money) in Praiſe of a Coward. Nor can either fine Houſes or Gardens, large Territories, or pleaſant Fields delight him, who when he walks in them, muſt remember that they were purchaſed at the Rate of the Curſe of God, and his own Infamy.

From all which we may eaſily ſee, that the Luxurious are not only uſeleſs, but Enemies to the Commonwealth wherein they live: Uſeleſs, becauſe they become effeminate and ſoft, unable to defend and improve their native Country; Enemies, becauſe they debauch the Innocent, and aſſiſt the Guilty. Whereas the frugal Man takes more Pleaſure in being a good Example to the Youth, and in oppoſing the Luſts of Tyrants, than the Luxurious can do in feeding upon what their Cooks prepare, or in dallying with the Proſtitute whom his Money can buy. *The Pleaſure of Sin laſts but for a Moment; but a good Conſcience is a continual Feaſt.* The one pleaſes only thoſe corrupted Flatterers, whom the Luxurious himſelf contemns; whilſt the other pleaſes the Heroic, the Wiſe, and the Virtuous, whom the Vicious muſt admire in ſpight of his Corruption: And even many Thouſands, who tho' they are not virtuous themſelves, yet are by Conviction, or Intereſt, forced to appear as ſuch.

I ſhall cloſe theſe few Arguments againſt Luxury, in obſerving, that it appears from all that hath been ſaid, how unſatiable both Avarice and Luxury are; both of them are acted by Imagination, which can never be ſatisfied nor bounded: The one ſeeks Money only, that he may have the Pleaſure to have it lying by him; and the other, that he may pleaſe his Fancy in ſpending it. And yet, I think, that Avarice is a more ſevere Maſter than Luxury. For the luxurious Man propoſes only what he may ſpend, but the avaritious Man covets every Thing: The one is ſatisfied ſometimes in enjoying what is got; but the other gets no ſooner any one Thing, than he preſently runs after another; and when he has reaped the Fruit of his Pains, he is made poor again by Poſſeſſion.

*Sect.* 7. Remedies againſt Luxury.

FROM theſe Reflections alſo may ariſe Remedies againſt Luxury to any thinking Man: For tho' when we conſider the Luxurious as they ſhine at Courts, live in ſumptuous Palaces, ſaluted in the Streets, adorned with Panegyrics; it is probable, that moſt Men will think, that Philoſophers and Divines have only writ againſt Luxury, becauſe they could not attain to the Riches that are neceſſary for maintaining it: Yet, to balance this, let us conſider the vaſt Numbers of thoſe whom it has drowned in Pleaſures, others whom it has ſent to ſtarve in Priſons, and dragg'd to Scaffolds by its Temptations. I have oft-times ſeen the Luxurious railed at with much Malice by thoſe they ſumptuouſly entertained, who envied the Entertainer for being able to treat them ſo highly, and for living ſo far above their own Condition: Concluding, that they were rather called to be Witneſſes of the Entertainer's Abundance,

dance, than Sharers in his Bounty. And tho' ſome think to make an Atonement for their Oppreſſion, by living ſumptuouſly upon its Spoils; yet no wiſe Man will pardon a Robber, becauſe he gives back a ſmall Share of the great Riches he has taken.

Some think Riches neceſſary for keeping great Tables, and excuſe this by the Hopes they have of good Company. And a great Man told me, He wiſhed ſuch a Man's Eſtate, that he might keep us all about him. But my Anſwer was, That the Luxurious gather'd about them ordinarily the worſt of Company; and worthy Men valued more virtuous Converſation than ſumptuous Diet, which they rather ſhunned than follow'd. I believe there are few ſo prodigal of their Money, but that they have oft ſome Regrets for having ſpent it; from which the frugal Man is exempted, by the Aſſurance he has from his Virtue that he can live happily upon the Little he has, and can with Pleaſure find, that he is neither oppreſſed by the Weight of Riches, nor terrified by the Fear of Want; breeding up his Poſterity not to need theſe great Patrimonies, which he cannot give. I know, that ſome think they are never to be charged with prodigal and uſeleſs Spending, if they take exact Account of their Servants of what they ſpend: But our Inclinations may cheat us as much as our Servants; and therefore I am very well pleaſed with the Anſwer of that Father, tho' Miſer, who having ſeen his Son very buſy in taking in his Accounts, told him, Son, Son, ſpend nothing you can ſpare; but after it is once ſpent, think not you can make it up, by keeping an exact Account yourſelf, or taking in ſuch Accounts from your Servants.

I am ſo far from thinking that Luxury is uſeful, becauſe it ſuſtains many poor Artiſans, that I think there would be no Poor, were it not for Luxury and Avarice; for all would have ſomewhat, and none would have too much. The Commonwealth of the *Jews*, inſtituted by God Almighty, proves moſt Artiſans to be unneceſſary; and tho' a preſent Innovation in this Point may ſtarve ſome, yet it would not ſtarve ſo many, as might be eaſily entertained upon what the Luxurious and Avaritious poſſeſs beyond a due Meaſure: And in a little Time, all theſe Artiſans, who now drudge to pleaſe Luxury, would follow other Trades, whereby they might pleaſe God Almighty much better; whoſe Service is the chief End of Man, and to pleaſe whom is his chief Happineſs. And theſe Arts neither provide Meat nor Drink, as the Husbandman does: From which it follows clearly, That Husbandry, and not theſe Trades, ſuſtains the World. And there would be need of no ſuch Arts to draw Money from the Rich for the Supply of the Poor, ſince this would bring Men to a greater Equality as to Riches and Poverty. It is very obſervable, that many of theſe Tradeſmen ſtarve, whereas few Husbandmen do; and it is alſo obſervable, that Prodigality and Luxury entertain always the worſt of Men, for they are ordinarily ſuch who trade in Things that pleaſe the Vicious: Men being either by Force, or Cuſtom, eaſily induced to imitate the Maſters on whom they depend, and to eſteem thoſe whom they ſerve: Whereas the frugal Man not only chuſes fit Occaſions on which to ſpend his Money, but Perſons worthy of his Employment. And yet if Men do beſtow their Money upon Perfumes, Pictures and ſuch other Baubles, with Deſign to let it fall into Hands which needed it, their Sincerity in this Deſign will certainly reſcue them from the Severity of a Cenſure which they would otherwiſe deſerve.

*Sect.* 8. This Diſcourſe is not deſigned againſt true, but immoderate Pleaſures.

THIS Diſcourſe tends not to forbid the Uſe of all Pleaſure, nor even the pleaſing our Senſes; for it is not to be imagin'd, that God Almighty brought Man into the World, to admire His Greatneſs, and taſte His Goodneſs, without allowing him to rejoyce in theſe Things which he ſees and receives. The beſt Way to admire an Artiſt, is to be highly pleas'd with what he has done: And a Benefactor is ill rewarded, when the Receiver is not pleas'd with what is beſtow'd; his Joy being the juſteſt Meaſure, and Standard of his Eſteem. We find, that in *Eden* the taſting of all the ſweet and delicious Fruits was allowed, ſave only that of the Tree of Knowledge: And why ſhould all theſe Fruits have been made ſo pleaſant to the Eye, and ſo delicious to the Taſte, if it had not been to make Man, His beloved Gueſt, happy there? And I really think that the Eye has got the quality of not being ſatisfied long with any Object, nor the Ear with hearing any Sound, to the end that they might by this Curioſity, be obliged to ſeek after that Variety in which they may every Moment diſcover new Proofs of their Maſter's Greatneſs, and Goodneſs. But I condemn the pleaſing of the Senſes only, where more Pains is taken, and more Time is ſpent in gratifying them, than is due to thoſe inferior or leſs noble Parts of the reaſonable Creature. The Soul being the nobler and more ſublime Part, our chief Care ſhould be laid out in pleaſing it, as a wiſe Subject ſhould take more Care in pleaſing the King, than his Miniſters, and the Maſters, than his Servants. The true and allowable Luxury of the Soul conſiſts in Contemplation, and Thinking, or elſe in the Practice of Virtue, whereby we may employ our Time in being uſeful to others: Albeit when our Senſes, and other inferior Faculties have ſerved the Soul in theſe great Employments, they ought to be gratified as good Servants; but not ſo as to make them wild Maſters, as Luxury does, when it rather oppreſſes, than refreſhes them. I do alſo think that our chief Pleaſure ſhould not be expected from the Senſes; becauſe they are too dull, and unactive to pleaſe a thinking Man; they are only capable to enjoy little, and are ſoon blunted by Enjoyment: Whereas Religion and Virtue, do by the raviſhing Hopes of what we are to expect, or the Pleaſant remembering of what we have done, afford conſtantly new Scenes of Joy, and which are juſtly augmented by the concurring Teſtimonies of the beſt of Mankind, who applaud our virtuous Actions, and decry the Vicious. So that the virtuous Man is by as many degrees pleaſed beyond the Vicious, as the paſt and future exceed the ſingle Moment of the preſent Time, or as many Suffrages exceed one. Nor doubt I, but theſe who have relieved a ſtarving Family by their Charity, have feaſted upon the Little which they have beſtowed with more Joy, than ever *Lucullus*, or *Apicius* did, in all the Delicacies their Cooks could invent. I am convinced, that any generous Gentleman would be much more troubled to think, that his poor Tenants who toil for him, are ſcrued up to ſome Degrees that look too like Oppreſſion, than he could be pleaſed with any Delicacies which that ſuperplus of Rent could buy for him; and that he who has reſcued a poor innocent Creature from the Jaws of a ravenous Oppreſſor, finds a greater Joy irradiated on his Spirit, by the great and juſt Judge, than any General does in that Night, wherein he has defeated his Enemies merely for his Glory. We remember to this day with Veneration and Eſteem, *John* the Baptiſt's Locuſts and wild Honey; but the Deliciouſneſs of *Herod's* Feaſts laſted no longer than the Taſte: And even the Pleaſure of the preſent Moment, which the Luxurious only enjoy, is much leſſened by the prevailing Conviction, which ariſes from that ſmall remaining Force, which is ſtill left in the reaſonable Faculty of the moſt corrupted Men; and which can never be ſo blinded, as not to have ſome Glimmerings, whereby it can diſcover the Uglineſs and Deformity of Vice. It may ſurprize a ſerious Man to ſee, that Men immediately after being at the Sacrament of Baptiſm, or about the Celebration of Marriage (which all acknowledge to be of Divine Inſtitution, and which many own to be a Sacrament alſo) they ſhould run out immediately into ſuch luxurious Extravagancies, as may make Lookers-on rather conclude, that they acknowledge no God, than that they are obliged to Him for thoſe great Mercies, or that they hope by their Gratitude, to improve them into Bleſſings.

*Sect.* 9. Whether Avarice, Prodigality, or Luxury be the more dangerous.

WHETHER Avarice, Prodigality, or Luxury be the more dangerous and polluting Vice, is leſs worth our Care than the avoiding of all Three: But however, it ſeems that Avarice lies under more Diſadvantages, than any of the Two: For Prodigality and Luxury are uſeful to many, Avarice to none. Theſe are ordinarily the Extravagancies of Youth, and are cured by Age; but the other grows ſtronger by it. Intereſt and Self-preſervation may contribute much to cure theſe, but both do argue moſt frequently to the Advantage of Avarice. Theſe have a great deal of Liberality in their Compoſition, and Prodigality has all that Liberality has, except its Moderation; whereas Avarice has nothing of Virtue in it. Luxury wants many Things, but Avarice all Things. Luxury may ſeem the more deſirable Quality in a Governour, becauſe they who love to pleaſe themſelves, are obſerv'd to deſire all may be pleaſed about them; or at leaſt, they are ſo buſy in pleaſing themſelves, that they are not employ'd about thoſe new Projects, which avaritious Rulers are ever inventing. The Luxurious alſo are more eaſily influenc'd, and more exorable, becauſe they will not endure the Torture of oppoſing the Importunity of the Miſerable. But I have heard it aſſerted, That the Luxurious make the worſt Soldiers, becauſe that Vice effeminates and ſoftens; whereas Avarice makes Men hardy and laborious: And the Love of Pay and Preferment will make the very Noiſe of Cannons become melodious. However, *Agur* thought it worthy, not only of his Wiſh, but of his Prayer, *That God would give him neither Poverty nor Riches, but would feed him with Food convenient for him.* And as the Life is compared to a Lamp, ſo like a Lamp it burns longeſt and cleareſt, when it is neither oppreſt with too much Oil, nor ſtarved for want of it: And in this likewiſe we have Occaſion of admiring the Wiſdom and Goodneſs of God, who when we break all Squares, forces us even by our Vices to balance one another: And makes Things return to that juſt Proportion, which He at firſt deſigned. Thus He not only opens every wiſe Man's Eyes, to ſee that it is his Intereſt to hold the Scales equal, betwixt Riches and Poverty: But when any vicious Man runs to an Extreme in any of the Two, all others, tho' as vicious as he, find it their Intereſt to lie heavy upon the other Scale. If any affect an univerſal Monarchy, all Princes who are not Fools, or guided by Fools or Knaves, combine againſt him; if a private Neighbour do avaritiouſly incline to oppreſs, he will join even thoſe who were Enemies before, in a firm Deſign of bounding his Violence: And the Avaritious and Luxurious are in a conſtant Enmity againſt one another. So that while each endeavours to draw that which is contended for to his own Side, it muſt neceſſarily remain in the Middle: And whilſt the frugal and virtuous Man is going about his Affairs, he is ſecur'd by vicious Men's being Spies upon one another; and the very ſeeing them run to an Exceſs, is a new Obligation on ſuch as are wiſe, to pray with *Agur*, That God would give them neither Poverty nor Riches. Every ſingle Man alſo has the ſame

Balance within himſelf; and thus, tho' the exceſſive Love of Money incline a Man to oppreſs, yet the Fear of being oppreſſed, ſtops his Career: And many would pollute themſelves and others by Adultery, Gluttony, *&c.* if Avarice would allow them to go to the Price: He who is fondeſt of Pleaſure, is forced by the Fear of Law, and the Love of Health, and Self-preſervation, to imitate that Moderation, which he would otherwiſe neglect: For if he have enjoy'd too much at any Time, he is cloyed with his own Exceſs, and is forced to commend the Temperate whom he formerly ſcorned.

A pleaſant View of what Effects Frugality would produce in the World.

THE chief Thing that can recommend Frugality to all Men, but eſpecially to Magiſtrates, is that it employs every Thing to the Uſe for which it was ordained. If Men were enamour'd with it, and made it their chief Care, we ſhould ſhortly ſee bloody Wars ceaſe every where, ſince (let Men talk now what they pleaſe of Glory) the great Deſign of the War, is rather to gain Land, than Reputation; of which this is a convincing Proof, that thoſe who talk of Glory, take more Pains to gain Towns and Countries by Bribes and Cheats, than by expoſing their own Perſons to Danger, or obſerving Capitulations. Nor ſhould we ſee Monarchs betray'd by their Miniſters, nor Commonwealths by their Rulers, as now moſt frequently they are; Stateſmen would not ruin their native Country, and conſequently their own Poſterity, that they might get ſuperfluous Riches; nor would ſuch as are under their Care be tempted to rebel againſt their Sovereign, to be free from their Oppreſſion, and to enter into Combinations againſt thoſe Rulers; but Reaſon would make all our Laws, and Duty would make us obey them.

*Sect.* 10. How happy the World would be, if Men would be moderate in their Expence and Pleaſures.

IF Frugality prevailed, it would open the Store-houſes of Charity, the Poor would be fed, the Sick would be taken Care for, and the Priſoner would be relieved. This would reſtore Men to their Sleep, which is now oftentimes broke by the Fear of Want, or the Oppreſſion of Abundance. This would prevent the Melancholy cauſed by the one, and the many Diſeaſes occaſioned by the other. And we ſhould have a ſatisfied Mind in a ſound Body: A frugal Woman's ſtaying within Doors, would prevent the Jealouſies of her Husband; and the Husband by minding his Buſineſs, would thereby ſecure her againſt the infecting Diſeaſes which he contracts in his Idleneſs: And Parents living thus regularly, would not have Children who will prove rather Croſſes than Comforts, wiſhing either their Parents dead through Avarice; or making them Beggars during their Life by Luxury.

FRUGALITY would enable every Man to live ſo well, that the Servant needed not cheat his Maſter, nor the Tenent the Landlord; but on the contrary, every Man would take as great Pleaſure to help his Neighbour, when he needed his Aſſiſtance, as Men do now in Hunting and Hawking; and certainly there muſt be more Delight in helping a reaſonable Creature, bearing the Image of God, that is in Diſtreſs, than in riſing early, and ſitting up late, and giving ourſelves far more Toil and Vexation than Frugality requires, merely to kill poor innocent Creatures that never offended us. I know that it is hard to reform a World, wherein that which *is wanting cannot be numbered, and that which is crooked cannot be made ſtreight.* And it ſeems, that ſuch Devils as Avarice and Luxury, cannot be caſt out without Faſting and Prayer; but yet the oppoſing of theſe, is ſo much every Man's Intereſt, and is ſo ſuitable to Nature (from which Men will get all poſſible Aſſiſtance) that if Kings and Governors would concur with God and Nature, the Task would be eaſy, as the Effects would be pleaſant. I cannot but commend moſt cordially the *Quakers*, who have let us clearly ſee, that if Men pleaſe, they may emancipate themſelves from the Tyranny of Cuſtom in this Particular; and this one excellent Endeavour does not only give them much Tranquility, and enables them to help all thoſe of their Perſuaſion to a Degree that is to be admired and commended, but it really makes them acceptable in the Neighbourhood, and atones very much for the other Irregularities with which they are charged; and they may convince us, at leaſt in this one Point, That if ſuch as have much Power and Reaſon ſhould concur together, they would eaſily make Mankind Happy, by making them Frugal.

*FINIS.*

# REASON.

## AN

## ESSAY.

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### For the Honourable

### *ROBERT BOYLE* Eſq;

*I Know nothing* (Sir,) *more inconſiſtent with right Reaſon, or which deſerves more to be reform'd amongſt learned Men, than their Way of Dedicating Books. And, that we may the better underſtand what ought to be done in this Age, let us look back into what was done by the Ancients.*

*THE Poets did indeed invoke their Gods, or the Muſes, in the Beginning of their Works; but that was rather to obtain their Aſſiſtance, than to beſtow upon them Panegyrics: But their praiſing the Gods, was a ſafe Subject, in which they could not exceed. And therefore, tho' theſe Invocations were the firſt Occaſion of writing Dedications to Mortals, yet Flattery in this made them miſtake their Model ſo far, that at laſt ſome of the Poets did likewiſe invoke the Aſſiſtance of their Emperors, as if they had been Gods as well as Patrons.*

*OTHERS of the Poets did very anciently dedicate their Works to Men alſo: As* Heſiod, *who was older than* Homer, *dedicates, or rather addreſſes his firſt Poem to* Perſes. *But 'tis very obſervable, that he and others, in ſuch like Addreſſes, rather excite the Perſons (to whom they addreſs) to Virtue and Glory, than magnify them for having attain'd to the Perfection of either, or both. Yet ſome of theſe Poets have left us Dedications ſo excellent, that they are as little to be imitated as cenſur'd; ſuch as,* HOR. *Epiſt.* 1. *Lib.* 2.

Cum tot ſuſtineas & tanta negotia ſolus,
Res Italas Armis tuteris, moribus ornes,
Legibus emendes; in publica commoda peccem,
Si longo Sermone morer tua tempora, Cæſar.

*AND others of them, ſuch as* Virgil, *end their Poems with very decent and delicate Compliments; as that which cloſes the Fourth Book of his* Georgics,

Hæc ſuper arvorum cultu pecorumque canebam,
Et ſuper arboribus: Cæſar dum magnus ad altum
Fulminat Euphratem bello, Victorque volentes
Per populos dat Jura, viamque affectat Olympo.

*which exceed, in my humble Opinion, the fam'd and large Dedications of* Grotius *and* Cauſabon.

*IT was uſual amougſt the modeſt Ancients, to addreſs their Books to ſuch as they thought able to correct them, ſeeking rather Advice than Patronage. And thus* Plutarch *tells us in the Life of* Lucullus, *That* Scylla *having wrote an Hiſtory, ſent it to* Lucullus *to be corrected; and the* Greek *Word uſed there, ſeems to me to import only* Adlocutio. *And I think that the Ancients have found Protection and Patronage, even in thoſe Addreſſes wherein Advice was ſought for. Who durſt have cenſur'd, as* Tully *obſerves, what* Brutus *or* Pomponius Atticus *approved?*

προσεφώνησε.

*SOME alſo prefix'd modeſt Prefaces; wherein they acknowledg'd the Favours done them, and told the Occaſion of their Writing; as* Vitruvius *to* Auguſtus. *Others did thereafter, in Imitation of the Writers of* Tragedies *and* Comedies, *addreſs themſelves in a Prologue; as* Valerius Maximus *to* Tiberius: *And this I think he did, to give his Fancy Scope, as a Poet, to praiſe with the Latitude that Poets take. For that is the firſt Debauch I find committed of this Kind; for he could not have ſaid greater Things to a worſe Man.*

*TO ſhun which Exceſs, ſome gave to their Books the Names of the* Muſes, *as* Herodotus; *or of Men of great Merit, as* Plato *did in his* Socrates, *or* Tully *in* Lælius, &c. *or elſe omitted all Addreſſes, as* Thucidides, Livy, Saluſt; *or at moſt extended not their Addreſſes beyond a mere Compellation, ſuch as that of* St. Luke *to* Theophilus; *by which poſſibly may be meant any Chriſtian under this appellative Name, rather than a particular Patron or Friend: As ſome Books are now addreſs'd to the Chriſtian Reader, in Imitation, it may be, of him. For 'tis obſervable, that the Churchmen imitate this* Κράτιϛε Θεόφιλε *of St.* Luke. *And thus* Origen *dedicates his Book againſt* Celſus, *with this Compellation,* Φιλέθες 'Αμβρόσιε; *and* Euſebius *names his Patron* Θεόδοτε Φιλεθεῦ

*AT laſt the Word* Dedication *was brought in by Flattery; and Books were dedicated to Men in Imitation of their dedicating Temples, Statues, and other Things to the Gods. Nor did this extravagant Way of exceſſive praiſing ever appear, till the World was (under* Tiberius) *corrupted in all its Morals. This deprav'd Cuſtom was alſo much heightned by the Panegyrics made by* Pliny *to* Trajan, *and by* Euſebius *to the great* Conſtantine; *who thought that they might more juſtly praiſe the good, than others might the impious Emperors; tho' I'm afraid, the Eloquence which charms us in thoſe two Diſcourſes, ſhall never be able to account for the ill Example they have given.*

*MY Deſign in all this is to ſhew, That we can as little juſtify our Flattery by the Practice of the Ancients, as by the Principles of Reaſon, by which they always regulated their Eloquence. And therefore it ſeems to me, that Dedications ſhould be brought back to the ancient Model, either of a naked Compellation, which ſatisfies abundantly Friendſhip, or of acknowledging Favours, which ſatisfies Gratitude, or of exciting the Perſons to whom we write, to deſerve thoſe Praiſes which are now moſt unjuſtly beſtow'd upon them, which is a Chriſtian Duty. And I cannot but obſerve Three very ill Conſequences which ariſe naturally and neceſſarily from our late Dedications: The Firſt is, That they learn Men to lye and flatter; and Cuſtom hath almoſt legitimated this Crime, and made it a Duty. Secondly, They have poiſon'd the very Fountains of Truth ſo far, that Poſterity can hardly diſtinguiſh betwixt thoſe who have deſerved well or ill; Flattery thinking always fit to ſupply, by its exceſſive Praiſes, what is wanting in due Merit. And therefore, by how much their Patrons deſerve ill, they praiſe ſo much the more; and the only Mark of Virtue in an Author, or Merit in a Patron now is, That there is no extraordinary Thing ſaid in any Addreſs to the one by the other. For who can believe an*

*Author ſpeaks Truth in his Book, who lies and flatters in its very Beginning; or that a Patron has any Modeſty or common Senſe, who ſuffers himſelf to be ſo impoſ'd upon? If the Patron believe what the Author ſays, he muſt be a Fool; and if he believes him not, he muſt think the Author one; and ſince they who lie improbably, are thought Fools in all Things elſe, Why not in this too, in which they exceed the moſt romantic Travellers? for they only would impoſe on us in Things which we know not, but theſe, in Things wherein we cannot but diſcover them. And I wonder why they do not as well praiſe the* French *King for having found out* America, *or for having vanquiſh'd* Alexander *the Great, as for thoſe Things which they of late aſcribe to him in their Dedications. Thirdly, Our late Dedications have really corrupted the Eloquence of the Age; for whereas the true Ornaments of Eloquence are, to be natural and decent in expreſſing out Thoughts, theſe Dedications have blown our Stile into a Tympany, and have ruin'd its natural Beauty by fulſome and ill-plac'd daubing Paints: † Which made* Chryſippus, *as* Laertius *tells us, decry all Dedications to Kings and Princes, leſt they ſhould entice Men to Flattery; but this were to run from one Exceſs to another.*

† Δοκεῖ δὲ ὑπερόπτης τὶς γεγονέναι τοσαῦτα γοῦν βιβλια γράψας, οὐδενὶ τῶν βασιλέων προσεφώνησε.

*I DESIGN, Sir, nothing in this Eſſay, but to hold out a Lantern to thoſe who are ready to ſplit on a Rock; and I wiſh rather that this may be* one of the Works that may follow me, *than one of thoſe that may bring me Reputation: And I ſend this to you, as* Lucullus *did to* Scylla, *for Correction; or as* Cicero *did to* Atticus, *as a Token of our Friendſhip, and of my juſt Eſteem of your Piety and Learning.*

G. M.

# PART I.

## *How weakly Men reaſon in Matters of greateſt Importance.*

IT may ſeem a bold Undertaking in any Man to own right Reaſon in this Age, it being the declar'd Enemy of our Intereſts and Inclinations; for it may poſſibly excite Man to reflect upon what the World and himſelf does; and ſo inſpire him with Thoughts contrary to thoſe which are generally received; and that is the only unpardonable Error. It may likewiſe ſeem ridiculous to think, that there is any common Standard of Reaſon amongſt Men, ſince that charms in one Country, which is abhor'd in others; and the very imaginary Lines which divide Kingdoms, ſeem likewiſe to divide their Way of Thinking, and to make a different Geography in the Reaſon which they adore, as well as in the Earth on which they trample. Every Age of the World has almoſt had a different Way of Reaſoning; and every Age in Man ſuggeſts to him contrary Thoughts: In the Preſent, he condemns what himſelf formerly admir'd: So little Influence has it upon the beſt refin'd Judicatures and Aſſemblies, that the moſt infallible Churchmen, the moſt learn'd Judges, and the moſt zealous Patrios, muſt truſt to Voting, becauſe they cannot to Reaſoning; and they are by this likewiſe ſo often miſled, that it may be expected Men will one Day agree to decide Matters by the feweſt Votes; as the Wiſer have always told us, That Votes are rather to be weighed, than numbred. It has often griev'd me, that Men could gueſs the Deciſion and Determination of any Point to be debated, before they had the Reaſons to be produced upon either Side; and to hear them laugh at ſuch as truſted to the Solidity of the Reaſons they were to produce; being fully convinc'd that the Point would be determin'd by Intereſt, and not by Reaſon. The *Inka* of *Peru* was much in the right, when he regretted, that his Predeceſſors had not oblig'd him to worſhip a reaſonable Man; yet his Choice in this had been unſucceſsful; for it would have been as hard to have found him, except he had believed his Prieſt, who had undoubtedly told him he was the Man. And tho' I believe not that *French* Phyſician, who aſſures us, he found in his Travels a Nation that differ'd altogether from us in our Way of Reaſoning, as if God deſign'd to ſhew Mankind that His Omnipotency is not tied in this to any known Meaſures; yet I ſee, even amongſt ourſelves, that Conveniency (the gentler Name of Avarice) Pride, Revenge, Bigotry, Education, and every Thing elſe, paſs for Reaſon, except Reaſon itſelf; which makes me oft-times cry out, *Is this that nobler Cerature form'd after the Image* *of God, for whom Chriſt died, and who is to be Co-heir with Him of His everlaſting Kingdoms?* All which notwithſtanding, it is undeniably true, that there is ſomething in Man more ſublime than can be aſcrib'd to Fleſh and Blood; that dull Matter could never inſpire him with theſe penetrating, ſubtile, comprehenſive, generous, and elevated Thoughts, which made the Pagans believe, that his Soul was *particula Divinæ naturæ*, a Parcel of that ſame Divine Subſtance of which the Gods were formed; and that Men ſo qualified were Demi-gods. And God Almighty Himſelf has by a ſurer Revelation reveal'd to us, That this noble Soul was formed after His Image; and it was moſt conſequential, that God who is infinite, being to communicate Himſelf to ſome of His Creatures, to the end His Greatneſs and Goodneſs might be known to them, He ſhould, in order to this, breathe into them ſomewhat that might comprehend, at leaſt, ſome Idea's of that infinite Perfection; and therefore it was neceſſary that the Soul ſhould be an Image of what was infinite. And that we might underſtand this from ſome exterior and ſenſible Repreſentations and Things, He has form'd his very Body (the Casket wherein that noble Jewel is kept) after a very wonderful Manner; thus by ſmall and interceptible Rays darted into his Eye, the Repreſentations of the vaſt Hemiſphere are imprinted ſo on that little Tablet, that it ſeems as great and diſtinct there, as in the Original; all he ever heard is laid up in his Memory, as diſtinctly as Papers in a Cabinet. And almoſt by the ſame Motion of the Tongue, or at leaſt, without any ſtudied Variation, vaſt Numbers of delicate Words, or harmonious Sounds, do, in a Way unknown, and unperceptible by Fleſh and Blood, ſally out in mighty Swarms and Armies, which paſſing thus undiſcovered, thro' the Air, enter at many Thouſand Ears in the ſame Figure, Ranks and Files, wherein they were at firſt ſpoke; and there, in a ſpiritual Way, they charm ſome, and enrage others; they animate ſome, and diſcourage others; working almoſt as great Varieties as they bring.

DIVINE Wiſdom alſo foreſeeing that Intereſt would perſuade Men to pull all to Pieces, whilſt each drew all to himſelf, he impreſt upon this Soul common Principles, which even thoſe muſt reverence who neglect them; and therefore they err, not in the Rule, but in the Application, and cheat themſelves by Subterfuges; the recurring to which infers neceſſarily, That theſe Principles are ſubmitted to by the moſt ſtubborn, and ſomewhat reſpected by the wildeſt in ſublunary Matters; and yet in what concerns our immortal Souls, and eternal State, we are more negligent; as will appear too clearly by theſe following Particulars, which I have claſſed according to their different Inferences.

I have oft-times admir'd to ſee Men buſied about nothing, ſave external and ſenſual Objects; but it is yet ſtranger to find, that amongſt ſuch as are convinc'd that Knowledge is as much to be preferr'd to all other Things, as the Soul is to the Body, there are yet ſome ſo ſenſual, even in this Point, that the Knowledge they ſeek after is but a more delicate Senſuality. Mathematicians conſider chiefly how to meaſure Bodies; Phyſicians how to know and cure Men, as Soldiers do how to deſtroy them. But the Study of Chriſtian Morality (which has for its Object the Soul of Man heighten'd by the Chriſtian Religion, teaching him how to underſtand the Duty of that Soul to God) is too much neglected, as a Thing obvious and eaſy. Whereas when our Saviour came into the World, He neither taught Mathematics, Medicin, nor Phyſiology, tho' all theſe were much conſider'd in that Age wherein He aſſum'd our Nature; and He could have made Himſelf as much admir'd by clearing myſterious Doubts in theſe, as by working Miracles: But He paſſing by all theſe as leſs uſeful Notions, and ſuch as too frequently divert and diſtract, rather than inform, He declares He was come to make Man happy; and begins His Miniſtry by an admirable Sermon on the Mount, whereby in order to the making him happy, He teaches him to reaſon rightly upon his Duty to God and Men. And it is ſtrange, that we ſhould think dull Matter is able to afford more noble Contemplations, than that ſubtle, that ſublime, that vaſt, and that nimble Soul, which retains ſo far the Image of its Maker, as to be inſcrutable in all its Faculties. And O! what wonderful Springs and Motions, what various Windings and Flights, what boundleſs and new Spheres and Worlds are there in his Reflections? And what Things are daily ſaid, and Volumes written on the Love to Women, which is but the Excurſion of one of them? Our Diſeaſes cannot conceal themſelves, being tied to Matter; but the Diſeaſes of our immortal Souls are ſo concealed by Self-Love, which loves to cover its own Imperfections, and to hide its own Retreats, that they are paſt finding out. And if a little Microſcope can diſcover to the Eye new and ſtrange Things in Objects that have been daily ſeen, without being conſider'd for many Ages; what wonderful Diſcoveries may ſerious thinking Men make in ſo immenſe an Object, that has been ſo much neglected? Eſpecially, ſince the Thoughts of Men do change and vary themſelves into as many Shapes, and give themſelves as many Colours as they pleaſe: And every Duty or Error is really a different Object, as they are in Conjunction with, or in Oppoſition to one another; whereas all other Objects are incapable of ſuch Variations either from themſelves or others: And tho' God has deſign'd to be known in His Works, yet He ſeems on Purpoſe to have made the Knowledge of them ſo unſearchable to natural Philoſophers, and the Succeſs ſo little able to reward or honour their Endeavours, to the end they might the more reliſh Moral Philoſophy, which is then only uncertain when like the other it grows more a Science than a Duty.

In my Reaſoning I will uſe the Forms preſcrib'd by God Himſelf in His holy Scriptures; wherein when He would convince Man of his Folly, Sin, or Ingratitude, He argues with him from his own Conceſſions in theſe Caſes, or his own Practice on all other Occaſions: As for Inſtance, when He ſends *Nathan* to *David*, He asks him what the Man deſerv'd, who having great Herds and Flocks of his own, took a poor Man's Lamb out of his Boſom? And *David*, having in great Anger ſworn that he ſhould die, *Nathan* then tells him, it was his Caſe, and condemns him from his own Mouth. And God ſays to His People, who acknowledg'd Him to be their Lord and Father, but walk'd not ſuitably to their Acknowledgment; *If I be a Father, where is Mine Honour; and if I be a Maſter, where is My Fear? Malachy* 1. 6. He calls to them, *Iſaiah* 1. 18. *Come, let us reaſon together*; and admiring the Unreaſonableneſs of unthinking Man, He appeals to the Heavens and Earth, *Hear, O Heavens, and give ear, O Earth, for the Lord hath ſpoken; I have nouriſhed and brought up Children, and they have rebelled againſt Me. The Ox knoweth his Owner, and the Aſs his Maſter's Crib; but* Iſrael *doth not know, My People do not conſider*. And in the ſeveral Goſpels we find our bleſſed Saviour, after the ſame Manner, confuting the *Jews*, and convincing all His Hearers. Nor do I find ſo much delicate Reaſoning in any of thoſe Books, highly eſteem'd by our Men of Senſe, who ſlight too much that admirable one, which God Himſelf owns as His ſacred Word: And I admire our Saviour, as much for His Reaſonings as for His Miracles. Thus when He would convince Men of the Folly of caring immoderately for the Things of this World, He asks them, What Profit ſhall it be to gain all the World, that ſoon periſhes, if they loſe their own Soul, which is immortal? *And which of you,* (ſays our Lord) *by taking Thought, can add one Cubit to his Stature?* And urges them, not to fear Want, becauſe, if they who are ſinful know how to provide for their own Families, how much more ſhall your Father, which is in Heaven, know how to provide for you, if ye be His Children? *Behold,* (ſays our bleſſed Maker) *the Fowls of the Air, for they ſow not, neither do they reap, yet your Heavenly Father feedeth them; are not you much better than they?*

For eſtabliſhing this my Poſition, it is fit to conſider, that ſuch as are reaſonable, endeavour to ſhew it in the greateſt Concerns; and it implies a Want, or Weakneſs of Reaſon, to be exact and delicate in inconſiderable and ſilly Things, and yet to err and be careleſs in Matters of greateſt Conſequence: And who would not laugh at an Ambaſſador or a General, who would value himſelf upon his dancing or playing upon the Lute, beſtowing upon theſe Exerciſes the Time due to his King, Country, and Negotiations? Which makes me admire, why in this fooliſh Age, we call theſe Men of good Senſes, and ſtrong Spirits, who can criticiſe *Virgil, Juvenal, Livy, Tacitus,* or it may be, underſtand the Mathematics, or Converſation; whilſt we are convinc'd, that albeit they believe there is a God, yet they mind Him not, and care leſs for their Souls than they do for any of their ordinary Recreations, tho' they are forc'd to tremble at its ill Condition, when they begin to conſider it.

One of the Things which prompted me to write this Book, was the reading of a *French* Treatiſe, *De la Juſteſſe*, wherein, tho' he made me expect great Matters, by promiſing to learn us to think juſtly; yet it only taught how to chuſe true Epithets, or underſtand Criticiſms, and ſuch trivial Knacks: But, alas, it is more to be regreted, that Men ſhould have the Senſe to laugh at others, for not having conſider'd the Plot and Deſign of their Plays; whilſt many who paſs for refin'd Wits, want one in their whole Life; and where the Want of it is not only a greater Shame, but is of greater Danger, ſince a Man cannot err here without being ruined to all Eternity: And one of theſe great Wits, without a ſolid Deſign in his Life, appears to me like a glorious Firſt-rate Ship, magnificently equipp'd, richly gilded, and abundantly provided of all Neceſſaries; but becauſe it wants a Rudder, and a ſkilful Pilot, fluctuating in a great Storm, and near a dangerous Shore, on which it is driven with Violence, threaten'd by the Wind, and overflown by the Billows; ſometimes ſhatter'd by one Rock, and ſometimes by another, till at laſt it ſinks down irrecoverably into an unfathomable and dreadful Abyſs. Whether then is the Owner of this Ship, who looks on unconcernedly, and perhaps, would not leave his Whore, Game, or Supper; or that Poet, who wrote his Play without a Plot, moſt to be contemn'd? Yet he who has no Deſign to ſave his immortal Soul from endleſs Torments, is a much greater Fool than either; which recommends to me the Senſe of a wiſer, tho' a Heathen Poet, on this Subject; and which I wiſh the whole Tribe would ſeriouſly conſider.

*Diſcite, O miſeri, & cauſas cognoſcite rerum,*
*Quid ſumus, & quidnam victuri gignimur, ordo*

*Quis datus, aut metæ quam mollis flexus & unde*
*Quis modus argento, quid fas optare, quid aſper*
*Utile nummus habet: patriæ cariſque propinquis*
*Quantum elargiri deceat: quem te Deus eſſe*
*Juſſit, & humana quâ parte locatus es in re.*

It is a pleaſant Thing to hear us admire Men; for conſidering exactly the Anatomy, Specialities, and Natures of Fiſhes, Fowls, Flies, and other Inſects; and yet never conſider whence themſelves came, whither they are going, or what is their Duty whilſt they remain here. And I wonder why we ſhould think it juſt, to look upon Men in *Bedlam*, tho' they be very reaſonable in many Things, if they be very diſtracted in any one; as I know one, who ſeem'd a diſcreet Perſon, and could converſe moſt pertinently in every Thing, till they ſpoke of the Moon, but upon hearing that nam'd, fell inſtantly a ſtaring, and into great Extravagancies, believing himſelf to be Secretary to the Moon. And others will be diſcreet enough, till you mention the Name of ſuch a Man or Woman; and yet we do not conclude ſuch mad and diſtracted, who, tho' they underſtand to meaſure Heaven, never deſign to enter into it; and who can eloquently convince Men of eternal Torments, and fright them from the wicked Courſe which lead to theſe, and yet ruin themſelves on the Precipices againſt which they guard others. And who would not think a Phyſician mad, for all his Skill, if after he had made a learn'd Diſcourſe to prove a Liquor to be Poyſon, he ſhould drink it off himſelf; and yet more, if he would not take an Antidote, tho' ready, and which he knew would ſecure him?

I ſhall but lightly touch that ridiculous and impudent Extravagance of ſome, who rather pretending to Reaſon, than having it, take Pains to perſuade themſelves and others, that there is not a God; whilſt even the Subtilty which they uſe, when they are endeavouring to prove this their Aſſertion, does neceſſarily prove His Being: It being impoſſible, that Matter and Chance, (their great Idols) could forge and poliſh ſuch ſubtile Notions: And how can they imagine, that ſince their own little Affairs could not be managed without Foreſight and Conduct, that yet this great and glorious Univerſe, which comprehends ſo many Millions ſuch as they, ſhould be ſo exactly and juſtly governed by blind Chance? If there were no Men but the ſilly and humorous Aſſerters of this Opinion, I ſhould be aſhamed to bring Man as an Inſtance of the Power and Wiſdom of God: Let us then conſider this Creature, form'd of I know not what, fed, breathing, and growing in the Womb, we know not how; but from theſe deſpicable Beginnings, one riſes in a ſhort Time, to meaſure the Heavens, to calculate their Motions, and to imitate their Lightning and Thunder; another does for his own Glory, form ſuch Models of Religion as ſeduces, and draws after him Millions of Men, contrary to their former Intereſts, as well as former Inclinations: A Third, by his Skill, Conduct, and Courage, makes even the remoteſt Countries of the World to tremble, overturning, and confounding that World, whereof he is ſo ſmall a Part: And a Fourth, by drawing ſweetly and gently together very diſtant and different Reflections, and Thoughts which come readily, as it were upon his Call, from their ſeveral Repoſitories, forms an Harangue, or a Poem, which pleaſes or torments the Hearers irreſiſtibly, as they have Commiſſion from their Author; it being harder to reſiſt them than to make them: Can ſo regular Things be aſcribed to wild Chance, or ſuch ſubtile Things to dull Matter, which by its Nature moves neceſſarily and without Choice? The beſt contriv'd Machine can only repeat; but Man chuſes his own Thoughts, and varies or changes them as he pleaſes.

I deſire our Wits to conſider, that every Thing which they ſee, or know, is ſo marvelouſly ſitted to ſome Uſe, that as they could not be wanted, ſo they cannot be contrived better: And it is ridiculous to anſwer with *Epicurus*, (who, tho' he denied Providence, yet denied not a Deity) that theſe Things were not made for theſe Uſes, as we pretend, but were, in Proceſs of Time, made uſe of to theſe Ends by Wit or Neceſſity: For even Brutes do immediately after they are brought forth, run to thoſe Things which they need, with greater Exactneſs than Man could teach them. And how could Men, by Reaſon, make every Thing uſeful, if ſo infinite a Being did not direct and ſuperviſe their almoſt infinitely various Neceſſities and Deſigns, and inſtruct them, by the Uſe of Thinking, (that wonderful Engine) to accommodate every Thing to its true Uſe? The next Thing I recommend to them, is to conſider that all the Principles of Juſtice and Government, without which the World could not ſubſiſt, depend upon the Belief of this infinite Being: For how could I convince a Man without this, that it were not fit to poyſon his Brother for an Eſtate; or his Prince, when he thought that by that he might ſtep into his Throne? Which oft-times might be done covertly enough, to eſcape the Puniſhment of Laws, if they could that of Conſcience. Nor is it of any Force to tell us, that Politicians have only invented this for their own Conveniency, ſince even this Anſwer preſuppoſes that there was a Pre-diſpoſition on the Spirits of Men, to receive and ſubmit to this Impreſſion, which is an unanſwerable

Proof of its Truth; and this Trick had not been long believ'd, had it been only ſuch; nor could their Inventions ſecure us againſt private Treachery, tho' it could againſt open Force; nor can I omit to obſerve from this Anſwer, how unfit theſe Men would be to govern others, and how unſufferable they are under all Governments, who thus expoſe to Contempt that which they confeſs to be the great Engine of Government. I might likewiſe urge the Conſent of all Nations; which, by how much they became the more poliſh'd and civiliz'd, do ſo much the more reſt on this Belief. The Certainty that has ariſen from Predictions which are above Nature, and the wonderful Effects wrought by Miracles, even againſt it, are confirm'd to us, by the unerring Teſtimony of thoſe Senſes which our Atheiſts make the only and ſure Teſt of Knowledge. And do not we perceive, that that Light of Reaſon, which by conſtant and penetrating Reflexions, in Time, diſcover'd, overcame, and baffled every Cheat and Error, has notwithſtanding more fully fix'd, aſcertain'd, and clear'd the Being of a God, whoſe Power affords us ſuch Protection; and whoſe Providence affords us ſuch beautiful and pleaſant Contemplations, that to love that Life, without believing His Being, is to be without that Senſe and Wit which theſe wild Sceptics pretend to; who whilſt they ſhun to be miſerable, make themſelves ſo; and whilſt they pretend to paſs for Wits, demonſtrate themſelves to be Fools and brutiſh? I purpoſely avoid the Proof of this by Metaphyſical Arguments, becauſe God's own Way of proving it, is, by deſiring us to conſider the Sun, Moon, and Stars, and the other Objects, which are obvious to all Men; for it was fit, that what was to be univerſally believ'd, ſhould be inferr'd from what was univerſally ſeen: And ſuch as underſtand not thoſe metaphyſical Notions, are apt to believe that there is a Deſign to impoſe upon them.

But ſince our Curioſity muſt be always ſomewhat ſatisfied with Arguments raiſed above Senſe, I ſhall offer this one: It cannot be deny'd, but that there is ſomething in Man that can compare two or more different Things; ſuch as, Whether the Pain of the Head or the Leg be greateſt. And that this cannot be done by any Thing that is material, is very clear: For if ſo, it muſt be done by ſomething that touches at once both the Things to be compared; and no material Thing can do that in the ſame Points: And if it be in different Points, then it cannot judge of the Difference betwixt the Two; for they muſt be touched in one common Point, elſe there can be no Application of the material Judge to both at the ſame Time. And if this Judgment muſt be made by ſomething in Man that is immaterial, and ſo is able to extend its indiviſible Self to both the Things to be compared; then it neceſſarily follows, that this muſt be a Spirit; for there can be nothing immaterial but a Spirit: And if we can once comprehend a Spirit, we can never deny there is a God. For the hardeſt Things that are objected againſt His Being, are thoſe which ſtrike againſt the Being of Spirits in general.

Because few or none are really diſtracted by this Kind of Madneſs, tho' they could wiſh they were, by ſmothering their Reaſon with Illuſions, that they may cover their Crimes to themſelves, with the Hopes of Impunity; I haſten to another Kind of unreaſonable Men, who, tho' they acknowledge there is a God, do yet, by a deplorable Negligence, little mind how to pleaſe and obey Him. And that I may enforce upon my Reader the Weakneſs of their Reaſonings, I wiſh any of us would think, that if a Society of Men were ſhipwreck'd upon, or ſent Priſoners to an unknown Iſle; were it not moſt unreaſonable for them to ſit reading, diſcourſing, or gaming, and not to think who were Maſters of that Iſle, and how they might live in it? And if they learn'd that it belong'd to a great Prince, who had abſolute Power of Life and Death, were it not unreaſonable, not to deſire to obtain his Friendſhip? But much more to reject it, if he offer'd it with Riches and Preferment, upon no other Condition, ſave that they would attend at his Court, love him, and not wrong one another? But this is our Condition in a much ſtronger Caſe: For we are here in a World created by God Almighty, in which He can kill and preſerve, not the Body only, but the Soul too; nor for ſome Time only, but for ever: Nor requires He any harder Condition of us, than that we would *love the Lord our God with all our Hearts, and our Neighbours as ourſelves*; which are ſo far from being hard Leſſons, that one would think we could not but take great Delight in them, if they were not preſcrib'd to us as our Duty. For if a Man be admir'd once for his great Courage, Conduct, or Learning; who would not be pleas'd with being allow'd to converſe with him? Who amongſt us would not have taken Pains to have been lov'd by *Cæſar*, as his Friend, but more, as his Son? But if *Cæſar* had been as expert a Mathematician as he was a Soldier, and could have burnt his Enemies Ships, like *Archimedes*; if he had invented Gun-powder for his Magazines, and found out the whole New World, as well as conquer'd a conſiderable Part of the Old: How much more would we yet have eſteem'd him? And to proceed further; if this *Cæſar* could either have ſav'd his own Life, by knowing the Secrets of, or by killing alone all his Aſſaſſinates, or prolong'd for many Hundreds of Years that of his Servants; we ſhould yet more have rejoyc'd in his Service and Adoption. But what is all this to the infinite Perfection of the Great King of

Kings, whoſe Servants, Friends, nay, and adopted Sons we may be? He it is who govern'd *Cæſar*, as He does the Flies or Ants; who, with one Word, made *Cæſar* and all the World, whereof he conquer'd only a Part, which he was not able to retain. By whoſe Skill the Heavens were ſtretched out, in which vain *Cæſar's* greateſt Ambition was, to be a little Star: Who not only knows, but in one Moment governs all the various, and almoſt infinite Thoughts and Deſigns of Angels, Men, and Devils; and who forces them all, how contrary ſoever to one another, to agree in the great Deſigns He has in governing the World.

WHO would not rejoyce to ſerve a Maſter, that knew when he were innocent, and who, as he is exactly juſt to his Servants, ſo could not be impos'd upon by others, to their Prejudice; and tho' even Swarms of Witneſſes combined againſt them, could ſee thro' the Miſts that they threw up; which no earthly Maſter, how juſt ſoever, can do? But ſuch is our Heavenly Maſter, who can alſo not only enrich us when we are poor, and cure us when we are ſick; but can tame our Paſſions, illuminate our Ignorance, ſtrengthen our Inclinations, ſweeten our Tempers, and make all theſe Joys complete, by the Removal of all Fears or Jealouſies that can end or leſſen them. Can we give any reaſonable Account, why we ſhould be careful to keep the Road exactly, if we knew there were great Precipices on every Hand, into which whoever fell were irrecoverable? And yet knowing, that in our Voyage to Eternity, there are Precipices that lead to dreadful Pits of Fire and Brimſtone, kindled by the Wrath of an angry God; we notwithſtanding, go on careleſly, laughing at ſuch as admoniſh us, and minding little Trifles, which we are convinc'd will pleaſe no longer than we poſſeſs them.

HOW falſly do we reaſon, in reflecting on ourſelves and others? For we think them mad, who endeavour not to get themſelves cur'd, when they find they are tormented with Gout and Gravel; yet who amongſt us is at any Pains, ſo much as to ſeek Remedies for his Paſſions and Vices, which of all other Diſeaſes torment us moſt. And if we heard a Fellow in Livery value himſelf upon the Richneſs of his Suit; would we not eſteem him an airy and fooliſh Creature? But if we ſaw a Man who were condemned, and going to the Scaffold, admire himſelf, and talk of his Power and Glory, would we not conclude him diſtracted? And yet this is the true State of a vain and glorious Monarch, who has nothing but what he has receiv'd from an infinite God, who can recal it when He pleaſes; and who, whilſt he talks of his Glory and Greatneſs, is by that God condemn'd to die as irredeemably, as muſt the meaneſt Slave over whom he inſults. And ſince we would laugh at a vain Coxcomb, who whilſt he were entertaining his Friends in his Maſter's Houſe, as if it were his own, were taken out of it by the Ears, and forc'd to tremble under the Laſh: How ridiculous muſt we conclude *Belſhazzar*, (and which is the Caſe of too many other great Men) who, whilſt he was feaſting all his Nobles, and perſuading them of his Independence, was ſeiz'd by an irreſiſtible Horror, which ſhak'd him all to Pieces.

I doubt not for all this, but learned Men will think they may juſtly value themſelves on their own great Parts and Skill; and you may read long Lectures made by them on this Subject: But how unreaſonable are they in this, ſince theſe Endowments are given them as external Things are given to others? And a School-Boy may more juſtly admire himſelf, becauſe he can repeat excellent Lines made by another; or a Man, becauſe the borrowed Furniture, that he would make us believe to be his own, were within, and not without Door, or were finer than that borrow'd Stuff which another had, whom he deſpis'd. If Two poor Men ſhould borrow, the one Ten, and the other a Thouſand Pounds, the Difference of the borrowed Sums ſhould not ceaſe to leave both of them equally poor. But he is really a wiſe and reaſonable Man, who knowing that what he has is borrow'd, endeavours not to boaſt of it as his own, but to repay (as much as he can) the Intereſt to the true Owner for the Loan. Let us then conclude this Period with the Apoſtle's juſt Reaſoning, 1 Cor. 4. 7. *For who maketh thee to differ from another? and what haſt thou that thou didſt not receive? Now if thou didſt receive it, why doſt thou glory as if thou hadſt not received it?*

BEING once in Company with a great Wit, who ſeeing Two poor Chairmen ſweat in carrying a groſs, corpulent, vain Fellow; he cry'd out, That he had rather be hang'd, than ſerve ſo meanly ſuch a Rogue. Whereupon I told him, He was doing a meaner Thing, in bearing the Extravagancies of a violent and tyrannous Stateſman; to pleaſe whoſe extravagant Humor, I had ſeen him ſweat more theſe poor Men did; who had alſo in this the Advantage of him, that they did ſo to get Bread for their Family; whereas he did the other to feed that Ambition and Avarice, which tended to deſtroy himſelf.

MAN'S Unreaſonableneſs appears alſo in the Unſuitableneſs of the Means he uſes, to the Ends he propoſes to himſelf. Who would not think him a Fool, who would endeavour to cure a mad Dog, by putting a golden Collar about his Neck? Or, Who would think to cure a Fever in a Man, by beſtowing a great Office on him? But are not Men ſuch Fools, when they think they can quiet their Paſſions by Riches, or their Minds by Advancement? ſpiritual Diſtempers are to be cur'd by ſpiritual Means; and as the fineſt Thoughts cannot feed the Body; ſo neither can the greateſt Riches, or any other external Thing ſatisfy the immaterial Soul!

If I were deſirous to get Preferment, would not I endeavour to pleaſe him from whom I were to expect it, and not his Enemies? But tho' we ſay that we expect, or at leaſt wiſh to be Favourites to God Almighty, and to be by Him happy for ever; yet we ſpend not our Time in obeying Him, but in ſerving openly and aſſiduouſly the World, the Devil, and our own Luſts, which are His declar'd Enemies; and that too ſo reſolutely, that any reaſonable Man cannot (upon conſidering our Actions) but conclude, That either we car'd not for what He could give, or elſe that we were ſubtle enough to cheat Him, or ſtrong enough to over-power Him.

If a Man were going to live in another Country, would he not endeavour to accuſtom himſelf to the Cuſtoms of it, and to carry with him Things that were uſeful in that Country? And would we not laugh at him, if he ſpent his Time in building and adorning that Inn, which he were to leave? But this is our Condition, who beſtow all our Thoughts on the Things of this World, from which we ſhould expect to remove every Moment, and in which we cannot ſtay long.

It is moſt ſtrange that Men, to ſecure themſelves againſt Fortune, ſhould put themſelves more and more into its Power. For the Remedies we uſe are to grow richer and greater; and nothing ſubjects us more to Accidents than theſe do; for it is for theſe that Men are purſu'd and deſtroy'd, and they are oftner Crimes than Defences.

God has promiſed, that *if we ſeek we ſhall find, if we knock it ſhall be open'd*; ſo that Prayer is the true Way to attain to what is deſirable: And Men may pray ſecurely at their own Bedſide, or in walking about their own Field. But yet Men will leave this ſure, ſafe, and eaſy Way, and ſail to the *Indies* amidſt Storms, and travel thro' the Deſarts of *Arabia* amongſt Thieves, to get unneceſſary Riches; expoſe themſelves to Cannons, and watch in Camps, to get Honours; truſting the Seas, Winds and Cannons, more than their own kind and merciful Father, who made and governs all theſe.

When we have Children, we are very deſirous to leave them well ſecur'd, and conſequently provide them Eſtates: But tho' we take Pains to breed our Colts and Hawks, we take no pains in teaching our Children their Duty to their Maſter, as we do thoſe Beaſts; and probably by not being bred to a juſt Way of Reaſoning, they may loſe by one Extravagance all that we have left them, or at leaſt live unhappily, in not knowing how to uſe it aright. And the ſame Parents which would beſtow their Eſtates to free their Children from burning for a Month in a Fever, will, to get them a little Addition to that ſame State, breed them ſo, as may occaſion their burning to all Eternity.

If any Man were guilty of Crimes, and ſo needed the King's Pardon; would we not think him a meer Brute, if he ſhould, inſtead of ſeeking it earneſtly and ſincerely, run up and down railing at him, and reviling his Laws? Yet moſt of our Wits, who have indeed more Guilt than Wit, and are not ſure what Moment they ſhall be damn'd for ever, make it their Buſineſs rather than Sport, to treat in Ridicule His Divine Majeſty and Laws.

Let us a little examine the Unreaſonableneſs of Men's arguing in Matters of Honour, wherein they pretend to be ſo exact, and delicate, and we ſhall be convinc'd how weak their Reaſon is.

And in the firſt Place, would not right Reaſon dictate to us, that thoſe Things are fitteſt for Men of Honour, which are moſt approv'd and recommended by that Judge whom all acknowledge to underſtand beſt what is Great, Glorious, and Juſt? Who would believe any Thing to be honourable for a Soldier, which *Cæſar* or Mareſchal *Turenne* had condemned as unjuſt and mean? And if this Rule hold, we muſt conclude, That it is the Almighty God, the glorious Maker of Heaven and Earth, and of the Heart of Man; and not the inſolent Courtier, the huffing Hector, or the unſtable and ignorant Rabble, who muſt give the Rules to juſt Honour and true Grandeur. Nor ſhould the beſt of mortal Men be able to perſwade us, that any Thing is honourable, but according as it agrees with the reveal'd Will of the omnipotent and infallible Judge; for if He be infallible, it is ridiculous that His Judgment ſhould not be acquieſc'd in; and if we think Him not infallible, we cannot think He is God.

If any Man ſhould call one perjur'd, eſpecially if he were a Perſon of Quality, he would reſent it irreconcilably; and yet are not all ſuch as are guilty of Adultery, guilty of Perjury? And to aggravate this Perjury, it is Perjury againſt a Lady, to injure whom, and to whom the breach of an ordinary Promiſe, would be thought a ſhameful Crime; but yet much more, when it is conſidered, that upon that Oath the Lady had deliver'd herſelf up, and by the like Oath had forſaken all the reſt of Mankind: So then, if Prejury be a Villany, when committed in the moſt trivial Things, and to a Perſon who never obliged us; what can it then be, when committed in the greateſt Concern, and when the Oath was given in the moſt conſiderate Manner, and under the greateſt Obligation to the moſt deſerving Perſon, and to one of that delicate Sex, which the moſt Unworthy are unwilling to injure or cheat?

I doubt not, but all who pretend to Reaſon, will acknowledge, that Ingratitude is the moſt abominable of all Vices, and moſt inconſiſtent with true Honour. And if a Prince had obliged one of his Subjects, behaving himſelf as a kind Father to him, would he not be a very Rogue if he were ungrateful; but yet more, if he refuſed to obey him, after many Promiſes and Vows, nay, and after many Pardons, having ſeveral Times relapſed again and again into thoſe Crimes, and even employed the Forces with which the King had truſted him, againſt himſelf? And yet the King of Kings, and our Heavenly Father, having heaped hourly ſuch Favours on us, that it needs a Man's whole Time to repeat them, becauſe every Moment of our Time makes a Part of them, we ungrateful Miſcreants employ all the Strength of our Spirits and Bodies in offending Him daily, to that height, that tho' we ourſelves tremble when we think with Confuſion upon them, and vow againſt, and mourn for them; yet we, unreaſonable Men, return with the Dog to the Vomit, and with the Sow to the Puddle, and add the Breach of our new Vows to our old Sins.

I know that Pride has form'd for its own Defence a Body of Law call'd *Point of Honour*; as one Inſtance whereof, amongſt others, I urge how unreaſonably Men repair their Honour, in endeavouring to take a Man's Life for a Word, damning both themſelves and him, and by way of Compliment drawing innocent Men (and ſuch ordinarily as have the greateſt Kindneſs for them) into the ſame Hazard and Condemnation; which in ſpight of all the Gallantry imaginable, does prove how little uſe of true Reaſon Men have, tho' they value themſelves very much as if they were the ſole Maſters of it. For this is not only contrary to the Law of God, the true Fountain of Honour, as of all Good, but to the Laws of our Country: And what can be more abſurd, than that ſome private, young, and ranting Hectors ſhould be able to make that paſs for Generous and Gallant, which whole Nations aſſembled, have after much Reaſoning and Deliberation condemned as a Crime in all Ages and Countries. And even the ſame Men, who brag of this when enrag'd, and in the Field, condemn it in Parliament and in cold Blood. But nothing diſcredits this Heroiſm more, than that thoſe, who would not yield up their Revenge to God, nor their Conſcience, have been frighted from it by the *French* King and the Gallows.

If one Man give another the Lye, he muſt pay down his Life, becauſe a Man of Honour would rather chuſe to die than to be a Liar, or rather thought one; but this Man of Honour will flatter, till all Men laugh at him for lying ſo groſly; and this Eloquence of Knaves muſt likewiſe make his Patron a Fool for being capable to believe what none believes, ſave himſelf; ſo that this Flatterer, who yet paſſes for a Man of true Honour, makes himſelf a Liar, and his Patron a Fool. How oftentimes alſo have we ſeen theſe Men of Honour lye and flatter, to promote Faction, and to pleaſe the Multitude, which they were thereby deſigning to cheat; as if the Addition of a Cheat could make a Lye honourable. Rebellion and Pimping are noble Flights of Glory and Kindneſs, to which faſhionable Men, and Men of Honour can only pretend, and a Prerogative deny'd to thoſe Men who are truly virtuous. If Men, who are tender of their Reputation, were reaſonable, would they not conſider, that all theſe their Crimes and Vices are known to that Great God, who is the Fountain of Truth, and the Rule of Purity, and ſhall at the Great Day be known to Men and Angels? If a Lady conſidered, that all her unchaſt Thoughts, and a Perſon who paſſes for an honeſt Man, that all his Secrets and Cheats would be diſcover'd to their Neighbours, tho' as guilty as they, it would confound them: How then will all Men look, when the Sins they are endeavouring to cover, ſhall be laid open in that illuſtrious Aſſembly, where Innocence and Knowledge ſhall be in ſuch high Perfection? How can we then be judg'd reaſonable Creatures, when we dare do that before the Almighty God, who is of purer Eyes than that He can behold Iniquity, which we durſt not attempt before our own Servants, who depend on us, and are as frail as ourſelves? And if we cannot abide the Accuſation of our own Conſcience, how ſhall we be able to hold up our Faces in ſo glorious a Judicature? And can Men be reaſonable Creatures, and yet not mind ſo great a Concern?

Fame, that tacit Acknowledgment of Immortality, even in thoſe who believe it not, is purſued ſo extravagantly, that Idolatry itſelf is not more inexcuſable. For to gain the Opinion of a brutal Multitude, we ſacrifice to them our Duty, our Quiet and our Security; And what Deſign can we have, or Return can we expect for all this? For if we be not immortal, What ſignifies our being eſteem'd, when we are to have no Being? And why ſhould we give ourſelves real Trouble for an imaginary Good? And if we believe the Chriſtian Religion, it teaches us That either we muſt be ſav'd or damn'd; if ſav'd, Fame from Men will ſignify nothing, when we diſcover how fooliſh we were to adore ſuch Worms; if damn'd, that which made a great Part of our Crime, cannot be an Alleviation of its Puniſhment. But if a Man, believing there is a God, did argue juſtly, he would value highly the being eſteem'd by that Wiſdom that cannot err, and whoſe Suffrage will laſt to all Eternity. Men can only raiſe our Character, without being able to raiſe our Merit, but our great Maſter can really make us merit, and open the Eyes of others to underſtand it, when true; which no Man can do; and His Eſteem brings Rewards ſuitable to its Greatneſs; and therefore is only worthy of our Pains; eſpecially, if we beſtow'd that Pains in ſerving Him, which we do in gaining Fame, we might expect from His Goodneſs what can never be valuable when obtain'd from Men, becauſe of their Meanneſs; or ſecure, becauſe of their Injuſtice or Caprice. If we ſaw any of our Acquaintance running up and down among mean and ignorant People, to perſuade them to praiſe and admire him, we would laugh at his Folly, as well as Vanity; but this is the Condition of us poor blind Sinners, who are ſick and dejected, if our ſilly, blind Fellow-Mortals do not admire us, and praiſe our Actions.

I have remark'd in my own Time, that ſome by taking too much Care to be eſteem'd and admir'd, have by that Courſe miſs'd their Aim; whilſt others of them, who ſhunn'd it, did meet with it, as if it had fallen on them, whilſt it was flying from the others; which proceeded from the unfit Means theſe able and reaſonable Men took to eſtabliſh their Reputation. It is very ſtrange to hear Men value themſelves upon their Honour, and their being Men of their Word in Trifles, when yet that ſame Honour cannot tie them to pay the Debts they have contracted upon ſolemn Promiſe of ſecure and ſpeedy Repayment; ſtarving poor Widows and Orphans, to feed their Luſts; and adding thus, Robbery and Oppreſſion to the diſhonourable Breach of Truſt. And how can we think them Men of Honour, who, when a potent and foreign Monarch is oppreſſing his weaker Neighbours, hazard their very Lives to aſſiſt him, tho' they would rail at any of their Acquaintance, that meeting a ſtrong Man fighting with a weaker, ſhould aſſiſt the ſtronger in his Oppreſſion?

The ſureſt and moſt pleaſant Path to univerſal Eſteem, and true Popularity is, To be juſt; for all Men eſteem him moſt who ſecures moſt their private Intereſt, and protects beſt their Innocence. And all who have any Notion of a Deity, believe that Juſtice is one of His chief Attributes; and that therefore, whoever is juſt, is next in Nature to Him, and the beſt Picture of Him; and to be reverenc'd and lov'd: But yet, how few trace this Path? Moſt Men chuſing rather to toil and vex themſelves, in ſeeking popular Applauſe, by living high, and in profuſe Prodigalities, which are entertain'd by Injuſtice and Oppreſſion, as if rational Men would pardon Robbers, becauſe they feaſted them upon a Part of their own Spoils; or did let them ſee fine and glorious Shows, made for the Honour of the Giver upon the Expence of the robb'd Spectators. But when a virtuous Perſon appears Great by his Merit, and obey'd only by the charming Force of his Reaſon, all Men think him deſcended from that Heaven which he ſerves, and to him they gladly pay the noble Tribute of deſerved Praiſes.

Another great Claſs of Arguments, to prove how ill Men reaſon in Matters of greateſt Importance, may be brought from the Contradictions we are guilty of in our Conduct. As for Inſtance, Life is the Thing in the World moſt valu'd; for without it we can enjoy nothing; and yet ſo unreaſonable are we, that for a Complement, we will hazard it ſo far, as may be rather call'd a loſing of it. When Time is going, we cry out againſt Providence, for having made it ſo ſhort; and when it is gone, we would give all the World to redeem it; and yet we are weary of it ſo far as to beſtow Money upon any Thing that will help to ſpend it; and give it away in Viſits, to ſuch to whom we would not give any Thing elſe. We would for no Money quit one Year of our Life; and yet for the ſame Money which we ſo undervalu'd in the expreſs Exchange, moſt Men do really give away very many of their beſt Years, ſince they are ſpent in gaining Money.

We exclaim againſt Tyranny, Uſurpation and Oppreſſion, and in this we are much in the Right: But why then do we admire, and cry up ſuch as have been great Oppreſſors and Uſurpers, as *Alexander*, *Cæſar*? For in this, we are not only unjuſt upon the Matter, but

Enemies to ourſelves; for that Eſteem we put upon them who have been ſuch, invites others to make us the Prey of our own Errors.

Most Men do admire, and prefer themſelves to all others, which is a great Proof of our Unreaſonableneſs; but yet, even theſe cannot ſtay with themſelves, and by being afraid to look into their own Hearts, contradict the Eſteem which yet at all Times they have for themſelves, to an unſufferable Exceſs. All Men deſire to prefer the beſt Company; and when Men prefer any Company to the being alone, they demonſtrate that themſelves are not the beſt.

Most Men, when they are young, contemn Riches, and love them when they are old; and though our Wits ſcorn to think or ſay with the Vulgar, yet even theſe are ſwayed as much and as ſtrongly by vulgar Vices, as thoſe who never exclaim'd againſt the unthinking Crowd. All Creatures ſtand in Awe of others, according to the Eſteem they have of them; and tho' we admire our own Perfections, and value ourſelves far above our Proportion, yet ſtand we not in Awe to commit Wickedneſs when alone, which we durſt not commit if others were preſent; and thus we are ſo unreaſonable, that we want a due Reverence and Eſteem for ourſelves, where we ought to have it, and have it exceſſively where we ought to want it totaly.

*SELF-LOVE*, the falſeſt tho' the ſubtileſt of all Reaſoners, endeavours to perſuade us, That in Revenge, we ſhall, by ſeeing our Enemies ruined, remain ourſelves the excellent Creatures, our Rivals being thus depreſs'd: And this is that hid Reaſon which juſtifies to us that Paſſion which is truly moſt inhumane. But what an improper Argument is this? For we are not one Whit the more excellent, that another is ruined by an Accident. Another Argument brought by Revenge, is, That thus we ſhall ſecure ourſelves againſt our Enemies, and ſo Revenge would paſs with us under the Diſguiſe of Self-defence: But becauſe this would ſeem cowardly, and be in Effect, a tacit Acknowledgement of Fear, we rather ſay, That in Revenge, we will teach others not to attack us. But all theſe are falſe Reaſonings; for no Man ſecures his true Quiet by Revenge, for it raiſes an Enemy within, which is always preſent, and able to diſquiet: And all Men conclude themſelves obliged to deſtroy the revengeful Man, by the ſame Argument that he purſues his Revenge; and thus a Man is tortured by it after he has prevail'd.

Most Men deſire to be in Employment, from a ſecret Deſire to be admir'd; whereas when they are in Employments, they do not thoſe juſt and virtuous Things, for which they would be truly admir'd: And albeit Self-love makes them believe, that the being fear'd is a Mark of true Dominion; yet they conſider not, that even Dominion is only at the Bottom deſirable, becauſe it is a Sign of Merit and innate Excellency; and does pleaſe, becauſe it makes us believe, by the Suffrage of others, that we are noble and excellent Perſons, of which, even the leaſt reaſonable cannot ſeriouſly be perſuaded, except they believe they have done virtuous Things. And thus it were more reaſonable to do what is really virtuous, than to cheat ourſelves, with thinking that others admire us. And it is very unreaſonable not to do Things rather for Virtue itſelf, than for the Applauſe which follows it, ſince that Applauſe derives its Deſirableneſs from Virtue, and ſo Virtue itſelf ſhould be much more deſired: And which ſhews yet more the Weakneſs of our Reaſon, tho' in this we contradict the undeniable Sentiments of Mankind, yet we are cheated into it by a Miſtake, as if it were eaſier to attain to the Applauſe of Virtue, than to Virtue itſelf; whereas quite contrary, it muſt be more difficult to attain Applauſe, ſince it depends upon many Thouſands of Rivals and capricious Fools; whereas Virtue ſprings from a Mans own Breaſt, and we may have it, and keep it in Spight of all Mankind.

Every Man alſo may, in his private Station and Employment, find Thouſands of Inſtances to confirm this Truth. And thus a Courtier ſhould conſider, that when he ſees his Prince bow and pray to a Superior, before whom he acknowledges himſelf to be a Worm and a Vapour, that certainly it is fit to do nothing to diſpleaſe that Superior Power, for gaining the Favour of that Prince who adores Him: And who would not think him mad, who would ſcorn to depend on a Monarch, but would take Pains to flatter his Footman? When a Lawyer obſerves, that Men take ſuch Pains to ſecure in Law an Intereſt that cannot be ſecur'd againſt Accidents, he ſhould in Reaſon conclude, That it is bruitiſh not to take more Pains to ſecure that which ſhall never fail: And when he obſerves, how zealouſly the eldeſt Men defend a Life, that Accidents, nay, and Nature probably will end with the Proceſs, Should he not conſider what Pains ſhould be taken to ſecure a Life that continues for ever, free too from that Care, and thoſe Sickneſſes, that even before Death make this Life miſerable?

If a Soldier, who was beſieg'd by his Enemies, ſhould abandon his Watch, and ſpend his Time in Gaming and Drinking, or ſhould loſe the glorious Opportunity of defeating them, for a Feaſt; or as *Mark Antony*, for a Miſtreſs; eſpecially if they be ſuch Enemies, whom we know would not only kill, but torment us to Death; Were he not to be accounted a Fool? But this is our Caſe; for being ſurrounded with Temptations and Devils, we ſpend our Time in Toys and Trifles; and whilſt we hear that others have receiv'd an immortal Crown, for having overcome their Spiritual Enemies, we, who value Fame and Glory ſo much, ſpend our Time in pleaſing Two or Three ſilly Courtiers, whom we deſpiſe whilſt we attend them, and laugh at the Actions which we ſeem to admire. A Merchant were ridiculous, if he ſhould ſpend his Stock and his Time in buying up Wares that were unfaſhionable in that Country where he has his Abode; and yet moſt Men employ themſelves wholly in gathering Riches, and getting that Knowledge, which can neither be carried to Heaven with them, nor can comfort them when they are in Hell. And I have oft applauded the Remark of a Gentlewoman, who hearing a whole Society admire one of her Acquaintance for a great Wit, told them, That his Father had left him a great Eſtate, which he had ſpent amongſt Whores, that he had himſelf married a Whore, and had chang'd the Orthodox Religion, in which he was bred up, for a worſe, and was not devout in that neither; and deſir'd them to conſider, If that Man deſerv'd to be call'd a Wit?

Nor are we only unreaſonable in purſuing our Pleaſures and Vices, but the very Meaſures we take in being virtuous, ſhew how weak our Reaſon is, and how ill we uſe it. For our Friendſhip is, for the moſt Part, but the preferring thoſe for whom we have a Kindneſs, to thoſe who deſerve better both our Kindneſs and thoſe Employments; and thus we rob the Common-wealth, to repay the Debt our Gratitude owes. The Courage of many is but a hypocritical diſguiſing of their Fear, or a dull Ignorance of their Danger. For when a Man goes to Battle, he fears to die; but to diſguiſe this Fear, he conſiders the Shame of flying; and knowing certainly that his Reputation would be ruined, he fears more this certain Loſs, than the Hazard of being kill'd; but if he cannot attain to that, he at leaſt braves it out, and endeavours to cheat others, when he cannot ſatisfy himſelf.

Liberality and Charity are oft-times but the diſguiſed Effects of Vanity, wherein Men tacitly deſign rather their own Perpetuity, than the Advantage of thoſe on whom they beſtow what is given; in which they act very unreaſonably: For if they lent it to God, He would reſtore it with a very enriching Intereſt; but in beſtowing it on Fame, they beſtow it on a Cheat, which has oft deceived both them and others. And it ſtill ſeems ſtrange, that we will beſtow it on that Multitude (for Fame and the Multitude are the ſame Thing) to preſerve any one of whom from ſtarving, we would not beſtow one Farthing. And yet the World eſteem thoſe who do ſuch Things, more than they do reaſonable and judicious Perſons.

It is one of the chief and fundamental Dictates of Reaſon, *That we ſhould do to others as we would wiſh them to do to us.* But tho' we exclaim againſt our Equals, poor Mortals, if they refuſe us this Meaſure, yet we allow it not to our great King and Sovereign. If we heard that any, who pretended to be our Friend, did ſit tamely and hear us rail'd at, and contemn'd, we would conclude them baſe and treacherous; and a King would for this treat his Subjects as Rebels: But yet we ſit not only to hear impious Creatures rail at Religion, and oft-times at Providence itſelf, with ſo little Reſentment, that we comply and even admire the Miſcreant. I remember that I ſuggeſted once to a Perſon of Quality, who was buſy about his Accompts, to conſider if our Steward ſhould ſpend our Rents upon his own Affairs, or upon maintaining his own Family in Luxury; and much more if he ſhould riot it away with our Enemies, Would we not hate him as a Rogue, and at leaſt recal the Truſt we gave him? But the Great Maſter of the Family of the Faithful, having appointed us only to be Stewards, not to appropriate, but to beſtow the Eſtates He gave us, for the Uſe of His poor Children and Servants, preferring us kindly to as much as may ſatisfy our Conveniency; for ſo the Scripture, and even Reaſon itſelf, teaches us; (For why ſhould the wiſe God have beſtow'd ſo much upon ſome, whilſt others want, if He had not deſign'd to level all by this Neceſſity of Diſtribution?) Yet we ſee His Children ſtarve, whilſt we employ the Portions due to them upon the Wicked, who are His Enemies. And thus we uſe the Almighty God at the Rate we would not ſuffer from the meaneſt of our Servants. And ſo unreaſonable are even ſuch as are convinc'd of the Reaſonableneſs of Charity, that by doing their charitable Actions in Public, they loſe the Reward, by not preſerving the true Deſign of it; for as our Saviour argues, *Matth.* 6. 4. *It is very juſt, that ſince they beſtow their Charity to gain the Applauſe of Men, they ſhould be rewarded with the Applauſe for which they beſtowed it.* And how can they expect a Reward from God, to pleaſe whom it was not given? And He is not obliged to repay what was not lent Him: And they cannot expect double Payment; for being paid by Men, the Obligation is fully ſatisfied.

I ſhall conclude theſe Obſervations with what ordinarily we conclude our unreaſonable Lives, and that is Death-bed Repentance, which of all Things is the moſt unreaſonable. For if we believe the Rewards and Torments which attend our future State, and make the Delay ſo dangerous, Why delay we? And if we believe neither of theſe, Why repent we? The one cannot but make our preſent Pleaſures very bitter, by the Fear that muſt thereupon haunt us; and the other cannot but needleſly cut off the Pleaſures, which we exclude as inconſiſtent with true Repentance. But which of us being condemn'd to horrible Torments, would delay to ſeek a Remiſſion till the laſt Hour? Or being invited to leave our Cottage to receive a plentiful Eſtate, would delay to undertake his Journey? And yet we eaſily delay our Repentance, which can only preſerve us condemn'd Sinners, from eternal Torments; and which would certainly bring us, poor Wretches, to that Inheritance of immortal Glory. And tho' we condemn ourſelves for leaving the Diſpatch of our little Concerns till the laſt Hour; yet we delay that great and neceſſary Work, on which a long Eternity hangs, for every Trifle. And that which aggravates much this Neglect is, that the Reaſons which encourage us to it are as weak, as the Thing itſelf is abſurd and dangerous. For the Hope we may live, has for its Foundation a frail Body, that every Accident can deſtroy; and it is a Wonder, that when we hear of ſo many unexpected Deaths, we ſhould not tremble to think, What if I had died? And tho' the Mercy of God be as infinite as His Juſtice, yet it is inſupportable Inſolence in us to think, that we can be ſav'd when we pleaſe: This is not only to undervalue Him as the laſt Thing to be choſen, which implies that our infinitely glorious Maker is of all Things leaſt worthy of our Choice; but in this we exalt ourſelves above Him, as if we might command Him to beſtow upon us Heaven and Happineſs, whenever we thought fit to call for it. And which of us would beſtow the meaneſt Favour upon him, who would reſolve to oppoſe, or but neglect us as long as he pleas'd? The delaying makes us the unfitter, not only to crave, but even to receive Mercy; and ſince all our Life, albeit as piouſly ſpent as human Frailty can allow, is ſhort enough for ſo great a Work; What can we expect from a few ſickly Hours diſtracted by new Pains, and amazed at ſo many old Sins? And the Scripture having commanded us to repent, and bring forth good Works, it has every where made good Works, and a ſubſequent Amendment of our Lives, the Mark as well as Fruit of ſincere Repentance: And therefore ſince a Death-bed Repentance muſt want this Proof, it cannot but be by ſo much the more uncomfortable to us and our Friends. Nor is there any generous Soul, who having receiv'd ſo great and undeſerved a Pardon, would not deſire to be able to live, that he might magnify that infinite God to whom he ow'd it. I know that the Thief on the Croſs has been a Stumbling-block to many others; but we reaſon very weakly from this Inſtance of God's Mercy: For he, by believing the Divinity of our Saviour amidſt all that could have been ſaid againſt it, when even the *Jews* were deſiring Him to come down from the Croſs, and they would believe in Him; and the other Thief was reviling Him; did evidence as much Faith in that contracted Span when dying, as the beſt of us can do in a prolong'd Life. And it being fit for the Saviour of the World to ſhew His Power and Mercy when He was leading Captivity captive, that happy Thief can be no Precedent for us, who remain unconverted after ſo many Miracles, that no reaſonable Man can now doubt of, eſpecially if he never heard, as 'tis probable, of that Goſpel which we have ſo oft undervalued; and if he has not neglected former Offers of Mercy, which we have ſo oft contemn'd. And ſhall we preſume on God's Goodneſs, becauſe one Man was ſav'd, and but one, to preſerve Mankind from Deſpair; not remembring, that as the Thief obtain'd a Pardon when he ſought it, ſo *Eſau* found no Place for Repentance, tho' he ſought it earneſtly, *Heb.* 12. 17? And tho' thoſe who came in at the laſt Hour, got as much as thoſe who had wrought at the firſt; yet it is remarkable, that it is ſaid, They came not ſooner, becauſe no Man had deſired them. But let me conjure any Noble Soul to conſider, that if God be worthy of the Adoration of Angels through all Eternity; and that we confeſs, that to walk like *Enoch* with Him, will be ſo amiable and glorious; Why ſhould we delay it for Pleaſures that are unworthy of a reaſonable Soul, and which laſt but for a Moment? For at leaſt we loſe ſo much unexpreſſible Joy and Pleaſure; and in delaying our Repentance we continue to be ſick when we may be whole, to be blind when we may ſee, to be poor when we may be rich, to lie in Priſon when we may live at Liberty, and to be Slaves to our Enemies, when we may be Heirs to a Kingdom: All which induces me to believe, that they who delay Repentance, deſign not to repent, but flatter themſelves with a falſe Conceit of it; for to repent is to be grieved, and no Man who is grieved, can put it off at his Pleaſure, no more than a Man can be griev'd, or not, as he pleaſes. As alſo if a Man reſolv'd ſincerely to repent, 'tis neceſſary that he were convinc'd of the Greatneſs of his Danger, and were actually aſham'd as well as afraid thereof; and if he were truly touch'd with theſe Convictions, he would not continue in the Courſes which occaſion'd them. And to finiſh all, Is it not the Height of Unreaſonableneſs for a Man to continue to do theſe Things, of which he knows he muſt be aſham'd, and for which he reſolves to be exceedingly troubled and afflicted? And if we were coming into a Room where a Man was wounding himſelf, Would we not conclude him yet madder, if he told us, that he would give himſelf more and more, becauſe ſuch a Man got ſo many Wounds, and yet was cured?

Let me therefore conclude this Diſcourſe with the noble and juſt Reaſoning us'd by St. *Peter*, 2 *Epiſt*. 3. 10, 11. *But the Day of the Lord will come as a Thief in the Night, in the which the Heavens will paſs away with great Noiſe, and the Elements ſhall melt with a fervent Heat, and the Earth alſo, and the Works that are therein ſhall be burnt up: Seeing then that all theſe Things ſhall be diſſolved, what manner of Perſons ought ye to be in all holy Converſation and Godlineſs?*

And what a frighted Creature will the greateſt Hero be, when he finds himſelf in the Midſt of a burning World, having greater Terrors within his Breaſt than theſe rais'd by an Omnipotent God, and which will force him to cry to the Hills and Mountains to fall upon him, and cover him from the Face of this angry Judge?

But theſe great and ſad Truths need (alas) to be preach'd by an Angel, to Hearers ſtanding upon the Brink of their Grave, and having Heaven and Hell open'd before them.

# PART II.

## *Whence proceeds it, that Man is ſo unreaſonable, and how to improve our Reaſon.*

IT is indeed very ſtrange, that Man, who improves daily ſo much in all Arts and Sciences, that are neither ſo neceſſary, ſo eaſy, nor ſo advantageous to us, ſhould ſtill decreaſe in this excellent Study, this noble and uſeful Knowledge: Let us then enquire a little into the Occaſions of theſe Errors in his Reaſonings, and we ſhall find them ſo ſilly, that they alſo diſcover to us new Weakneſſes in his Reaſon.

I know that we generally charge this on Man's Atheiſm, imagining he would reaſon juſtly, if he believ'd the Principles I have laid down; but this is a Miſtake, for Atheiſts reaſon moſt weakly, as well as others, and moſt inconſequentially to their own Principles; for even Atheiſts diſquiet themſelves for Fame and Money, and by Whoring and Drinking deſtroy their Bodies, which is all they dote upon, and ſhould preſerve, and which ſhews their Unreaſonableneſs, according to their own Principles; and that Infidelity is not the Cauſe of falſe Reaſoning, appears clearly, becauſe ſuch as are not Atheiſts, reaſon falſly; and we may obſerve, that ſuch as believe that by the ill Diets they uſe, their terrible Pains will be renew'd, do yet adventure on them. Oh, that they only of all Mankind were the unreaſonable Men! But how unreaſonable are they, who believing there is a Crown of Glory reſerv'd for thoſe that will run that heavenly Race, chuſe rather to ſit Tipling and Gaming; that believe the Son of God ſtands ſtretching out His Arms, ready to preſerve them, and yet will rather ſink down into that fearful Pit from which there is no Redemption; who will rather ſtarve than ſeek that heavenly Manna, and languiſh of their Wounds, than ſeek the Balm of *Gilead*, from the Hand of a loving Father; whom no Judgments on others can awaken, nor Mercies to themſelves can oblige; ſick, amidſt ſo many Cures; poor, amidſt ſuch Plenty; blind, notwithſtanding ſo much Light; and inſenſible, ſpight of ſo many Convictions?

But how can Men reaſon well, ſince they neither underſtand the true Uſe of Reaſon, nor what Man is? And theſe are the two firſt and great Occaſions of our Errors.

As to Reaſon, let us examine ourſelves narrowly, and we ſhall find that Men think they need not Reaſon in the great and conſiderable Deſigns of Life; as if theſe were Matters to be taken upon Truſt; and as if Reaſon were to be us'd only in Matters of State, or in Debate or Trade. And I deſire to know, who ſits down to reaſon with himſelf, why he lives ſo, or to know, if what he does, is according to the Rules given him, for regulating his Actions? I have myſelf ſpent Twenty Years in reaſoning eagerly to ſecure other Men's Eſtates; but I have ſpent very little Time to conſider, by a nobler Reaſoning, why do I ſpend ſo much Time in reaſoning for other Men, and yet ſo little for myſelf; tho' in the mean Time, I do but too much prefer myſelf to all others? You will find ſome Divines very buſie in arguing, whether God from all Eternity could have made Creatures, and yet theſe Men will never conſider what ſhall become of them in Eternity. The Cure then of this, is to conſider Reaſon, not as a Tool, uſeful for Gain or Fame only, but as a Square, put in our Hands by our kind God, to inſtruct us how to make our Actions ſtraight and even; and as a Workman does firſt mind to have all regulated by his Square, and after his Work is finiſhed, applies the Square to what he has made; ſo ought we, when any Thing is deſign'd by us, reſolve to do all in it by the Rules of Reaſon, and when the Action is ended, examine if it be ſo: And to invite us to this, God has not oblig'd us to ſeek for this any foreign or remote Remedy; no, nor to owe our Remedy to any other; but has plac'd His Candle in our Breaſts, and honour'd us with the being our own Governours and Directors. Let us then think, and think on Matters of Importance, and of Matters that import us; let us think as much of Heaven, which cannot be taken from us, when once we are poſſeſſed of it, as we do of temporal Eſtates, in the Poſſeſſion of which we cannot be ſecured. Let us think as much upon ourſelves, whom we value too much, as upon others, whom we value too little.

WE uſe oft-times our Reaſon to argue falſly for Intereſt, or by Pre-engagement; and this debauches our Reaſon, after which it continues eaſily in this Error: For this takes off that Reverence and Eſteem we ought to have for juſt Reaſoning. Thus Lawyers favouring ſtill, and being oblig'd to maintain the Cauſe of thoſe who have retain'd them, force their Reaſon to find Arguments for their own ſide; Divines thinking themſelves obliged to defend the Poſitions of that Church wherein they were born, reaſon ſtill in its Defence: Stateſmen to fortify their Party, endeavour to perſuade all Men to embrace it; and Orators, not excepting the Philoſophers amongſt them, to beautify their Diſcourſes, urge Things that are mere Flouriſhes, having much Luſtre, but no Strength; great Inſtances whereof are to be ſeen in *Seneca*, and generally in all the Heathens, who as I ſhall ſhew expreſly elſewhere, were forc'd, by not knowing the true Principles whereupon Reaſon was to be built, to maintain by falſe Reaſonings the true Principles that they deſign'd to recommend. We do likewiſe form our Morality by our Intereſt, and guide not our Intereſt by our Morals; and after we have form'd any Deſign, we find out Reaſons to perſuade us that it is juſt: And thus we oft-times miſtake Intereſt, Imaginations, and Prejudices, for ſolid Reaſon; the true Cure whereof lies in being painful and curious in our firſt Reaſonings; and as careful not to commit Errors by falſe and careleſs Arguings, in Matters of eternal Happineſs, as Mathematicians are in their Demonſtrations about Figures and Concluſions, which cannot ſecure them againſt one Misfortune, nor add one Day to their Lives.

BIGOTRY, and falſe Conceptions of Religion, do alſo darken much our Reaſon; for ſometimes, by implicite Faith and Infallibility, (thoſe great Tyrants over Reaſon) we accuſtom ourſelves to Lazineſs, wherein we loſe the Habit of Reaſoning; and ſometimes by impoſing upon us Things inconſiſtent with it, and by teaching us that it is a dangerous Guide, we leſſen our own Eſteem for it, and create inſenſibly in ourſelves a Jealouſie that it is an Impoſture; and we baffle it ſo on theſe Occaſions, that at other Times it dares not try its own Strength. I confeſs, that it ought in a juſt Submiſſion yield to His Commands who made it, nor ſhould we hear the Servant when the Maſter ſpeaks; but except when the Will of God does expreſly ordain one's Reaſon to ſubmit, we ought not to deny ourſelves the true Exerciſe of it, to pleaſe Men, who underſtand not its true Strength, or do upon Deſigns impoſe on us the abandoning of it. And this has infected us ſo far, that by it all other Sciences did fall very low. And if ſome bold Defender, ſuch as *Cartes* and others, had not interpos'd, we had been led by implicite Faith, in all the Objects of Knowledge as well as in all the Objects of Faith; and every Schoolman would have exacted as much abſolute Submiſſion to his own Dictates as we ſhould pay to the unerring Commands of our infallible Creator. And oft-times Self-love paſſing for Religion, blinds us whilſt it promiſes Illumination: As a clear Inſtance whereof I ſhall deſire any wiſe Man to conſider, that if this were true Zeal which led Men to hazard all they have for the ridiculous Difference about indifferent Ceremonies or Tenets, Why do they not hazard all they poſſeſs for the Defence of the Chriſtian Religion againſt the *Turks*; ſince in ſound Reaſon, and by a Mathematical Certainty, the Whole is to be preferred to a Part? And to prove that this is the Effect of Self-love, and not of true Devotion, it is very obſervable, that the leſs the Differences be in ſuch Caſes, we are ordinarily the more paſſionate in them, being inclin'd rather to have our Sentiments ſuſtain'd, than the Commands of

God obeyed; moſt Men being to themſelves their own only God, and being aſham'd that they ſhould err even in the meaneſt Circumſtance.

Men may think me inſolent, when I tell them that they underſtand not themſelves; but they ſhould bear this from me, who would willingly wiſh that they could juſtly tax me of a Lye in it. But for my Security I muſt put them in mind, that Monſieur *Paſchal* told them before me, That he had laid aſide the Study of the Mathematics, becauſe few underſtood to converſe with him in it, and betook himſelf to conſider Man, as thinking that a Subject ſo near, and of ſuch Concern to every one, that All could not but underſtand it; and yet he found This leſs underſtood than the other. But that I may contribute my mean Endeavours for clearing them in this, I muſt deſire them to conſider, that Man being created to love and admire God, it muſt follow by a neceſſary Conſequence, That God was to be the Centre of all his Knowledge; and right Reaſon was a drawing of all his Concluſions, as ſo many Lines to reſt upon God as that Centre. But Man deſigning to exalt himſelf, does by a woful Miſtake make himſelf the Centre; and Self-love, as another Reaſon, draws all into this Deſign. And thus, whereas we ſhould ſtudy to underſtand the excellent Works of the Creation, that in them we may underſtand the Infiniteneſs of that wonderful Creator, we ſtudy them only thereby to adorn our own Spirits, and thus to raiſe an Eſteem in others for us; and crook in all the Concluſions we make to ourſelves and our Conveniency, as the Centre of all our Deſigns. And thus we have invented new Sciences, Arts and Recreations, ſuch as Criticiſms, Raillery, Comedies, Tragedies, &c. merely that our Works may be admir'd as much as His. And therefore it is impoſſible that we can ever reaſon juſtly, ſince all the Lines of our Reaſoning tend to a wrong Centre: But if we return to our Duty, in reſolving to love and admire Him, and not ourſelves, every Concluſion, being drawn from true Principles and Poſitions, would recover its original Streightneſs. And thus, if we adored God more than Kings and Princes, we would not diſpleaſe God to pleaſe them, that we might be enrich'd or advanced by them. If we ſtudied only to know Him in His Creatures, and not to raiſe our own Fame by them, we would not toil and vex ourſelves to acquire Fame, nor forget ſerving and adoring Him, that we might get Time to know thoſe Sciences, and be eſteem'd for, and delighted in that Learning. Self-love, amongſt its other Cheats, hinders us to ſtudy Chriſtian Morality, becauſe that would let us ſee how vile and frail we are; and therefore, as a Diverſion, it carries us impetuouſly to ſtudy other Sciences, wherein we may admire our own Wit and Sagacity. But that which ſeems to me the true Notion of Learning, is, That it ſhould be a Deſign to know and admire God in His Works; for which natural Philoſophy and Mathematics are to be ſtudied; in His Providence, which we may know by Hiſtory; in His Juſtice, to be known by Law; and in His governing the Soul of Man, which is the Object of Moral Philoſophy; but above all, in Himſelf, and the Myſteries of our Salvation, taught by Divinity when well directed.

A Proof of which, as well as a new Cauſe of our Errors in reaſoning, is, That the firſt Rule by which our Reaſons are ſquar'd and directed, are the Writings of thoſe illuſtrious Heathens, who in our Youth are recommended to us, as the only Guides and Patterns: The beſt of which, ſuch as *Plato*, *Epictetus*, *Seneca* and others, being abſolutely ignorant of Man's great Diſeaſe, which is original Sin, could not but miſtake the Remedies of his actual Tranſgreſſions; and knowing nothing more excellent than their own Reaſon, they concluded it was ſufficient. And having, from their Poets and Traditions, learned mean low Thoughts of their Gods, who were in thoſe Days made the chief Actors of the Sins they ſhould have puniſhed, and deſcrib'd as more employ'd in ſatisfying their own Paſſions, than in governing of the World; thoſe miſled Philoſophers did not only equal themſelves to, but rais'd themſelves above the Gods whom they taught others and themſelves to adore. And to that Height did this Miſtake in their *Reaſoning* fly, that *Seneca* concludes his Wiſe-man much preferable to the Gods, becauſe the Good they did, aroſe from the Neceſſity of their own Nature; whereas Man, being left to a Freedom in his Actions, made them good by his own wiſe Choice. *Epictetus* founds his Philoſophy upon that only Principle, *That the Things within us are in our own Power, but the Things without us are not.* Whereas St. *Paul* from Heaven aſſures us, That *of ourſelves, as of ourſelves, we can do no good:* And our own Experience doth moſt convincingly agree with St. *Paul*, againſt *Epictetus*. And whereas a Principle in any Science ſhould be an uncontroverted Truth; we find daily, that this Principle is an abſolute Lye. For that Man, who thinks that he can with an unerring Hand govern his Paſſions, has never undertaken the ſubduing of them. And *video meliora, proboque, deteriora ſequor*, agrees much better with our own Experience, as well as with St. *Paul*; who, tho' among the greateſt of Saints, complains juſtly, *Rom.* 7. 15. *That which I would, that do I not; but what I hate, that do I*; and therefore is forced to cry out, *Who ſhall deliver me from this Body of Death? Cicero*'s Diſcourſe concerning *the Nature of Gods*, and *Plato*'s Dialogues *of the Immortality of the Soul*, may convince us how weakly thoſe great Patterns of Philoſophy do reaſon, even upon thoſe Subjects where Reaſon was not altogether miſtaken.

And from thoſe, and all the Writings of the ancient *Pagans*, I do more juſtly conclude, That thoſe great Ideas which our Maſters have given us of them, and the Eloquence which ſhines every where in their Writings, have miſled us from the Ways that lead to the New *Jeruſalem*; and from admiring the Beauty of Holineſs which ſhines in thoſe Scriptures, which have God Almighty and the Holy One of *Iſrael* for their Author and Subject; and in which we are taught to expect more Help from Heaven, than from ourſelves, againſt our innate and original Corruption; which is more to be overcome by Praying than Thinking, and can never be overcome without that Humility and Self-denial, which was abſolutely unknown to the Heathens; as I hope to prove in another Diſcourſe, where theſe Thoughts ſhall have their full Scope.

I am far from deſigning in this to root out Self-love, but rather to direct and improve it. For certainly God has grafted Self-love in every Man's Heart, to the End Man might thereby be the more oblig'd to love Him, to whom he owes all thoſe Excellencies which he loves in himſelf; and that he may be thereby obliged to preſerve himſelf as a Part of the Univerſe, and which is in general preſerv'd by every Man's loving himſelf: And ſo far has God allow'd this Self-love, that He puniſhes Man when he deſtroys himſelf. But that Self-love which I here inveigh againſt, is a falſe and Impoſture-Paſſion, whereby Man makes himſelf the Spring, from which all his Deſigns follow the Mark at which they aim, and the Rule by which they are to be ſquared, than which nothing can be more unreaſonable. For how can we juſtify ourſelves, in requiring abſolute Deference from all that is ours, if we yield it not to that Infinite Being to whom we owe all? And as He brought us out of nothing, ſo we ſhould ſtill remember that we are nothing before Him. If every Man made himſelf the Rule, and drew all to himſelf, What a diſtracted Thing would this World be? And how impoſſible would it be for any Man to live comfortably in it? And as a private Man would be eſteem'd mad, who in a Court would think that all Things ſhould be deſign'd there for his Glory and Pleaſure; ſo, much more is Man a diſtracted Creature, when he makes himſelf the chief Aim of all his Actions. Whereas, if a Courtier take great Care to pleaſe the Monarch, and to deſign his Glory and Advantage, he will thereby raiſe himſelf in a ſecurer, as well as a juſter Way. And therefore, becauſe Self-love is ſo ſtrong an Orator, and is ſtill at the Bottom of all Perſuaſion, we ſhould examine cautiouſly what is urged upon us under the Diſguiſe of Self-love; and whether we do really love ourſelves, when we yield to thoſe Things to which we are tempted. I ſhall conclude this Period with a ſad Aſſertion; That in ſpite of all that Men profeſs, yet too many really, at the Bottom, miſtake themſelves ſo far, as to think that they have no Original Frailties, and therefore that they are able to command their Paſſions; and that they need no Divine Aſſiſtance; that they are nothing elſe, ſave that Body which we ſee; that they are not to die ſo ſoon; and that the Things they are doing now, are the only Things to be car'd for, and will remain with them for ever. And if moſt Men have this *Idea* of themſelves, I deſire to know how they can draw juſt Concluſions from ſuch miſtaken Principles.

ANOTHER Cauſe of our Reaſoning ſo weakly, is, That the Things of another World are too remote to ſeem great to us, and too ſpiritual to be diſcerned by carnal Eyes. The leaſt Thing, when plac'd immediately before our Eyes, will intercept, and exclude all further Proſpect; and even the leaſt conſpicuous Objects, and ſenſual Things do, by a conſtant Tide of Emanations, flow in continually upon us, ſo as to fill our Thoughts, and leave little Room for any Thing elſe. But as a Remedy to this, let us conſider, that ſince even corporal and ſenſual Pleaſures charm us only when we think much upon them, it follows, that Thinking is the Source and Origin of Eſteem: Tho' we ſee not the Riches of a golden Mine, yet our Belief will make us toil for it; and the Hope of ſucceeding to an Eſtate will oblige us to follow eagerly what that Hope ſuggeſts. And ſince *Faith is the Evidence of Things not ſeen*, it does repreſent Things to come with a Certainty that makes them preſent; and albeit it may be objected, that we have ſeen ſome ſuch Things as theſe Mines, and worldly Succeſſions, and therefore it is that we believe and love them more; yet that is of no Moment. For the Miracles that Men have heard of, and the wonderful Works of Providence which we daily ſee, eſpecially when born in upon us by the Conviction of our own Conſciences, ſeem as ſtrong Motives as any that Senſe can afford. Conſcience, that luminous Senſe of the Soul, being ſtronger, and more perſuaſive to any that will hear it, than any of our dull and outward Senſes, which have only Aſſiſtance from ſtupid Fleſh and Blood: Converſation alſo about Things Spiritual and Divine, will be in place of ſenſual Emanations to us, and will repreſent a future Life, and the World to come, to a hearkning Soul, as if it were preſent; nor will the Almighty fail to aſſiſt that Eloquence which has Him for its only and ultimate Scope.

The Soul certainly being a ſpiritual Subſtance, can more eaſily unite itſelf to immaterial Objects, ſuch as a future State of Happineſs, than to the terreſtrial Objects, with which we fill it; and the only Fault is in us, who do not apply ourſelves to the thinking on theſe. Do we not find that ſuch as aſpire to Fame, are more taken with it than any Man is with Meat or Drink, yea, and Life itſelf, for the Conqueſt whereof all theſe are contemn'd: And yet Fame is a mere immaterial Object, that has nothing affecting the Senſes, otherwiſe than by thinking nothing preſent, nothing corporeal; and generally, the Spirit of Man is more pleas'd with Expectation than with any preſent Poſſeſſion whatſoever; ſo far, that if we expect any little Accident, it will buſy more our Thoughts, and faſten them more to it than a Thouſand Things of greater Value already poſſeſs'd. This then can be no ſuch hard Task as our Lazineſs perſuades it to be.

Tho' we be convinc'd of the Truths on which I have founded my Obſervations, yet we advert not to them, nor heed them. Thus tho' an Object were moſt conſpicuous, yet if we dote ſo upon any other, as never to turn our Eyes that Way, we ſhall not be taken with either its Value or Beauty. We are bred up in a great Eſteem for the Things of this World, and ſo are rather pre-engag'd than blind, and buy not that Pearl of Price, becauſe we have laid out our Stock on other Trifles; which is a great Defect in our Reaſon, and for which we would contemn other Merchants: And this is to be cur'd by having a true Value for Things, and by rectifying all our *Ideas*; and therefore he who reſolves to Reaſon juſtly, ſhould begin firſt to conſider, when any thing occurs, of what Uſe it may be, and of what Value it is. As for Inſtance, Is this Land, for which I am ſinfully providing Money, worth Heaven? Or this Man, whom I am to pleaſe, abler to make me happy than God Almighty, to whom in this I prefer Him? And ſo, like a ſkilful Chymiſt, reſolve every Thing into its true Principles, and then try its Value; and like a Merchant, who has been often cheated, reſolve at laſt to conſider what ſuch Things are worth, whether they will be faſhionable where we are going, and whether they will return us the Stock we lay out upon them.

For improving this Thought, we ſhould conſider, that tho' we diſcover Truths, yet we do not take Time to ponder them ſufficiently: And thus, tho' we be convinc'd, yet we improve not ſufficiently our Convictions. Self-love, and the Love of Eaſe has us'd us to a partial and ſuperficial Way of Enquiry; and from this alſo proceed theſe Wanderings which weaken thoſe pious Meditations, and diſturb that Earneſtneſs in Prayer, by which we can only procure a juſt Illumination in our Reaſoning: Deſultorineſs of Thought grows daily when it is not leſſen'd, and the next Day's Wanderings are the Puniſhment of thoſe which we ſuffer'd to prevail Yeſterday. But ſhould we not be aſham'd, that we cannot think our Salvation worthy of ſome ſerious Hours, ſince it is that which God Almighty has conſtantly deſign'd, and follow'd from all Eternity, tho' we are far more concerned in it. And that we can ſpend many entire Hours upon a Queſtion of Law or Mathematics, and yet cannot fix our Thoughts upon that infinite Being, in whom there are far more infinite Perfections; an Object that can never be exhauſted, where every Thought would open a new Scene of Thoughts, yet more delightful; by which Angels have been for many Thouſands of Years detain'd in conſtant Raptures, contemplating thoſe admirable Myſteries, which the Scripture tells us the Angels deſire to pry into, finding by a conſtant Enquiry, new Matter of holy Learning and bleſſed Curioſity; and are ſaid by God Himſelf to have learn'd this from thoſe happy Chriſtians to whom thoſe Myſteries were firſt reveal'd, *Eph.* 3. 8. Learn then, O Chriſtian, to manage thy Spirit, try firſt by what Means thou uſeſt to fix it on other Occaſions, and improving theſe from the obvious Advantages that pious Fixation will yield above all others, beg humbly, by Prayer, a new Supply to thy native Forces, acknowledge to God that thou haſt taught thy own Thoughts this Seditiouſneſs and Tumultuarineſs of which thou complaineſt; and hope, that as by frequent Yieldings thou feddeſt that Vice into a Habit, ſo that by frequent and reſolute Oppoſitions thou may'ſt deſtroy that obſtinate and dangerous Habit, and introduce a contrary one, which will make thy Fixedneſs eaſy and pleaſant. Frequent Reaſonings do alſo not only make us argue more ſtrongly and eaſily, but do warm us into a Conviction firſt, and then into a Love for that for which we contend: And thus Lawyers are oft-times convinc'd, even in the ill Cauſes they plead; and Heretics fix themſelves in their Errors, by frequent Conteſts for them. Why then ſhould we not argue more frequently both againſt ourſelves, and with others, upon theſe excellent Truths, by which alſo we ſhould be engag'd in Honour to walk ſuitably to theſe Truths, of which we profeſs to others that we are convinc'd? And who could be ſo abſurd, as after he has been debating againſt another for his Drinking, yet would invite him to a Debauch? But, alas, every Man loves to debate in his own Calling, except the Chriſtian: And it is become as much a Shame to talk of Devotion, as it ought to be our Glory and Delight; and Men ſeem afraid to debate, leſt by being too much convinc'd of what they ought to do, they ſhould be too much

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terrified for what they have done; and ſo theſe Convictions beget an Uneaſineſs to them, when to gratify their Humour they are tempted to renew their Sins.

HYPOCRISY affords us a clear Proof of this Partiality, as well as of Man's contradicting himſelf; for to confeſs there is a God who is omniſcient, who knows the Secrets of Hearts, and before whom there is nothing hid in Heaven or Earth, and yet to think that we can conceal our Thoughts from His all-ſeeing Eye, implies a flat Contradiction; as it alſo does to care for nothing but what may cauſe an Eſteem in ourſelves for ourſelves. We really value other Men's Approbation, becauſe it confirms us in our own: Nor would the vaineſt Man alive value all the Flatteries imaginable, if he thought he could not deſerve them. Yet in Hypocriſy we muſt know, that we deſerve not the Applauſe to which we pretend; and 'tis worthy of our Thoughts, to enquire impartially, how Men can reconcile theſe in themſelves; for the moſt debauch'd Reaſon will not adventure upon any Contradiction, without ſome ſeeming Reconciliation. And tho' at the firſt, it may ſeem, that Want of Conſideration is the Cauſe of this, yet this cannot be; for if we know not that we are maſquing, it is no Hypocriſy; and on the contrary, Hypocriſy requires great Reflection, becauſe it needs much Precaution. The Reaſon then of the firſt muſt be, That as to God we truſt our Repentance, and to His Mercy; as if forſooth, we did Him little Wrong, by making His Creature appear more excellent than it is; and as if it might prejudge His Service, to let others ſee, that we are many times more wicked than they; or that we did God good Service, in encouraging others to be pious by our good Example; and that we by Hypocriſy, do only raiſe an Eſteem, or come to an Imployment by which we may be truly ſerviceable to God in our other Actions. But I really think, that the Heart of Man is ſo narrow, that it can hold only one Scheme of Thoughts at once; and therefore, this little Soul being fill'd with a Deſire of Applauſe, and with the Shame of being ſilly and undeſerving, it reflects indeed, but all its Reflections look that way. The Man is full of this, and intent upon it, and ſo he ſees not the Contradiction, how palpable ſoever it be; but yet it is ſo notorious and diſcernable, that I may juſtly conclude his Reaſon weak, if not blind, who does not diſcern it. The Cure then of this ſubtile Cheat, muſt be by purſuing this Impoſture into its ſecret Receſs, by ſeeing this Player before he put on his fine Cloaths and Diſguiſes, by turning all our Thoughts to God, and from ourſelves; and adverting ſeriouſly and impartially to every little Circumſtance in the Deſign that is to be conſidered.

I have oft-times admir'd the Prevalency of Cuſtom above Reaſon; and tho' Brutes, who want Reaſon; or Children, in whom it is ſcarce rip'ned, be led by it; yet what a ſtrange Thing is it, that in Men who have Reaſon in Maturity, Cuſtom becomes not only a ſecond Nature, but overcomes Nature; and is a ſecond Nature, becauſe it almoſt extirpates Reaſon, which was our firſt Nature? For tho' the older we grow, our Reaſon ſhould grow the ſtronger, yet it falls ſtill weaker, and melts ſo before Cuſtom, that even the virtuous and dutiful Actions we do, ſeem rather the Effect of Cuſtom than of Reaſon. For if they proceeded from Reaſon, the ſame Reaſon which prompted us to do them, would oblige us to act virtuouſly on all other Occaſions. And we ſee, that we alter our Virtues as the Faſhions and Cuſtoms of our Country change. But to conclude this Expoſtulation, I cannot but wonder, that a Man ſhould be call'd reaſonable, after he has truſted the making Laws and Moulds for living happily and dutifully, to the Multitude or Crowd, the worſt of all Judges; and which we ourſelves contemn as an ignorant, giddy, and capricious Rabble.

OF which Influence of Cuſtom over Reaſon, many different Cauſes occur to me; for ſometimes I think that Cuſtoms eſtabliſh and fix themſelves in us whilſt we are yet young, that Reaſon can neither defend itſelf nor us, eſpecially as to unuſual Pleaſures, which are the proper and natural Objects of our firſt Years; and like Weeds that have over-grown the Ground, tho' never ſo fertile, they hinder the better Plants from growing up. To prevent which, it is neceſſary, that we teach young Ones to reaſon very early, and accuſtom them to a Chriſtian Logic, that is better than what they can learn in the Schools. Thus we may make Cuſtom itſelf uſeful rather than hurtful to Reaſon, and teach it to ſerve, whereas now it governs. And I know One who cur'd his habitual ſwearing, by arguing with himſelf, That ſince even the King's Enemies were able to reſtrain themſelves from ſpeaking Treaſon, by reflecting on its dangerous Conſequences, it was ſtrange, that he who was convinc'd that ſwearing did draw more dangerous Conſequences, could not abſtain from a Cuſtom that was altogether hateful, without the leaſt Allay of Pleaſure or Advantage to which the others might pretend.

SOMETIMES I think, that Cuſtom having the Force of the Multitude which ſupports it, they all concur to pull back a well reſolved Man from his virtuous Reſolutions; and Cuſtom prevails rather by Numbers than by Strength: And to prevent this, it is neceſſary for a Man who reſolves to reaſon juſtly, to withdraw for ſome Time from the Crowd: *Prov.* 18. 1.

*A Man*, ſays *Solomon, having ſeparated himſelf, meddleth with all Wiſdom.* And *Seneca* tells us, That *ſanabimur modo à cætu ſeparemur.* Jeſus Chriſt alſo, who has triumph'd over the World, is by ſtrong Interceſſions to be call'd in againſt this potent Enemy, who has ſhewn us, that He can throw out and diſpoſſeſs that Devil whoſe Name is *Legion:* But the Multitude is never ſo corrupt, but that ſtill ſome are to be found who can aſſiſt us in reaſoning juſtly upon Things; and we ſhould alſo remember, that we value ſo little the Multitude, that we ſtand not in Awe of what they ſay of us, when we are gaining Money, or ſatisfying our Pleaſures: Why then ſhould we ſtill ſpend all we have, and deny ourſelves all Pleaſures in following Cuſtom, or courting Fame; ſince Cuſtom and Fame are but the Dictates of the Multitude, an Homage which unthinking Men are forc'd to pay the Rabble, becauſe they dare not ſeriouſly reflect on what they do? Or which deſigning Men pay them, in hopes to make them firſt Tools to their Ambition, and thereafter Slaves to their Tyranny.

But at other Times the Strength of Cuſtom flows from our Lazineſs, who love the Way that is chalk'd out to us, and think it ſafer to follow, rather than lead the Crowd; cheated to this by a cowardly Humility, which proves our never having conſidered the Nobleneſs of our own Origin: Which is to be cur'd by a generous Reſolution of deſpiſing Difficulties, and of being Slaves, as all Perſons are who love better to obey, than to examin the Dictates of others. And we are moſt unreaſonable, when we have ſo ſtrong Deſires to lead the Multitude to our Ruin, as in ſeditious Tumults and Factions; and yet will be content to be tamely led by them in what is much nobler, and of great Conſequence. How much more do we praiſe thoſe great Legiſlators, who govern'd the Multitude by their Virtues, than thoſe Sycophants who ador'd them by Submiſſions? There is Light in Virtue and Religion, and there is none dares reſiſt it; it is able to aſtoniſh as well as convince: Nor are Men ſo wicked, as not to deſire to be aſſiſted by ſome happy Genius, in what they are convinc'd is beſt. And every Man almoſt ſtands only in awe of another, expecting and wiſhing ſome *Moſes* to undertake their Delivery.

Generally Self-love ſeems to lead into theſe Sentiments, as thinking the Multitude will cry up their own Inclinations, and is unwilling to check that Multitude from which it expects Applauſe; and whoſe many Suffrages it needs to maintain it, againſt that inward Senſe it has of its own Weakneſs and Sillineſs. And this is to be cured by a noble Reflection upon the Dignity of our firſt Creation; and a Deſire to be again like to that God whoſe Image at firſt we were, and whoſe Sons we may yet be, if we can raiſe our Hopes above thoſe lower Spheres of ſenſual Joys and Pleaſures which poyſon us when they ſeem ſweet, and cheat us when they appear great.

One of the dreadful Effects of our following the Example of others, is, That we think it is ſufficient to be as reaſonable as they: And thus we fooliſh and unreaſonable Mortals, ſtint and bound one another's Goodneſs. Now this we ſhall eaſily perceive to be moſt unreaſonable, when we conſider that no Man will ſatisfy himſelf in being as powerful or rich as his Neighbours; tho' theſe be much leſs deſirable for a Soul and Spirit, which is the Image of an infinite God, and is after all its beſt Endeavours here very far from attaining to that Degree of Perfection which is even requiſite to the Life of a Chriſtian. Devotion is a Race, and who is it that when he runs with many Rivals, will content himſelf to be in the Throng, eſpecially if the Prize be conſiderable? And therefore the Apoſtle exhorts us to *forget thoſe Things which are behind, and to reach forth to thoſe Things that are before, preſſing towards the Mark, for the Prize of the high Calling in Chriſt Jeſus*, Phil. 3. 14. We are not only obliged to preſs on to obtain the Crown, but being purſued by our ſpiritual Enemies, we are concerned to uſe all the Speed that is poſſible. And would not we conclude him mad, who if he were purſu'd for his Life, would not deſire to be paſt all Danger, but content himſelf that he were not the laſt amongſt thoſe who endeavour'd to eſcape.

It is ſtrange, that notwithſtanding that Cuſtom does ſo lead us when we go, not where we ought to go, but where others have gone before us, yet we oft-times err to a contrary Extreme, and by a contrary Reaſon, which is as falſe and more dangerous than the other; reaſoning weakly and falſly from a Deſign and Deſire to be ſingular, and conſequently to be admir'd. Thus even whilſt in this we oppoſe the Multitude, we deſign to pleaſe them too; for no Man admires what does not delight him; and probably, theſe ſame Contradictors would have choſen rather to have gone to Fame in the beaten Path, by a direct pleaſing and following of them; but finding a Crowd before them in it, which they could not paſs by, they, by a long and a dangerous Circuit, run before, and endeavour to keep the Paſs on their Rivals, and hinder them from coming up at Fame; and tho' they want the Multitude at preſent, yet they hope to make them follow, elſe they would not differ from them; for few would care to continue alone till the laſt, tho' they love to be ſingular at firſt; yet this Humour is a very great Enemy to true Reaſoning, for it introduces a Habit of arguing falſly; and it is difficult in this dark Eſtate to recover our Road if we once quit our Light; one Error emboldens us to commit another, and it is the Puniſhment of it when committed; even thoſe who care not to oppoſe Truth, love to be conſequential in their Oppoſition; for to do likewiſe, were to be guilty of a double and more palpable Vice in reaſoning.

ANOTHER great Hindrance to right Reaſoning, is Senſuality: For tho' I am far from being of their Opinion, who think the Soul nothing but the animal Spirits; ſince we cannot conceive how Matter can think ſo delicately and ſubtilly; yet there is no doubt but the Temper of the Body has great Influence on the Mind; and that Sobriety does purify the Blood, and make theſe animal Spirits fitter Organs for the Soul; as on the other Hand, Drunkenneſs drowns it, Gluttony ſtupifies it; and even after that Time has diſſipated thoſe Loads which oppreſs the Soul, there remains a Stock of Dregs which are eaſily inflam'd into Luſt, Rage, and other brutal Paſſions, which in a more laſting Manner enſlave it. Therefore *Pagans* have recommended Sobriety as a Diet for the Soul as well as the Body; and the Scripture Faſting, as a religious Duty. And ſince there is none of us ſo brutal, but if we were about to preach, plead, or aſſiſt in a public Judicature, we would be careful to avoid all theſe Exceſſes, leſt thereby our Reaſon might be diſturbed or clouded; we ought much more to ſhun them, with an Eye to the Service of an Infinite God, and the Preſervation of our immortal Souls; minding in this the Obſervation of the Prophet, *Wine, and new Wine take away the Heart*: And the Advice of our Saviour, *See that you be not overcharged with Surfeiting and Drunkenneſs.*

THERE remain yet two vigorous Enemies to our Reaſon to be ſubdued, Bigotry and Raillery; which tho' they be contrary to one another, Bigotry treating Things that are ridiculous as ſacred, and Raillery treating Things ſacred as ridiculous, yet they both conſpire againſt our Reaſon, and are the favourite Extravagancies of the Times, which obliges me to inſiſt the more upon them.

*Du Lange verb. Bigot.*

I define Bigotry to be a laying too much Streſs upon any circumſtantial Point of Religion or Worſhip, and the making all other eſſential Duties ſubſervient thereto; and got its Name from an Occaſion extravagant like itſelf. *Rolland* firſt Duke of *Normandy*, being oblig'd to do Homage to *Charles* King of *France*, for that Dutchy, refus'd to kiſs his Foot, except the King would raiſe it himſelf to his Mouth; and when it was told him, that the Solemnity conſiſted in his taking up the King's Foot, and kiſſing it, he anſwered, *Ne ſe begot*; that is to ſay in old *Norman*, Not ſo, by God; whereupon the King and Court derided him; and the *Normans* were from that Occaſion called Bigots, as they who adher'd pertinaciouſly to ridiculous Extravagancies. Theſe latter Ages having in this Dotage of the World produc'd Multitudes, who miſtaking Reformation for Humour, and ſeeing ſome devout Men admir'd for ſeparating from idolatrous and ſuperſtitious Churches, becauſe they would not reform great and fundamental Errors, imagin'd that every Thing was to be ſtruck at with the ſame Zeal which theſe ſhewed in Matters of greateſt Conſequence; and by a farther Effect of the ſame Zeal, they proceeded to force others to concur with them in their Extravagancies; which ſurprizing Diſtraction forc'd Men to beſtow on them the Name of Bigots. Superſtition could not ſo well agree to them, that being only an exceſſive Worſhip paid to a Deity, true or falſe, from an ill-grounded Fear of Miſchief from it: Nor could Dogmatizing ſerve, that being only a Poſitiveneſs in any Opinion, joined to the Vanity of thinking that the Dogmatizer had Right to dictate to others: Nor Opiniatrity, becauſe that conſiſts only in adhering too ſtifly to any Opinion, in ſpight of the beſt Reaſons: Nor Schiſm, becauſe it is an unneceſſary Separation: Nor Hereſy, for tho' it is an obſtinate Error in ſome important Point, yet it is always in Matters of Faith; whereas Bigotry reſts only in Matters of ſmall Importance. But tho' Bigotry properly relates to Matters Eccleſiaſtical in our late Acceptation, yet it is by an eaſy Stretch us'd to expreſs Opiniatrities of all Kinds; and if we conſider its Original, we muſt conclude, That it has been drawn to Matters Eccleſiaſtic, and is appropriated now to them, becauſe they are the moſt remarkable and frequent Inſtances or Effects of this miſchievous Principle. For we may juſtly ſay, That Bigotry is the Hypocondriaciſm of Reaſon, the Bedlam of Religion, and the Ape of Infallibility.

INSTANCES of this Bigotry, as they are very frequent, ſo they are very ancient. The Apoſtles themſelves were forc'd very early to inveigh againſt Zeal that was not according to Knowledge; and the Chief of their Scholars, who had been ſo happy as to hear them preach, did yet rend the Church by a dreadful Schiſm, which ſoon after grew to that Height, that the Weſtern Church excommunicated the Eaſtern, for differing from them in the Obſervation of *Eaſter*.

THE beſt Way to deter Men from ſpending their Time and Zeal in the Service of Bigotry, either as its Chaplains, or as its Emiſſaries or Executioners, will be to conſider the great Defects under which it labours, and the ſad Effects which it produceth.

The firſt pernicious Effect of Bigotry, is, That it obtrudes on us Things of no Moment as Matters of the greateſt Importance. Now, as it would be a great Defect in a Man's Senſe to take a Star for the Sun; or in an Orator to inſiſt tenaciouſly on a Point which deſerved no Conſideration; ſo it muſt be a much greater Error in a Chriſtian to prefer, or even to equal a mere Circumſtance to the ſolid Points of Religion.

But theſe Miſtakes become more dangerous, by inducing their Votaries to believe, that becauſe they are Orthodox in theſe Matters, they are the only People of God, and all who join not, are Aliens to the Commonwealth of *Iſrael*: And from this ſprings firſt, that they, as Friends of God, may be familiar with Him, and as Friends do one to another, may ſpeak to Him without Diſtance or Premeditation; thence it is that we hear dreadful Nonſence inſolently vented in extemporary Prayers, ſuch as would induce one to think that they do not believe Him to be a God to whom they ſhew ſo little Reſpect; for who can think that infinite Wiſdom can conſider them as Friends, who dare addreſs to Him ſo unſuitably? Bigotry having thus corrupted our Reaſoning in Matters of Religion, it eaſily depraves it in the whole Courſe of our Morals and Politics.

The Bigots, in the Second Place, proceed to fancy, that they who differ from them are Enemies to God, becauſe they differ from God's People; and then the Old Teſtament is conſulted for Expreſſions denouncing Vengeance againſt them: All Murders become Sacrifices by the Example of *Phineas* and *Ehud*; all Rapines are hallowed by the *Iſraelites* borrowing the Ear-rings of the *Egyptians*; and Rebellions have an Hundred forc'd Texts of Scripture brought to patronize them. But I oftentimes wonder where they find Precedents in the Old Teſtament for murdering and robbing Men's Reputation, or for lying ſo impudently for what they think the good Old Cauſe; which God foreſeeing, has commanded us not to lie, even for His ſake.

The Third Link of this Chain, is, That they fancying themſelves to be the only *Iſrael*, conclude that God ſees no Sin in them, all is allowable to them; and (as one of themſelves ſaid) *They will be as good to God another Way.*

The Fourth is, That ſuch as differ from them are Baſtards, and not the true Sons of God, and therefore they ought to have no Share of this Earth, or its Government; hence flow theſe holy and uſeful Maxims, Dominion is founded in Grace; and the Saints have the only Right to govern the Earth. Which being once upon an Occaſion earneſtly preſs'd in *Cromwel*'s little Parliament, it was anſwered by the Preſident of his Council, That the Saints deſerved all Things; but that public Employment was ſuch a Drudgery, that it would be unjuſt to condemn the Saints to it; and that the ſecureſt Way to make the Commonwealth happy, was to leave them in a pious Retirement, interceding for the Nation at the Throne of Grace.

The Fifth Error in their Reaſoning, is, That ſeeing their Opinions flow immediately from Heaven, no earthly Government can condemn any Thing they do, in proſecution of theſe their Opinions; thence it is that they raiſe Seditions and Rebellions without any Scruple of Conſcience: And believing themſelves the Darlings and Friends of God, they think themſelves above Kings, who are only their Servants and Executioners.

It may ſeem ſtrange, that ſuch Principles as Bigotry ſuggeſts, ſhould be able to produce ſo ſtrange Effects; and many fanciful Perſons pretend it to be from God, becauſe it prevails ſo. But this Wonder will be much leſſen'd if we conſider firſt, That the greateſt Part of Mankind are weak or diſhoneſt, and both theſe ſupport Bigotry with all their Might. Many virtuous Men alſo promote its Intereſt, from a miſtaken good Nature, and vain Men from a Deſign of gaining Popularity. Theſe who are diſoblig'd by the Government join their Forces with it to make to themſelves a Party; and thoſe who are naturally unquiet or factious, find in it a pleaſant Divertiſement; whereas on the other ſide, few are ſo concern'd for Moderation and Truth, as the Bigots are for their belov'd Conceits.

There is alſo a tinſel Devotion in it, which dazzles the Eyes of unthinking People; and this ariſes either from the new Zeal, that like Youth, is ſtill vigorous, and has not as yet ſpent itſelf ſo as that it needs to languiſh; or elſe, from the Bigot's being conſcious that his Opinions need to be diſguis'd under this hypocritical Mask.

Severity alſo increaſes the Number and Zeal of Bigots. Human Nature inclines us wiſely to that Pity which we may one Day need; and few pardon the Severity of a Magiſtrate, becauſe they know not where it may ſtop. I have known alſo ſome very ſerious Men, who have concluded, that ſince Magiſtrates, have not oftentimes in other Things a great Concern for Devotion, their Forwardneſs againſt theſe Errors muſt ariſe either from the Cruelty of their Temper, or from ſome hid Deſign of carrying on a particular Intereſt, very different from, and oft-times inconſiſtent with the religious Zeal they pretend. And generally, the Vulgar believe that all Superiors are inclin'd to triumph over thoſe who are ſubjected to them; many have alſo a ſecret Perſuaſion that the Magiſtrates are ſtill in League with the National Church, and its Hierarchy, which they ſuſpect to be ſupported by them, becauſe it maintains their Intereſt, and they are apt to conſider Churchmen but as Penſioners, and ſo as Partizans to the Civil Magiſtrate.

MANY are drawn into the Eſteem of ſuch Opinions as they ſee Men ſuffer Difficulties for. But this Miſtake was foreſeen by the Primitive Church, who therefore declared that *non Pœna ſed Cauſa facit Martyrem.* Chriſtian Prudence does not allow a Man to ſell his precious Life for an incompetent Price; Forwardneſs that Way does not always recommend an Opinion: Men of all Perſuaſions have died with Firmneſs; Pagans, yea, Women, for their Country or Husbands, have ſhewed a Courage beyond any of theſe Bigots or Enthuſiaſts. The Hiſtory of *China* relates a notable Inſtance of fantaſtical Bigotry; an Hundred Thouſand *Chineſes,* who had born tamely the Nation's being enſlav'd by the *Tartars,* without making any Effort to recover their Liberty, choſe rather to die than conform to the *Tartars,* in turning up their Muſtachoes after their Mode. Vanity well diſguis'd can flatter Men with the Glory of Martyrdom; and 'tis obſervable that this Firmneſs faints often where Executions are private; however, this ſhould prevail with a wiſe Magiſtrate, never to make religious Opinions criminal.

THE true Cures then of this Diſeaſe ſeem to be, Firſt, To endeavour to plant Reaſon early and carefully in the Hearts of Young-ones, or to recover it in thoſe of more advanced Years; for this is a more ſolid and effectual Way, than the immediate oppoſing, or offering to cure this Imperfection itſelf, will prove; Men love their old and familiar Acquaintance. Travelling abroad conduces much to this Cure; for ſuch as converſe only with thoſe of their own Perſuaſion, are daily warm'd into new Degrees of Zeal; whereas when we ſee that Men of true Senſe differ from us, we will be inclin'd from a Chriſtian Modeſty and Humility, firſt to doubt our own Opinions, and then to hear Inſtruction. The orthodox Clergy ſhould by their pious Lives conduce to this Cure; and even Laics ſhould, by their ſerious and devout Converſation, convince them that Sincerity and Piety are not inſeparable from ſuch humorous Conceits. Theſe poor deluded People ſhould conſider, what Miſchiefs and Deſolations thoſe *Vulcano's* of Zeal have brought upon this Iſland by their dreadful Eruptions; there being but very few Families, in which ſome of their Children have not been ſacrific'd to this *Moloch*: Nor can our Navies or Armies ſecure us while this Enemy lodgeth within us, and is cheriſhed by us. They ſhould alſo conſider, That religious Reaſon left to itſelf will at laſt overcome thoſe Prejudices, which, like Meteors, may ſhine for a Time, but will at laſt vaniſh into the common and undiſtinguiſh'd Air.

BUT the beſt of all Remedies is, To conſider ſeriouſly the Doctrine and Practice of our bleſſed Saviour; (to form our Reaſon by which, is the great Deſign of this Eſſay) and therefore they ſhould remember, that our Saviour foreſeeing the Inconſequentialneſs of their Actions, did obſerve, That they did ſtart at Straws, and ſwallow Camels; That they tithed the Mint and Anniſe, but forgot the great Things of the Law. Our Saviour's reaſoning in the Parable of the *Publican* and *Phariſee*, ſhould humble all ſpiritual Pride; and His humble and ſubmiſſive Form of Prayer ſhould bridle the Indiſcretion of all rude Addreſſers. He ſuffered not the Sons of *Zebedee* to call for Fire from Heaven, that He might thereby inſtruct the World, how unſuitable their Zeal was to His Goſpel; He reaſoned againſt fighting *Peter*, That if His Kingdom were of this Earth, His Servants would fight for Him; and if He needed any Aſſiſtance, He might call for Legions of Angels: Nor can I think, after this Inſtance, our Saviour would have truſted *Peter*, in His Abſence, with two Swords, ſince he was ſo forward in His own Preſence, when he had but one. But if others will be ſo blind as not to follow our Saviour's Way of reaſoning, let us at leaſt follow it, in praying for them, becauſe they know not what they are doing. Yet I wiſh both they and we would conſider, That we reſemble too much at this time the unhappy *Jews*, who, by fighting amongſt themſelves for ſmall Matters, relating to their religious Rites, occaſioned their being totally deſtroyed, and extirpated by the *Romans* who beſieged them.

I know no greater Enemy to juſt Thought or Reaſoning, than Raillery and Satyrs, and the new Way of Reaſoning, ridiculous Similies. Moſt Men are ſo famous for this Kind of arguing, and do by it confute and baffle ſo much all who oppoſe it, that it paſſes for the ſtronger Way of Reaſoning; Victory being ſtill accounted the Effect as well as the Reward of Strength: But this Way looks ſo ſilly to Men when they retire and are alone, that they begin to wonder what it was that pleas'd them ſo before they left the Converſation. And therefore I think it worth my Pains to ſearch a little into the Cauſes of this vulgar Error, Why Men are ſo much pleas'd with Raillery, and why it prevails ſo in the World at this Day.

THE Firſt Cauſe of this, in my Opinion, is, That Men naturally love Truth, as the Eyes do Light, or Brutes Food; for Truth is indeed the Light and Food of the Soul; yet miſſing it, after much Enquiry, and a paſſionate Search, they do either conclude there is none, and ſo laugh at all others who ſeek it; or in Revenge, contemn it as a Cheat; and this breeds at firſt Raillery and Satyrs; even as we ſee, that when Gallants are rebuked by a ſevere Miſtreſs, they pleaſe or revenge themſelves in railing at her, or treating her in Ridicule; as Stateſmen and Courtiers ſeldom fail, when thrown off, to uſe the Court and Employments from which they are fall'n, after the ſame manner. And ſince too few ſeek after Truth itſelf, naked and unrewarded; others again, weary of the Toils and Severity required in true Reaſoning, reſt on this as the eaſieſt; even as Men content themſelves with gilded Plate, when they cannot attain to true Gold; and Railery has become by this as ordinary as the falſe Jewels, with which ſo many now pleaſe themſelves inſtead of true ones; and at a Diſtance, and on the public Theatre, even of Buſineſs, the one appears brisker than the other.

RAILERY pleaſes alſo Men's Self-love better than Truth; for Truth is too honeſt to ſerve our Revenge; whereas Railery does tempt the Jeſter to flatter himſelf, and is an ordinary Occaſion for others to flatter him as a formidable Wit: Nor can the World find ſo fit a Tool for Revenge as Railery; ſince few durſt even for fear of Checks of Conſcience ſtab their Neighbour, or for Honour wound him when his Back is turn'd, if it were not in a pleaſant Jeſt, which makes Malice paſs for Wit, and cheats the Satyriſts into a Belief that they deſign not to wrong him, but to pleaſe the Company: The Hearers alſo would hate ſuch Enemies to Mankind, if they were not ſo raviſh'd with the Way, that they had not Time to think on the Malice. This Misfortune alſo attends it, that it tempts Men to do or ſay many Things on which they would not otherwiſe adventure, preſuming that their Wit, which is ſo much admir'd, will alſo fright or bribe others from accuſing or puniſhing them.

TRUTH is a ſober and equal Pleaſure, free from all Tranſports, and hating them; and ſo ſeems dull and flat to young and warm Spirits; whereas that Paſſion which accompanies Railery, either in Joy or Revenge, is more vigorous and elevated; and 'tis indeed a Wonder to think what Force and Energy there is in the Soul, when the Sails of its Imagination are filled with the proſperous Gale of Applauſe, and by what ſecret Springs the Fancy is able to raiſe it to ſuch Heights, when it is warmly pleaſed; or what infinite Numbers of raviſhing Images appear to a ſtrong Fancy: And how it creates ſo many pleaſant Notions out of other Men's Infirmities: And what great Variety and Newneſs it conſtantly produces, forming always various Scenes of Joy, to the Wonder even of ſober Men. I deny not, but ſome do from good Nature, and to pleaſe the Converſation, ſcoff and jeſt; and, as I ſaid formerly, ſome ſeeing it ſo much admir'd, think it is truly good, it being a Kind of Modeſty, to believe that good which pleaſes others; and ſome ſeeing Victory attend it, think it is the ſtrongeſt Way of arguing; and, thus this Weed riſes and ſpreads, and we ſit with Delight under the refreſhing Shades; and with theſe Raptures of Malice or Pleaſure, Scoffers are ſo much taken, that they have not the Leiſure to think on what they ought to do, or even on what they are doing; and thus they forget frequently the Duty they owe to great Men, to whom they have Acceſs, and can hardly keep themſelves within that Moderation in Converſation, Eating, Drinking, and other Exerciſes that are requiſite for preſerving Health and Quiet, or for obſerving the Rules of Decency and Diſcretion. I conclude, That Jeſting and Satyrs are ſo far from being a Relaxation of Spirit to thoſe who are wearied with ſerious Employments, as is pretended, that they are oft-times rather a new and ſtudied Toil; and moſt of theſe Extravagancies could ſcarce be pardoned; like bitter and ſowre Fruits, which can hardly be eaten, except when confected with great Care and Expence. But if we look further into the Matter, we ſhall find, that nothing wrongs more both Reaſon and Piety, and is more deſtructive to true Friendſhip, or more inconſiſtent with Sincerity.

FOR clearing whereof we may obſerve, That every Faculty of the Soul contributes a peculiar Way to our Reaſoning: The Judgment does bring ſolid Arguments; the Memory, Inſtances, Examples and Citations; the Fancy or Imagination beautifies rather than illuminates its Objects with Similies, Metaphors, and other rhetorical Figures; ſo that Raillery neglecting the other Two, ſports itſelf lightly amidſt thoſe Flowers, without minding the great Buſineſs; and I have obſerved, That few who have been once bewitched with this Way, ever minded any other. This ſuffers them not to penetrate further than the Out-ſide of Things, and ſo it is impoſſible, that they who uſe it as their conſtant Divertiſement, can have any deep Thoughts, or can ſearch into the Bottom of Affairs.

I have alſo obſerved, That Railery ariſes oft-times from an undervaluing of all Perſons and Things; and nothing can be more contrary to Religion or Government than this is: To Religion, becauſe, when a Man contemns all that God has created, he undervalues what the Almighty Himſelf was pleas'd with, and rejoiced in, and ſcorns theſe great Exemplars of Piety and Devotion, whom God has called His Friends, and Men after His own Heart; and ſo in effect he concludes, That God (bleſſed be His holy Name) made not good Choice, and knew not how to value Men a-right. And therefore I ſtand aſtoniſh'd to hear Ballads againſt *Moſes* and *David*, ſo much admir'd by ſuch as confeſs there is a God, that the Scriptures are His Dictates, and they the Penmen of theſe Scriptures, and ſo Secretaries to God: Nor do ſuch Scoffers make good Stateſmen; for none are ſuch, ſave they who from a Principle of a Conviction and Perſuaſion, manage public Affairs to the Advantage of thoſe who employ them; Whereas they who believe that nothing is worth their Pains, can never do any thing with Affection and Vigour; and ſince they care not for the Things themſelves, and ſcorn ſuch as employ them, they muſt never care for what Events attend them. Have we not ſeen ſome of theſe great Wits prove the worſt of all Stateſmen in our own Days, and as far below the Meaneſt in Management, as they were above the Wiſeſt in Wit and Sharpneſs? What Friends alſo theſe prove, is ſufficiently underſtood to thoſe whom they have loſt for a Jeſt, after all the Services they could have done them: And 'tis very obſervable, That if Three or Four of them be in a Room, they who remain after ſuch Converſations, will fall on him who is gone, with all the Malice imaginable; and we very ſeldom ſee Two ſuch Wits true Friends.

I ſhall end theſe Reflections with this Addition, That generally Satyrs are made up of Impiety, Malice, or Bawdry; the Firſt, unworthy of a Chriſtian; the Second, of a Gentleman; and the Laſt, of a ſober Man; and in which Railers have Atheiſts for their Maſters, ſatyrical Waſps for their Comrades, and oft-times Fools and Madmen for their Superiors. Unhappy Men, who do Things that they muſt be aſham'd of, and whereof the Pleaſure is leſſen'd in the preſent Time by Checks of Conſcience, and grows bitter afterwards by Fear of Torments; a Quality our Saviour never countenanc'd, which His Favourites have ever zealouſly decry'd, in which Buffoons and Players have exceeded the greateſt Kings, the moſt renowned Heroes, and the wiſeſt Men; a cowardly Extravagancy, which ever attacks the Weak; and a mercileſs Humour, which triumphs over the Unfortunate: Upon which Accounts all Men make it their Intereſt to expoſe the Scoffer, as finding in his Ruin their own Self-defence; and becauſe they know he cannot be pleaſed, except they be miſerable; therefore they conclude, that they cannot be ſecur'd till he be humbled.

I deſign not by this to leſſen the Eſteem due to true Wit, and that Pleaſantneſs in Converſation which ariſes from it as Flowers from the Root. The Almighty certainly deſign'd to make all Men happy, and there is no Happineſs without Pleaſure; and as He rejoyced, when He ſaw that all that He had made was good, ſo He was deſirous that Man might find out this Good, both for making himſelf thereby happy, and for inviting him the more to magnify the Creator. And therefore to ſweeten the Miſeries which naturally imbitter human Life, God has illuminated ſome with a Pleaſantneſs of Humour, which rejoices the Society into which they come, as the Sun illuminates the Room into which it enters: Theſe are they who having Peace of Conſcience at home, are thereby allowed to be glad; and who having Wit, employ it in turning the right Side of Things to them, underſtanding as well to find out what is pleaſant in any Object, as Artiſts do to find a Mine of Gold in a barren Mountain. This is the true Uſe of Wit; and if at any Time they uſe it to treat Vice or Extravagancy in Ridicule, it is not from Malice to the Perſon, but from Deſire to reform him, and Mankind by him. There is a Juſtice in ſcourging, defaming, and baniſhing Vice; and this Juriſdiction is given by Heaven immediately to ſuch as have Senſe; of whom, upon that Account, the greateſt Rulers ſtand in awe; and ſo much Reverence is due to them, that the reſt of Mankind beſtow Applauſe according to their Inclinations: Bitterneſs then, and ſullen Moroſeneſs in Wit, is the Tyranny of this Juriſdiction: If it be inſolent, it is the wrong Side of this delicate Picture, a flaſhing Light, which at firſt dazles, but thereafter blinds; a delicious Fruit, corrupted into Bitterneſs, and a beautiful Face wrinkled by fretting Humours.

THE Ancients term'd Wit a Salt; and that is not fit for Food, but for Seaſoning; it may be us'd plentifully in Converſation, moderately in Buſineſs, but never in Religion.

THEY who enter into a Faction, do not properly Reaſon weakly, but deſert Reaſon altogether, as one does who leaves his own to go into another Country, whereof the Laws, Cuſtoms and Language are different. The Deſign and Centre of Faction is to drive on ſuch a Project, and adhere to thoſe who proſecute it. And therefore nothing muſt be allowed or argu'd but with reſpect to theſe. Hence it is, that in vain you reaſon with them; for one may tranſubſtantiate as ſoon as convert them; all that their Friends ſay is unanſwerable, and they contemn and ſcorn what is ſaid by their Adverſaries when they cannot anſwer it; there is no Crime they dare not commit, for the Guilt ſeems but ſmall when divided amongſt ſo many Bearers; they warm themſelves by clubbing into a kind of Belief, and they vote themſelves into a Shadow of Infallibility; whilſt they cry out againſt others as Slaves to the Government, they become really Slaves to the Faction, their Liveries and Chains being ſeen by all, except themſelves: But the great Salary with which their Bondage is to be rewarded, is Applauſe from their Friends, or it may be the Mob, to whom naturally their Appeal lies, and the getting into the Government, where they will be abhorred for practiſing every Thing they formerly decry'd, and ſo have that Reputation for which they toil'd, blaſted by their own old Arguments: This Extravagancy is in itſelf ſo unacceptable to all devout and reaſonable Men, that it is forc'd to uſe Railery to baffle Religion by Bigotry, and Reaſon by Railery; and I believe that Faction was the firſt Introducer of the one into the Church, and of the other into the State.

MY chiefeſt Wiſh then ſhall be, that God who has ennobled me with right Reaſon, may make me happy in the right Uſe of it; that I may neither ſell it for Money, nor barter it for Fame; and that it may never be dazled by the ſhining Brightneſs of Favour, nor clouded by the black Shadows of Fear; and tho' the Portion beſtowed upon me be very ſmall, that yet I may employ that one precious Talent ſo, as that I may have from my Glorious Maſter that only deſirable Character, *Well done, good and faithful Servant; thou haſt been faithful in a few Things, enter thou into the Joy of thy Lord.* Matth. 25. 23.

*The End of the Moral Eſſays.*

# TREATISES
ON THE
Laws of SCOTLAND,
AND
# PLEADINGS
Before Its
*SUPREME JUDICATORIES*;
With Their
# DECISIONS.
BY
Sir GEORGE MACKENZIE.

the [illegible] they could have done them. And [illegible] That if Three or Four [illegible] a Room, they who remain after such Conversation [illegible] on him [illegible] all the [illegible] imaginable, and we very seldom [illegible] true [illegible]

I [illegible] these [illegible] with this Addition, That [illegible] up [illegible] Piety, Majesty, or [illegible] the First, unworthy of a Christian, [illegible] of a Gentleman, and the [illegible] of a [illegible] and in which Railers have [illegible] for their Companions, and sometimes Fools and Madmen [illegible] their [illegible] Men [illegible] Things [illegible] they [illegible] and [illegible]

[illegible] which His Favourites [illegible] which [illegible] exceeded the greatest King [illegible] which [illegible]

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# *ORATIO INAUGURALIS*

## In aperiendâ

## Juriſconſultorum Bibliotheca,

### A Dom. GEORGIO MACKENZIE à *Valle-Roſarum*,

### *Facultatis* ADVOCATORUM *Decano, habita.*

QUINTUS jam volvitur annus, ex quo Advocatorum facultati viſum eſt, donariis & ſymbolis a Benefactoribus & Candidatis noſtris famæ conſecratis, Bibliothecam ſolis Juris-conſultorum ſcriptis, Juris-prudentiæque inſervientibus ornatam erigere & inſtruere. Et licet rei novitas ad hoc nos allicere poſſit, cum nulla hujus generis Bibliotheca adhuc extet; primitiæque & DEO & Hominibus placeant; rapiantque in ſui admirationem vulgi uſu non trita; omnibuſque arrideat, primos potius etiam minutiorum eſſe autores, quam in excellentioribus ſecundos: Hiſce tamen ſolidioribus ad hanc Bibliothecam noſtram inſtruendam adducti ſumus argumentis.

CUM virum totum, ingeniumque externis ſtudiis nec implicatum, nec diſtractum requirat Juris-prudentia, æmulorum impatiens; conſonum erat Bibliothecam, in quâ docti noſtri verſantur, ab hujuſmodi ſtudiorum Auctoribus puram conſervare, ne ad adulteros amplexus ſolicitarentur.

CURIOSIS & doctis, etiam ditioribus, non erat ea omnium Scriptorum copia, quæ hîc ſummâ curâ & ordine collecta eſt, quaque pro indiviſo (ut moris erat in aureo ſæculo) omnes nunc fruuntur, ſine ſumptu ullo abunde inſtructi, ſine ullâ ſolicitudine locupletati; atque ita nihil nobis niſi ingenium & induſtria deerunt. Nam quicquid *Græca* & *Romana* invenit ſapientia, quicquid eorum inventis ſerior aliarum gentium experientia addidit, quicquid hæc doctorum corona bono publico conſignavit, quorum ingenio nihil arduum, nec induſtriæ impervium, quorum opera quaſi ſemper nova etiamnum delectant, & in quibus nihil eſt quod ſuum quiſque non optaret, hoc jam noſtrum fœlici hâc fit adoptione. Nobis vigilarunt *Cujacius*, *Bachovius*, aliique hujus aurifodinæ effoſſores, quorum ſudore & laboribus nos jam ad votum ditati ſumus.

UT olim in foro *Attico* & *Romano*, benè fictâ immortalitate, etiam poſt mortem in ſtatuis ſuis ſpirantibus vivebant de Republicâ bene meriti, ita & hîc, clara illa ingenia, quæ Jurisprudentiam excoluere, in ſuis vivunt voluminibus, quæ æris inſtar politá, perenniora erunt ære, quæque exeſis ab edace tempore ſtatuis inveniet forſan Angelus ille, qui mundum hunc eſt incenſurus. Excogitet ſtulta adulatio (Nebulonum eloquentia) elogia Tyrannis peſſimè adoptata, inficietque marmora vultu malè collocato, virtute ſolâ ſibi quiſque ſtatuam eriget duraturam; nam ut quiſque fortunæ, ita famæ ſuæ optimus faber. Riſu enim, non honore ſunt digni, qui famam non merentur, ſed emunt: Beati autem, quibus gloriæ monumenta, honoris ornamenta, laudis inſignia in bonorum doctorumque animis conduntur & collocantur. Vera etiam gloria Juris noſtri ducibus hìc attributa, ſanam non febricitantem æmulationem, Bibliothecam noſtram intrantibus accendet, laudandum ambitum, ſanctamque veri & juſti avaritiam. Scandant alii tribunalia adulatione parta, è quibus pauci deſcendunt, multi præcipitantur. Nobis placebit *Ciceronem* Advocatum illum glorioſum emulari, qui ipſo *Cæſare* teſte, omnibus Triumphis tanto majorem Lauream adeptus eſt, quanto plus erat ingenii, quàm Imperii *Romani* terminos promoviſſe; ſanctumque illum *Catonem* mortalium integerrimum, Juriſconſultorum ſagaciſſimum, quem *Virgilius* invidendo exornat Elogio, dum illuſtrioribus *Romanorum* ducibus recitatis, nec quò altius aſſurgeret haberet, Venerandum agmen ita clauſit,

——Et his dantem Jura *Catonem.*

Erit etiam hæc Bibliotheca noſtra *Lycæum* aliud, aliaque Porticus, & Stoa, ubi ſe præclara ingenia innocuis exercebunt velitationibus. Aliquando enim propoſitâ & in diem alium prorogatâ quæſtione, unuſquiſque eam ſuis ditabit & decorabit meditationibus, dicenda majore curâ parans, quam ſi ingenti invitaretur Salario, aliorumque lucubrationibus veluti propriis delectatus, ſociorum lumine ſuam facem accendens. Ita quicquid in jure difficile, expeditum reddetur; & quicquid obſcurum, illuminabitur: Dumque omnes ſcalas difficultati admovent, expugnari eam neceſſe eſt. Aliquando etiam mellifluâ oratione, harum doctarum diſſertationum aſperitas lævigabitur; & hìc, ut in *Sampſonis* Leone, ex forti dulcedo proveniet. Doctioribus etiam delegabitur provincia juſtos authorum Characteres, ex probatis Juris-conſultis eruendi; cum ſummâ tamen curâ, ne ab his ſeducamur, quos ambitio vel ira excæcàrunt, quorum vis omnis in aculeo eſt.

*HVNNII* opera, piis *Bachovii* manibus, tanquam Holocauſtum comburenda credimus; iis autem *Fabri* rationalia, quia Advocatis utilia, non concedemus. Aliis ex hiſce delegatis mandabitur, ut recentiores expendant, quorum cenſura nondum extat; ſed judicium illud in Archiva noſtra non eſt referendum, antequam in frequenti conſeſſu probatum fuerit. Hujus ſcrutinii exercitio, ingenium noſtrum robur acquiret, & vitabunt poſteri indoctos, tanquam horrendos & rudes Scopulos.

Libros noſtros Juridicos in quinque Scholas diviſimus. Prima, eſt Auctorum Jus *Romanum* tractantium. Secunda, eorum qui *Græcam* excoluere Juris-prudentiam. Tertia, eſt Feudiſtarum. Quarta, Canoniſtarum. Quinta, ex Practicis conflatur: Et hæ in inferiores claſſes ſubdiviſæ ſunt.

Inter Juris civilis Auctores primus locus Textui, ejuſque variis editionibus debetur; ille enim ut ſtudii noſtri, ita & Bibliothecæ fundamentum: Divinum illud opus, quod Cœlo potius quàm *Romæ* debemus, & illinc demiſſum, ut legiſlatoribus exemplar, & gentibus arbiter eſſet; ita collectis hominum votis reſpondens, ut non ab hominibus, ſed ab ipſâ naturâ humanâ fabricatum diceres; eſſentque illi non operis hujus auctores, ſed rectæ rationis, opus dictantis, amanuenſes.

Secunda claſſis erit Veterum, quorum integra opera vel fragmenta, martyrio iis per *Tribonianum* deſtinato, fœliciter divinâ providentiâ, ſubducta ſunt, qui textus noſtri fontes dici poſſunt.

Tertia erit Gloſſatorum, qui primi inter Latinos jus noſtrum illuſtrarunt, quibus ſucceſſerunt Commentatores gloſſatorum fratres, ſed natu minores; & quos gloſſas diffuſas appellare convenit, caſus legum exhibentes, in rationes dubitandi & decidendi inquirentes, & textus inter ſe conferentes ac conciliantes; licet quidam etiam ſint, qui conciliationes has, vel enantiophana per ſe tractârint.

His proximi ſunt Conſiliorum auctores, qui de Jure-conſulti Reſponſa ſua non, ut veteres, paucis (oraculi inſtar) verbis reddidere, ſed & ſententiam ſuam textibus & rationibus plurimis confirmàrunt. Antequam enim jus *Romanum* à foro adoptatum fuerat, dumque ejus ſcientia in Cathedris ſolis adhuc lateret, Profeſſores hi conſiliis ſuis Jus noſtrum oppreſſerunt: Poſtquam autem Jus hoc Advocatis innotuit, rarius conſulti Profeſſores, rariora edidere conſilia; ideo ad quæſtiones illuſtres, varias reſolutiones, diſputationes & controverſias ſe contulere.

tulere. Advocati etiam controverſias forenſes, quibus patrocinabantur, ubique ferè ſcripſere: *Galli* autem ſoli Orationes ſuas forenſes, eloquio pariter & eruditione nitidas ediderunt: Controverſiarum verò ſcriptores nuda, & ſicca tantum argumenta nobis tranſmiſere ſua: cujus diverſitatis ratio eſt, quod apud unos *Gallos* & nos, vivâ voce & fusè, *Romano* oretur more. Aliarum ergo gentium Advocatos, ut fuſius & elegantiùs ſuos exornent caſus, *Galloſque* ut Orationes ſuas forenſes (vulgò *Plaidoyez*) Latinè ſcribant, rogatos habemus: Ita enim fratribus ſuis alibi orantibus auxilio erunt, & ſicut *Babylone* olim confuſæ in exitium humanum linguæ, ita & communi noſtrâ Latinâ hoc reſarcietur damnum. Ipſa etiam fama Latinè nunc tantummodo loquitur, in cujus linguæ ſocietate docti omnes conjuncti, hanc tanquam ſcientiarum omnium vernaculam, & patriam venerantur.

INCRUSTATUM olim, quaſi leprâ Philoſophicâ, corpus Juris noſtri, & mirabatur Jurisprudentia *Romana* ſe de præſcriptionum causâ formali, & finali, alieno mugientem ore: Sed Græcis & Latinis literis cœleſti beneficio renatis, harum ope, multo pulchriùs & perfectius Juris civilis corpus Criticorum curâ limatum reſurrexit. Illi enim poſt *Alciatum*, *Budæum*, *Cujacium*, textum noſtrum illuſtrarunt, vel obſervationibus, vel emendationibus, vel variis lectionibus: Poſt autem enodatas ab anteceſſoribus difficultates, ad probabilia tandem deſcenderunt, quæ in claſſem unam per ſe colliguntur. Et licet horum plurimi corpus Juris civilis lacerârint, non ſanârint, & a practicis nimium negligantur; eorum tamen curæ debemus, quod intelligi poſſit liber ille, per quem unum alios intelligere poſſumus. Nec minus harum emendationum ope, quam teleſcopiis & microſcopiis, mirum in modum illuſtrata eſt recentioribus hiſce ſæculis Philoſophia naturalis: Nam ut ait *Huberus*, qui ad illorum ſcripta ab *Accurſianis* & *Bartoliſtis* tranſeunt, non aliter ſecum agi putabunt quàm ſi e domo ſitu, & aranearum telis obſitâ, in ædes pulcherrimas, argento, aureâque ſupellectili renidentes aſcendant. Eadem argumenta novam, rejectâ *Accurſianâ*, gloſſam ſcribendi neceſſitatem evincunt; ille enim annum quadrageſimum egreſſus, antequam linguam Latinam addidiciſſet, audaciâ forſan vituperandâ gloſſam agreſſus eſt; cum non ſolùm ipſe, ſed & ſæculum, in quo vixerat, vim linguæ Latinæ, in quâ Digeſta, & *Græcæ*, in quâ plurimæ Codicis conſtitutiones, omneſque novellæ ſcriptæ, aſſequi non potuerit. Illi etiam hiſtoria Juris civilis, ejuſque formulæ, aliæque antiquitates ignotæ fuerunt; unde evenit, quod a *Cujacio*, aliiſque, ejus gloſſa meritò in unaquâque ferè caſtigetur paginâ, tyroneſque adhuc incautos ſeducat, potius quam inſtruat. Sed licet hoc ævo, non illi imputandum ſit (quia nemo in crepuſculo clarè videre poteſt) cum tamen hodie leges a Criticis puritatem, ab Enantiophanon ſcriptoribus pacem, a deciſionibus ſupplementa receperint; æquum eſt ut novâ etiam gloſâ, quaſi aliâ veſte, poſt tot ſæcula ſplendeat corpus Juris noſtri civilis. Verùm committenda eſt hujus gloſſæ provincia, non uni ſed pluribus, & his etiam, qui inter doctos Juris Coryphœos palmam obtinent; hi enim textûs Majeſtatem verentes, nihil eâ indignum poſteris tranſmittere audebunt.

IN gloſâ novâ, quam optamus, adjiciendæ forſan legibus *Romanis* celebriores ſupremarum curiarum deciſiones; quæ has vel interpretantur, vel ſupplent; digeſtorum ſtylo & brevitate quantum decrepitæ noſtræ eloquentiæ ſenectus ferre poteſt, conſcriptæ. Quo pacto deciſiones hæ, quas dum nunc legimus ſæpe ſæpius oſcitamus, in corpus unum cum Jure *Romano* quaſi coaleſcent: Vix enim credendum, ſenatui *Pariſienſi*, vel noſtro, tot ſæculorum experientiâ edocto, minus eſſe ingenii quam uni Prætori *Romano*; præſertim antequam Prætores illi *Papiniani* perſpicuitate, & *Ulpiani* ſedulitate inſtructi erant, ut ſunt noſtra hodie tribunalia.

PARATITULARII claſſem aliam obtinent, qui Juris *Romani* effigiem miniato quaſi opere contractam, ſed vero lumine irradiatam nobis exhibuerunt.

ALIA claſſis erit Repertoriorum; quibus adſcribuntur, qui Concluſiones Generales, Theſauros, Communes Opiniones, Indices, vel Lexica ſcripſerunt. Hæc Juriſconſultorum horrea videntur, in quibus ſervi tantum laboribus ſeſe frangunt.

IN ultimam claſſem, & quaſi in aliam inſulam relegandi ſunt *Vigelius* aliique Methodiſtæ, Syſtematici, Syntagmatici; qui cum omnes ad famam aditus viderent ab anteceſſoribus ſuis præoccupatos, Jus noſtrum in aliam methodum transfuderunt. Sed cum jus *Romanum* ſine ſuo methodo addiſci non poſſit, novam excogitando, auditores ſuos onerarunt potius quam inſtruxerunt; ut & illi, qui cum ſuis *ampliatur decimo tertio, & limitatur decimo nono* lectores nauſeâ affecerunt.

SECUNDA ſchola eorum eſt qui Juriſprudentiam Græcam, vel Græco-Latinam condiderunt aut illuſtrarunt. Juriſprudentiæ ergo Græcæ ſcriptores (Magnæ gens æmula *Romæ*) hic inveniuntur: *Athenis* & *Spartæ* primum illuxit Juriſprudentiæ crepuſculum, & naſcentibus radiis, *Romanis* viam ad Juris ἀκμὴν monſtravit, quam illi maturâ attigerunt experientiâ, apud quos Juſtitia in ſuo culmine effulſit. Poſtquam autem *Roma* magis ſuo luxu, quam externo milite perire cœpit, cum Juriſconſultis periit Juriſprudentiæ gloria: & poſtquam Jus noſtrum per ſexcentos annos *Græcè* redditum fuiſſet, tandem inverſo ordine in oriente occidit; Imperio enim *Româ Conſtantinopolin* tranſlato, ibi etiam Jus *Romanum*, at ſine *Romana ακριβεια* obtinuit. Placet tamen unamquamque Juris ætatem intueri; & licet *Athenis* infantis inſtar tantum balbutiret, & in gravi ſuo ſenio *Conſtantinopoli* delitare orſum ſit, prodeſt tamen ſcire, quid prima naturæ ratiocinantis dictata apud illos ſuaſerint: & quid apud hos ſtatuerit, & comprobaverit uſque ad extremum ſpiritum recta ratio. Nec forſan ſaniores Commentarii reperiri poſſunt in Digeſta illa *Romana*, Inſtitutioneſque *Conſtantinopoli* compoſitas, quam Græca illa tranſlatio in *Baſilicis*, & Græca illa Inſtitutionum paraphraſis apud *Theophilum*: Quæ cum edita eſſent ipſo illo ſæculo, quo fabricatum noſtrum Corpus Juris, fabricantium ſenſum in illo concinnando facile aperire & explicare poterant; quod (ſi DEO placeat) juſto opere aliquando latius bono publico apparebit.

Tertia Schola erit Feudiſtarum; quorum textus a Barbarâ gente, ſæculo Barbaro congeſtus, ſæculi Barbariem ſapit. Jus Civile ubique libertatem *Romanam* ſapit, & libertatem quam ſibi optabant *Romani* aliis conceſſerunt. Jus autem Feudale ſervitutem ſeu vaſſallagium pro fundamento habuit, eratque ſervitus apud Juris Feudalis conditores virtutis præmium. Jus tamen hoc, ſepulto Jure *Romano*, vel Eclipſin paſſo, radices egit, gentiumque ad jugum natarum depreſſit ingenium: Cum Jure tamen *Romano*, poſtliminio etiam reſtituto, (tanquam divo fratre) nunc ubique fere regnat, ſuoſque habet interpretes in eaſdem claſſes diſtinguendos, qui textum indoctum doctiſſimis Commentariis, Conſiliis, Controverſiis, & Deciſionibus ornarunt.

Quarta Schola erit Canoniſtarum; cum enim Jus Canonicum ſit Simia duntaxat Juris Civilis, (excepto ſtylo qui *Gothicus* eſt) in eaſdem Claſſes colligi poſſunt ejus interpretes; ſi unam addas ex Caſuiſtis conflatam, artem illam animarum inſidiatricem quæ dum iis inſervire profitetur, dominari ſtudet. Pro more tamen, & ne hæc noſtra Bibliotheca manca videretur, horum quoſdam hîc exhibuimus, ut non minus habeant noſtrates quos fugiant, quam quos ſequantur.

Quinta Schola erit Practicorum; inter quos Regnorum Rerumque publicarum Statuta agmen ducunt, quæ nos eadem curâ comparavimus, ac ſi iis ſubditi fuiſſemus. Et ubi vel in condendis Legibus, vel formandis Deciſionibus, diſſidia in noſtris Curiis oriuntur, a Juriſconſultis inquirendum, quid in his caſibus exteræ ſentiant gentes: Plus enim valere debet totius gentis, quam unius Doctoris Judicium.

His ſuccedunt, qui Jus conſuetudinarium ſuarum gentium tradiderunt; & forſan gemini hi, ſcil. Statuta & Conſuetudo, Jus ſcriptum & non ſcriptum, in unam claſſem redigi poſſunt, licet honoris ergo unicuique horum ſua debeatur regio.

Tertia claſſis erit eorum, qui in hæc Statuta, vel has Conſuetudines, Gloſſas, Commentarios, vel Obſervationes ſcripſerunt.

Quarta erit eorum, qui Deciſiones Supremæ cujuſque Curiæ collegerunt, odi tamen Deciſionum prophanum vulgus & arceo, quas vel Magiſtratuum metus extorſit, vel fallens aurum emit, eaſque etiam quæ oſcitantibus excidêre Judicibus. Nec ſaniorum repetitione (ut nunc moris eſt) laſſandus eſt liber animus; ne quæ erudire debent, nauſeam pariant. In harum etiam Deciſionum gremio argumenta, & rationes ſententiarum genitrices fusè explicatas invenire cuperem, auctoribus ita tum Advocatorum, tum Judicum munera obeuntibus. Optandum tamen eſſet, ut & in his & alibi, dum *Germani* facti ſpeciem, vel clauſulas controverſas narrant, non vernaculâ ſed Latinâ (Imperiali & victrici illâ) Linguâ uterentur; nam nunc velatâ nobis facti ſpecie, reliqua omnia inutilia redduntur.

Ultimam obtinebunt, modeſtiæ ſuaſu, Juris noſtri Municipalis ſcriptores, qui ideo pauci ſunt, quòd *Scotici* ſit ingenii ſcribenda potius orare & judicare, quàm quæ orarunt, & judicarunt ſcribere.

Sunt & Auctores *Amphibii*, qui vel inter interpretes Juris Civilis, vel Municipalis reponi poſſunt; & horum præcipui ſunt Collatores, vel Juris *Moſaici*, vel Canonici, vel cujuſvis Gentis cum Jure Civili. Loco autem collationum, quæ nunc ſupra modum turgent repetitione omnium, quæ vel Jure Civili, vel Patrio clariùs & uberiùs traduntur, paucas tantum deſideramus ſchedulas, Leges & Conſuetudines illas exprimentes, quas unaquæque natio Juri Civili addidit; una cum rationibus quibus ſuaderi poſſunt, ex quibus poſtea in librum unum collectis, vicinæ Gentes leges ſibi haurient neceſſarias. Gratum etiam Reipublicæ Juridicæ foret volumen unum, gentium diſſidentium Jura diſcrepantia, in oppoſitis columnis, uno intuitu exhibens; & aliud in quo libere inquireretur, quænam ex his ad rationis normam rectiùs ſint conformata.

INTER *Amphibios* etiam reponendi ſunt Tractatuum Auctores, qui quicquid vel Textus, vel Critici, vel Commentatores, vel gentium Statuta, vel Deciſiones ſeparatim docuerunt, in unum cumulàrunt: Et hi hodie Lectores omnes ad ſeſe trahunt, & fere detinent; hoſque ſolos ob multitudinem, ſecundum ſubjectam uniuſcujuſque Tractatus materiam, ordine Alphabetico digeſſimus. Caveant ab hoc oceano (in quo plures miſerè obruuntur, quam proſpere navigant) rates fragiliores, quæ ne vel bolide jactâ fundum attingere queunt, & quibus ejus etiam littus legere periculoſum.

DECISIONUM etiam Scriptores, non ſolum Regionum earum, ubi jus *Romanum* obtinet, ſed & aliarum, quæ Jure *Romano* ſuum ditant, aut inter Auctores Juris Civilis, vel Municipalis numerari poſſunt. Quidam ut Philoſophi Morales, de jure naturæ quædam divinàrunt, quæ *nihil ad Edictum Prætoris*: Alii tanquam Theologi de Juſtitia & Jure integros evomuerunt Tomos, qui inter Canoniſtas claſſem obtinere non debent, cum etiam Reformati hæc tractarint: Alii ut Politici de Jure gentium & Jure publico multa nugati ſunt, qui inter excentricos per ſe ſunt reponendi; quorum pauci de Republica literaria bene meruere, pro re nata, non autem integri, cum honore & fructu legendi. Hæc autem omnia potius ex jure noſtro, quam jus noſtrum ex his colligendum eſt.

TRIA ſunt Studia Juriſprudentiæ inſervientia, *viz.* Hiſtoria, Critica, & Rhetorica; & hinc fit quod Catalogus noſter abundet Hiſtoricis *Græcis* & *Romanis*, ex quibus origines & occaſiones Legum, ut & indoles Legiſlatorum eluceſcere poſſunt. Ex Poetis etiam, aliiſque claſſicis, vis & energia verborum in Jure noſtro frequentium erui poteſt; ſuntque optimi quaſi Commentarii in fuſiſſimum illum de Verborum Significatione titulum. Et quia antiquis Commentatoribus Hiſtoriæ & Critices Scientiæ ferè prorſus fuerant peregrinæ, ideo Juriſprudentiam noſtram, & ſuam famam fœdis macularunt notis: Nec ſine harum ope, *Antonium Fabrum* alioſque Tribunalium Coryphœos, in famæ faſtigium provehere poterant, acre ingenium & erudita praxis.

EAM docti omnes colunt Linguam, in qua traditus eſt Scientiæ cui incumbunt textus; Theologi Hebræam, Medici Græcam, Juriſconſulti Latinam, & præcipuè Digeſta Latini Sermonis fontem purum putum; quæ *Laurentius Valla* cum arce Tarpeia comparat. Nam ut hæc, urbe captâ & incenſâ, non tantum ſola manſit inviolata, ſed recuperandæ totius urbis & imperii occaſionem præbuit; ita & hos Libros non modo puros & ſanctos, cum omnia Barbariei ſitu obſita & contaminata jacerent, ait eſſe ſervatos; ſed per quotidianam illorum lectionem, & ſemper aliqua ex parte incolumem, atque in honore fuiſſe *Romanam* linguam, & brevi ſuam dignitatem atque amplitudinem recuperaſſe.

QUONIAM etiam Eloquentia eſt optima Juris (quia & mentis) interpres, ideo quotquot Oratores vel *Græcia*, vel *Latium* genuit, hic ſuis fulgent radiis. Hi ſunt qui veritatem Eloquentiâ exornant, & Juriſprudentiâ armant; quorum ſublime ingenium nihil humile dictat, dumque ſuadere tantum ſtudent, admirationem pariunt.

NOS non fugit, immaturam hanc Catalogi impreſſionem, quaſi expoſitionem infantis accuſari poſſe: At non hic famæ, ſed utilitati conſuluimus; & hæc eam neceſſariam reddidit, ut paterent tum Senatoribus, tum Advocatis, Oracula hæc quibus juſtum & æquum dirigi debent; ſupplebitque hunc defectum, nova poſt aliud quinquennium editio.

SPERANDUM gloriæ cupidos, templum hoc Themidis ſuis donis locupletaturos; & ſibi perſuaſum habeant noſtri Benefactores, ſuam liberalitatem hic diutius, quam in monumentis aliis ſuperſtitem futuram; perire enim vix poteſt, quod literis & eloquentiâ ſuſtinetur. Evacuentur ergo poſt mortem, in hanc communem, privatæ Juriſconſultorum Bibliothecæ, ut flumina in oceanum; ita enim inofficioſum non erit teſtamentum, nec poſterorum hæreditatem ita expilabimus; ſed pro pauculis, & forſan peſſimis, plurimos & optimos iis comparabimus libros: Et hic, ut alibi, ſæpe accidit, ut nihil tam inopiam inferat, quam proprietas, quæ nos arctat potius, quam ditat.

NOS Editiones primas potius, quàm noviſſimas diligenter quærimus; præſumendum enim ipſum authorem illas curaſſe; irrepſiſſe autem poſterioribus novos errores, præſertim in citationibus, neceſſe eſt. Eadem ratione preferenda credimus opera, vivo adhuc Authore, edita; incertum enim eſt an poſthumâ ultimam receperint manum; quod in *Cujacii* operibus nimium nobis apparet, ubi pro ſuis, vulgo quæſiti ſuppoſititiique partus, nobis forſan obtruduntur; immaturos vero obtrudi certum eſt: Sed quia plures ſunt Editiones præſtantiorum præſertim Authorum, idcirco & primæ & ultimæ nitidioreſque ſimul referendæ ſunt.

Quod nimio forſan ſumptu Libros decoravimus, nobis ignoſcendum eſt, qui Juriſprudentiam tanquam Scientiarum Imperatricem veneramur & colimus. Legiſlatoris enim eſt regnare, & regnantes auro, arte, & nobilitate fulgere decet; Juſtumque credidimus in hos aurum impendere, quibus aurum debemus.

Spernite, Commilitones doctiſſimi, ornatiſſimi, quicquid Cœlo inferius, & æternitate brevius; negligite omnia, preter famam, ſalaria, cujus archiva ſunt *libro vitæ* proxima. Nobilius eſt Mundum rectâ ratione, quàm Sceptro regere; & a ſapiente Juriſconſulto alienum ſit, caducis Clientûm negotiis, plus quam immortali ſuæ Animæ, proſpicere.

Supereſt tantum ut gratias, quas poſſumus maximas, agamus *Senatui* noſtro illuſtriſſimo, ſub cujus auſpiciis noſtra crevit Bibliotheca, & cujus Deciſiones (veras illas & immortales Judicum imagines) in hoc *Parnaſſo* Muſarumque ſinu, honore merito concelebrabimus. Nec dubitamus, quin, cum numero Studioſorum Juris, creſcat *Senatus* cura pro Bibliotheca & eorum privilegiis, quæ ſanè *Juſtiniani* Imperatoris noſtri prima cura fuit, dum Juris Studium, ita Legum Studioſis commendaret, *Ut, toto legitimo opere perfecto, poſſent etiam Rempublicam ſuam, in partibus ejus ipſis credendis, fœliciter gubernare.* Hoc enim modo crevit Reſpublica *Romana*, non tam Armorum Fortitudine, quam Legum ſuarum Juſtitiâ. Nos certe, quantum in nobis erat, Juris ſtudium promovimus, nec non de utilitate Profeſſorum, ad expenſas Parentum in educatione Liberorum recidendas, eorundemque neceſſitate, ad errores in Jure noſtro tam publico quam privato corrigendos, ſemel atque iterum ſtatuimus: Sed eorum Inſtitutionem tantum domi deſideratam, & à *Senatu* noſtro clariſſimo, jamdudum in Academia *Ja. 6.* tentatam, *Reipublicæ* Adminiſtratoribus ſerio curandam relinquimus.

# CHARACTERES
## Quorundam apud
## *SCOTOS* ADVOCATORUM.

ORNANDA tandem eſt hæc noſtra de Oratore inveſtigatio nonnullis advocatorum characteribus, quibus eloquentiam ſuam debet *Scotia*, & quibus non ingenium, ſed *Roma* defuit, ut non *Scotiæ*, ſed orbi exemplaria eſſent. Qui ante *Cragium* floruere, nobis vix aliter cogniti ſunt quam montes illi qui diſtantiâ non humilitate minuuntur. Ipſe etiam *Cragius* tam recondita doctrina auctus erat, ut eloquentiam ſperare vix poſſit; ejus tanta in foro auctoritas, ut eloquentia non indigeret, & trunco (non frondibus) effecit umbram. *Sharpius* eloquentiâ, non ambitu, dignitatem advocati regii meruit; tantaq; ejus facundia, ut ea ſæpe *Cragii* doctrinam vinceret. Succeſſerunt his Hopius, Nicholsonus & Stuartus; quem triumviratum ipſe non aliter vidi, quam ſolem occidentem auratis ſuis radiis hemiſpherum purpurantem ſolemus intueri. Hopius mira inventione pollebat, totq; illi fundebat argumenta, ut amplificationi tempus deeſſet; non orabat, ſed arguebat, modo uniformi, ſed ſibi proprio. Nam cum argumentum vel exceptionem protuliſſet, rationem addebat; & ubi dubia videbatur, rationis rationem: Ita Rhetorica non illi defuit, ſed inutilis apparuit. Diviſiſſe dixiſſes Hopium & Nicholsonum provincias; hic enim eloquentiam noſtram, ille juriſprudentiam limavit. Nicholsonus Hopio fere contrarius, faceto præludio, facunda cauſæ narratione, argumentiſq; paucis, at ſummo cum judicio ſelectis, ſtrenue & eleganter cauſam tuebatur: Hic primus nos a Syllogiſmorum ſervitute manumiſit, & *Ariſtotelem Demoſtheni* potius, quam *Ciceroni* forum concedere coegit: ſuo ſeculo Fulmen Fori dicebatur; omni vero paradigma fuit. In omnes luſos & jocos ſe ſæpe reſolvebat; ſed, accipitris more, é conſpectu aliquando aſtantium ſublimi ſe protrahens volatu, in prædam miro impetu deſcendebat. Stuartus argumenta penetrante doctrina acuebat, & callida ſuavitate condiebat: Illi peculiare erat poſtulata quædam ab adverſario petere, ſuiſq; conceſſionibus incautum obruere.

Ego Gilmoriis, Nisbeto, Nicholsono Juniori, Wedderburno, Kerro, Locartio & Cuninghamio Contemporaneus, non Æqualis, eram. Gilmoriorum Senior, ſine ullo Juris Civilis auxilio doctiſſimus, raro miraculo, dici poterat; ingenioq; ſuo praxin Fori *Scoticani* Juri etiam *Romano* æquabat. Illum Jura potius ponere, quam de Jure reſpondere dixiſſes; eiq; appropinquabant Clientes tanquam Judici, potius quam Advocato: Quaſi alter etiam Hercules, nodoſa & nulla arte perpolita clava adverſarios proſtravit; ſine Rhetorica eloquens, ſine literis doctus.

Opposuit ei Providentia Nisbetum; qui ſumma doctrinâ, conſummataq; eloquentiâ cauſas agebat, ut Juſtitiæ ſcalæ in æquilibrio eſſent; nimia tamen arte ſemper utens, artem ſuam ſuſpectam reddebat. Quoties ergo conflixerunt, penes Gilmorum gloria, penes Nisbetum palma fuit; quoniam in hoc plus artis & cultus, in illo plus naturæ & virium.

Nicholsonus Junior, eloquio uſus eſt Fanatico, non *Romano*; & hinc concionabatur potius quam orabat: documentum poſteris futurus, illud ad perſuadendum aptius quod ſeculo licet ſordido, & judicibus licet hebetioribus, placet. Si autem doctus hic orationes poſteris tranſmiſiſſet, *Auguſti* ſeculum (illi notiſſimum) imitatus fuiſſet.

Gilmoriorum junior vigore potius quam ſtudio orabat: Ille dicendi modum genio ſuo adeo conſonum educavit, ut quid natura, quid ars dictaſſet, vix diſtingui poterat: quæ Natura enim produxit adeo polita erant, ut arte limata viderentur. Ingenii hujus arbiter non tyrannus, nunc ſenatoria gravitate dictabat, nunc comica facetiâ ludebat, nunc ampliſſimam materiam paucis exhauriebat, nunc ſterilem inſperata fæcunditate dictabat. Quaſi omnia iis licerent qui omnia poſſunt! Nemo plus ingenio ſuo imperavit, nemo plus indulſit; junioribus advocatis innatâ generoſitate ſemper favens, eorum laudibus ſupra omnes eſt evectus; pecuniæ contemptor, famæ avarus.

Wedderburnus morum probitate judices clienti conciliabat, dicendiq; ſuavitate eos corrumpere potuiſſet, ſi voluiſſet: Nihil autem ille in facto, niſi quod verum, nec in jure, niſi quod juſtum, patheticè urgebat. *Ciceronis* lectioni ſemper incumbebat; unde illi dicendi genus uniforme & flexanimum: ex junioribus tamen nullus illum imitari poterat, ſicut ille *Ciceronem*; eloquium materiam, actio eloquium decorabat, famamq; fugientem proſequebatur.

Locartius, Corpus alterum juris civilis, alterq; *Cicero* dici poterat: Illi etiam peculiare erat, argumenta ſua eo ordine diſponere, ut tanquam lapides in fornice alter alterum ſuſtineret; quæ ex improviſo, dum oraret, ei ſuggerebantur, prompta ſolertiâ indicabat, aptiſq; locis diſponebat. Nihil ab eo abſcondidit juriſprudentia; & quamprimum caſus illi a cliente aperiretur, ſua omnia, omniaq; adverſarii argumenta retexebat, & in ipſam ſententiam quâ definienda erat cauſa, penetrabat. Iracundia, quæ alios oratores turbabat, eum tantum excitare ſolebat; vocem tamen catratu, vultumq; rugis deformabat.

Andreas Kerrus, *Bituricis* (*Athenis* illis juriſconſultorum, quibus ego etiam qualem qualem juriſprudentiam meam debeo) dum ſtuderet, exiſtimationem ſibi peperit; in praxi noſtra crudus, viam in foro doctrinæ ſuæ fiduciâ violenter aperuit, unde ſeniores contemnens, ab iis contemptui eſt expoſitus, in eumq; ſuos ſervos immiſere, qui vocabula foro notiſſima ignorantem deriderent; combinationem tamen hanc, auditoribus potius conſentientibus quam volentibus, ſuperavit: Faſtidii autem exceſſum nunquam ſuperare poterat; pœnas inde quotidie luebat: in foro autem verſans injuriam nec ferre nec inferre debet: Argumenta illi ſæpiſſime plurima & docta, ſed nimia ſubtilitate adeo attenuata, ut, cum ſolide diſputaret, ſophiſtice tantum cavillare crederetur.

Cuninghamus, Naturâ diſertus, & lucubrationibus doctus, dotes ſuas continuata per multos annos cum his diſputatione mire auxerat: Ab initio chartulas etiam neglectiſſimas, omniaq; facti ramenta perſcrutando, clientibus potius quam famæ ſe accomodaverat; nec in arguendo ea quæ juris erant ſibi in ſuis orationibus indulſit, donec hos per plures annos diſputantes audiverat, invidiamq; ita prudenter vitavit donec eam ſuperaverat. Tandem tamen verè maturus, ſuaviter docteq; oravit, & exiſtimationem quam alii audaciâ rapiunt, ille modeſtia ſua ſibi conciliavit.

Viventes pretereo, ne aut adulatione aut emulatione corruptus videar; nec mortuis invidere debent qui famæ loco vita fruuntur. Ita ego nos oraturos ſpero, ut habeamus poſt mortem *Cicerones* qui *Hortenſios* collaudent; illos autem militiæ togatæ Heroas——.

*Tu longè ſequere, & limina ſemper adora.*

# PLEADINGS
## (In ſome remarkable Caſes)
## BEFORE THE
## Supreme Courts of *SCOTLAND*,
## Since the Year 1661.
## To which the DECISIONS are ſubjoin'd.

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*Nulla res tantum ad bene dicendum prodeſt, quantum ſcriptio.*
CICERO in Brut.

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# The AUTHOR's Reflections
## UPON THESE
# PLEADINGS.

*FEW Men can expect Praiſe by Writing in this Age, wherein every Man almoſt doth think himſelf robb'd of that Praiſe which is given to others, and wherein he is thought to want Wit, who will allow others to have any. Former Ages railed againſt ſuch as wrote ill, but ours againſt ſuch as write well; they were ſometimes ſo unjuſt, as not to reward Merit; but we are ſo malicious as to perſecute it: Thus we can neither want new Books, nor deſerve them; and it hath been well obſerved, That it would ſeem now, that none but Mad-men write or cenſure.*

*THIS I ſay, not to regret my own Fate, which hath been kind to my Writings beyond my Merit and Expectation; and tho' it had not, yet I am ſecure, by want of that Merit which* *can raiſe Envy: But I ſay it to regret, that this ſhould have ſtopt ſo many ingenious and learned Men in our Profeſſion, from illuminating our Law, and from informing our Countrymen. The Laws of other Nations are oppreſt, but ours is ſtarv'd. This made me adventure to write theſe few Sheets, and I wiſh that Cenſure which is ſo much feared by others, might blunt all its Edge upon me; and that I might, like that noble* Roman, *by leaping into this Gulf, ſecure my Country againſt this Plague.*

*THIS Way of writing hath been very happy amongſt Strangers, and was not minded hitherto by us, and what Way of writing is preferable to that, which hath been ſucceſsful, and yet is new: But my Deſign in chooſing this Way of writing, was to inform Strangers as to our Way of Pleading in* Scotland, *to form to myſelf a Stile, and to give me an Eaſineſs in Pleading; for ſince that is my daily Employment, it ſhould be my greateſt Care,* Nihil tantum ad bene dicendum prodeſt, quantum ſcriptio, *ſays* Cicero, *the greateſt Maſter of that Art. I had, by pleading, whilſt I was yet very young, wrapt myſelf into Errors, which could not be reform'd in the Crowd and Noiſe of Buſineſs; and therefore I reſolved to employ ſome ſerious and ſolitary Hours for my own Recovery; and that I might oblige myſelf to the greater Exactneſs, I reſolved to print what I wrote, hoping, that thus the Fear of Cenſure would overawe my Lazineſs: By printing them, I likewiſe deſign to know my Enemies, and my Faults, ſuch as cenſure maliciouſly will inform me of the one, and ſuch as cenſure juſtly will inſtruct me in the other.*

*I deſigned at firſt, to have printed many moe, but I thereafter conſidered, that if theſe pleaſed not, they were too many; and if they did pleaſe, it was eaſy to add: And I reſolve to correct in the laſt, what ſhall be found to be juſtly cenſurable in the firſt.*

*IN Three of thoſe Pleadings, I have mingled with my own Arguments, the Arguments of ſuch as pleaded with me; in the reſt, I have uſed only my own: Thoſe Three I wrote to be Patterns, becauſe they were not particularly mine; thoſe which are particularly my own, I wrote for my own Divertiſement, and if they bear any Proportion to their Fellows, they may not only ſatisfy the World to which they go, but (which is, it may be, harder) the Author from whom they came.*

*I have been oft asked two contrary Queſtions; one was, How I diverted myſelf during all our Six vacant Months? and by others, How my Employment gave me Leiſure to write? To anſwer both at once, I conceive that a Man in two Afternoons of each vacant Week, may write twice more than ever I ſent to the Preſs; and he muſt be very buſie who hath not theſe to ſpare.*

*WHEN I was too young to write in my own Profeſſion, my Love to my Country tempted me to write* Moral Philoſophy, *and to adventure on a* Play *and* Poem; *but now that I find, that our Countrymen could be happy enough in theſe, if their Inclinations were not leſs than their Abilities, I have abandoned thoſe Employments; and the Spring of my Age being paſt, it is fit thoſe Bloſſoms ſhould ripen into Fruit. I promiſed formerly, never to appear in Print, ſave in my own Employment; to which Promiſe I have, theſe five Years laſt bypaſt, been very faithful; and this being my firſt Eſſay in it, ſome Allowance is due to a Beginner.*

*I muſt confeſs, that many in this Kingdom could have exceeded my poor Endeavours, but it were unreaſonable for any Man, to refuſe to fight for his Country, becauſe another could fight better. Aud I rather conclude, that others need not be diſcouraged, tho' I meet with no Applauſe; whereas, if any be allow'd me, their greater Parts may expect a greater Meaſure of Fame; and as I have been very kind to all my Countrymen's Productions, ſo I ſhall be extremely pleas'd to ſee myſelf out-done in my Country's Service. I deſign'd to let Strangers know how we plead in* Scotland, *and therefore it was not fit, that I ſhould have uſed here the* Engliſh *Language. I love to ſpeak as I think, and to write as I ſpeak.*

*NO Man ſhould be vain, becauſe he can injure the Merit of a Book; for the meaneſt Rogue may burn a City, or kill an Hero; whereas he could never have built the one, nor equalled the other. And I confeſs, that an ordinary Wit may diſcover Faults in a better Author than I pretend to be: For the Writer being intent upon all, cannot lay out all that Induſtry upon every Line, which a malicious Critic can; who (like the Waſp) faſtens ſtill upon the Sore: But a greater Wit than they ſaid,*

Ubi plurima nitent in carmine, non ego paucis
Offendor maculis———

*Malice likewiſe and Obſervation can eaſilier fix upon a printed Pleading, than upon what flies away from a current Speaker: And a Diſcourſe, animated by the Voice and Action of a graceful ſprightly Orator, will ſupply very much of that Force and Beauty, which a cold and indifferent Reader will require in what comes from the Preſs.*

*I am not concerned in the Reception of this Book, my Cares end with the Printing: And Thoughts in an innocent Breaſt are as ſecure as Men are, when Storms grumble and rore about, the ſtrong Caſtle where they are lodged. Few ever diſpleaſed, and none ever pleaſed all. Such as cenſure too ſeverely thoſe Sheets, are either of my own Profeſſion or not; thoſe who are not, may fear to be thought ignorant; thoſe who are, to be thought emulous. But having now confined all my Recreations to my own Employment, if I cannot pleaſe others, I will at leaſt improve myſelf. But it would abate very much the Paſſion of Authors and Critics, of Advocates and Clients, if all would ſeriouſly weigh my beloved Verſe,*

Hi motus animorum, atque hæc certamina tanta,
Pulveris exigui jactu compreſſa quieſcent.

# *What Eloquence is fit for the Bar.*

## AN

# ESSAY.

ELOQUENCE is that Art, by which the Orator at once convinces and pleaſes his Hearers; and by which he gains Fame and Obedience. Monarchs govern our Eſtates, but the Orator governs our Wills and Inclinations; the Soldier may conquer our Lands, but the Orator our Reaſon; and whilſt theſe owe their Empire to Multitudes of Men and Accidents, he does alone ſhare in the Glory of his Conqueſt. Amongſt all ſuch who ſtand Rivals for this great Honour, the Advocate ſeems to have the faireſt Pretenſions; for a Courtier may, by Eloquence, charm a Lady; he may rally, and ſay nothing with a *Bon grace*: A Preacher may, in his Retirement, form a Diſcourſe, which after much Premeditation, meets with no Oppoſition; but the Advocate muſt, upon Subjects infinitely various, make preſent Replies to what he did not expect. We come to Church convinc'd of every Thing our Preacher is to ſay, we are the Converts of his Theme, and not of his Diſcourſe: But at the Bar, Juſtice does oft-times ſide ſo equally, that a Thouſand Times the Hearers do confeſs themſelves ſtill convinc'd by the laſt Speaker. What can the World beſtow above what it allows the Advocate, as the Reward of his noble Pains? What is ſo deſirable, as to be a Sanctuary to ſuch as are afflicted, to pull the Innocent from the Claws of his Accuſer, to gain Bread for the Hungry, and to bring the Guilty to a Scaffold? What is ſo noble, as to be depended upon by ſuch as are in Proſperity, (for Client and Depender are the ſame in all Languages) to be complimented by ſuch as are beautiful, and admir'd by ſuch as are learned? And if he deſign to flatter his Vanity, would it not charm him to ſee a crowded Audience ſtand in a profound Silence, with Countenances which do mark Longing and Reverence, to ſee every Man look with Amazement upon his Neighbour, and all upon the Speaker, whilſt he makes his learn'd Judges bow under the Weight of his well expreſt Arguments; and when the Diſcourſe is ended, to have all who ſee him ſalute him with Reſpect as he paſſes by, and the City chooſe him for the Subject of their kind Diſcourſes?

SOME Divines and Philoſophers have oft-times prov'd ſo unjuſt to the Law itſelf, as to think it too dull and flat a Science to afford ſuch ſubtile Reflections, as could be the Foundation of an accurate Debate; to whom I deſign modeſtly to return no other Anſwer, than that Men cannot judge well what they do not throughly underſtand. Thus common Eyes diſcover no Difference betwixt the Stars, tho' to judicious and learn'd Perſons, they appear in their diſtinct Claſſes: I wiſh they would conſider, how much the Actions of Men differ, how many Circumſtances attend every one of theſe, and how they are varied by theſe Circumſtances; if 24 Letters can by their ſeveral Conjunctions, make up ſuch a Swarm of Words, certainly Thouſands of Statutes, Cuſtoms and Caſes, muſt afford much Room for new and ſubtile Concluſions; eſpecially ſince theſe have been ſubtiliz'd and cultivate for many Ages by the fineſt Spirits of the World, who have been drawn to prefer this to all other Employments, and to refine themſelves to all imaginable Height in it, by the joint Hopes of Glory, Applauſe, Preferment, Money and Emulation:

——*Stimulos dedit æmula virtus.*

I doubt not but there are many who will think that Eloquence is not allowable at the Bar, ſince thoſe who are to be convinc'd there, are old and reverend Judges, whoſe ſevere Judgments are not to be mov'd by a pleaſant Diſcourſe, but by ſolid Reaſon, Old-age being little taken with thoſe Flouriſhes which it cannot practiſe; and that tho' where Paſſions are to be excited, as they are by the Pulpit and Theatre, or where Stateſmen endeavour to reclaim a mutinous Multitude; there, Eloquence is not only allowable, but neceſſary; (Eloquence being the true Key of the Paſſions) yet ſince no Paſſions are allowed in judging, and the Object of that excellent Science being Truth, and not Humour, Eloquence ſhould not be allow'd in Diſcourſes there: And I imagine it will be objected to me, That at the firſt Inſtitution of our Senate, it was appointed by an Act of *Sederunt*, That all Argunning (which Term was us'd in that Age for Arguing) ſhould be *Syllogiſticè*, and not *Rhetoricè*.

To which my Anſwer is, That Eloquence does not only conſiſt in Tropes, Figures, and ſuch extrinſic Ornaments, whereby our Fancy is more gratified than our Judgment, and our Diſcourſe is rather painted than ſtrengthned; but when I mean that an Advocate ſhould be eloquent, I deſign thereby, that he ſhould know how to enliven his Diſcourſe with Expreſſions ſuitable to the Subject he treats; That he ſhould chooſe Terms that are ſignificant, and which ſeem full of the Thing which they are to expreſs, and ſo lodge his Reaſons handſomly; tho' when his Subject looſes him from the ſtrict Terms of a Statute, or Authority, and that he is to debate upon probable Themes, to enquire into public Utility, or to enforce or anſwer preſumptive Arguments, he may uſe a more florid and elegant Stile: His great Deſign is to conciliate Favour to his Client's Cauſe; and ſure, *cæteris paribus*, even the learnedſt and moſt ſevere Judges, love to be handſomly inform'd; and he muſt be very juſt, who is not ſomewhat brib'd by charming Expreſſions: But that the greateſt Part of Judges are taken with that Bait, is moſt undeniable; and as in Marriages, we find, that even thoſe who deſire rich Portions, are yet pleas'd to have a beautiful Miſtreſs; and the ſevereſt Man alive will be content to abate ſomewhat of the Portion to gratify his Fancy: So I'm ſure, that a *Papinian* or *Vlpian* would, when the Scales ſeem to ſtand even, incline to that Side upon which Eloquence ſtands. Eloquence raiſes the Attention of a Judge, and makes him follow the Speaker cloſely, ſo that nothing which he ſays in favour of his Client paſſeth unregarded; whereas another may ſay what is very reaſonable, and which if it were noticed, might weigh much; and yet the Judge, who is not allur'd to hear attentively, may eaſily miſs it.

I may likewiſe add, That Eloquence thaws (like the Sun) the Speaker himſelf, who when he is warm and pleas'd, will thereby have his Invention ſtirr'd up, and his Memory and all his Faculties open'd, by which many excellent and appoſite Reaſons may be ſuggeſted to him; as we ſee the Earth (when warmed) caſts up many new and profitable Fruits and Herbs, as well as Flowers; whereas we may daily obſerve, that a ſtiff and cold Pleader does omit oft-times even what he knows. By the ſame Eloquence alſo, the Hearers being warm'd and thawed, have their Judgments thereby open'd, and do receive more eaſily Impreſſions of what is ſpoke; and I conceive Eloquence the fitter for Advocates, that others think it ſhould be baniſh'd, as that which may bribe and corrupt Judges; and methinks it ſhould be pardon'd ſome little Dangerouſneſs that way, ſince it pleaſes ſo much another: Nor can I think but that Providence has ordain'd it for the Bar, to ſoften and ſweeten Humours, which would elſe, by conſtant ſticking at mere Law, become too rigid and ſevere, and to divert and eaſe the Spirits both of Judges and Advocates, which are too much upon the Rack, and bended for the Service of their Country.

As to our Act of *Sederunt* which appointed, That all Pleading ſhould be *Syllogiſticè*, I need not reflect upon the Ignorance of thoſe Times, which was very excuſable amongſt us, ſince it did at that Time blind even *Italy* and *France*, who do now ſmile with Pity upon the Cuſtoms and Productions of their Countrymen in that Age: But I conceive, that our Seſſion having been at firſt conſtituted of an equal Number of Churchmen and Laics, and the Preſident being an Eccleſiaſtic, theſe Churchmen having the Advantage of Learning and Authority, did form that Act of *Sederunt* according to their own breeding, by which they were tied in their Theology-ſchools to debate by Syllogiſms; but After-ages having found this upon Experience to be very unfit and pedantic, they did not only ſuffer that Act to go in Deſuetude, but allow'd of this auguſter and more ſplendid Manner of debating which is now uſed. And therefore I conclude, That not only is that Way not warranted by the Authority of that Act, but that it has the leſs Preference becauſe of that Act; for if that Act had not been made, we might have been induc'd to believe that ſuch a Way might take; but now ſince Experience has reform'd us from it, and ſince even the Authority of a Statute could not maintain it, we muſt think it was not fit nor ſuitable, as indeed it is not, if we conſider theſe few Remarks.

All Sciences have an Expreſſion which is ſuitable to them; the Mathematics require Demonſtration, and diſcover themſelves to the Eye: Medicine and natural Philoſophy require Experiments: Logic, Metaphyſic (and alas now Theology) muſt wreſtle by Syllogiſms; but the Law argues by a Diſcourſe, free, and unconfin'd, like thoſe who debate from its Principles. 'Tis the Nature of a Syllogiſm, to have the Subſumption in the ſecond Propoſition; but in Pleading, the Matter of Fact muſt come firſt, for it ſtands in the State of the Caſe; and therefore, tho' it be proper for Libels, (which are but a Syllogiſm) yet it ſuits not with a Defence: And it were very ridiculous, and impoſſible, to wrap up a long Story, many Circumſtances, Preſumptions and Probabilities in a Syllogiſm; and oft-times there are many Defences propon'd and join'd together. The moſt ordinary and moſt allowed Way of arguing in Law, is by Similies, Inſtances and Parallels; and 'tis improper to drive thoſe into Syllogiſms: But he will beſt confute this Way of arguing by Syllogiſms, who will ſit down and plead any of the Cauſes I have ſet down in a ſyllogiſtic Way; which if any Man do, I ſhall renounce Pleading, except he take ſyllogiſtic debating in a very large Senſe; as for Inſtance, In *Kennedy*'s Caſe, the Purſuer behov'd to ſay, *He who is guilty of forging Writs, ſhould be hang'd; but ſo it is*, Kennedy *has done ſo*; ergo: The Defender behov'd to deny the Minor; and then the Purſuer behov'd to ſay, *He who is burden'd with ſuch and ſuch Preſumptions, is guilty of Falſhood, but* Kennedy *is guilty of theſe*; and there he behov'd to inſiſt upon all the indirect Articles or Preſumptions: But how ſhould the Defender anſwer all theſe by a *Diſtinguo?* Or if this Way were introduc'd, How little would this ſhorten Debates? And are any Creatures alive ſo litigious as ſome Divines and Philoſophers, who debate only by Syllogiſms? And ſo little do Syllogiſms contribute to clear a Debate, that both in their Schools and Books, ſuch as uſe Syllogiſms muſt leave that Way, and enlarge themſelves by Diſcourſes, when the Debate grows warm and intricate.

Every Man in pleading gratifies his own Genius, and ſome of all Kind find equal Succeſs and Applauſe; but it has been oft debated, Whether pointed and ſhort Pleading, wherein the Speaker ſingles out a Point, and preſſes it, or full and opulent Pleading, wherein the Speaker omits nothing which may prove advantagious, be preferable? Each Side has its Examples and Patrons.

The full and copious Way pleaſes me; for I not only find, that to have been us'd by *Demoſthenes* and *Cicero*; but *Plinius* aſſures us, that it was us'd by *Cæſar* and *Pompey*. At firſt no Man was ſtinted among the *Romans* in his pleading, and when they were confin'd by *Pompey, qui primus fræna impoſuit eloquentiæ*, the Purſuer was allow'd Two Hours, and the Defender Three; but this being found thereafter too narrow, *Celicius* did allow the Purſuer Six Hours, and the Defender Nine. Nor can a Pleader be interrupted in *France*, (where Pleading is in its greateſt Perfection) tho' he ſpeak Three full Days; and if it be a Fault, it is *peccatum felicis ingenii*, the Error of great Wits; whereas ſhort Pleading is common to ſuch as pretend to be great Spirits, and to ſuch as really are mere Dunſes. Such as uſe to ſay much, can contract their Diſcourſes; but few who are us'd to ſay little, could ſay much, tho' they were willing; and copious Pleading is called ordinarily a Fault, by ſuch as have not the Wit to commit that Crime themſelves. We ſee that, in Nature, the largeſt Bodies are ordinarily the ſtrongeſt, the largeſt Fruits moſt deſir'd; and many Strokes do beſt drive in the Wedge. Nature has produc'd many Things for mere Ornaments; and God has in His Scriptures us'd Eloquence and Rhetoric on many Occaſions. But there are Two Arguments which have determin'd me to this Choice; the Firſt is, That a ſhort Pleader may leave Things unclear, and ſo wrong his Client; whereas a full Pleader can only burden too much his Hearers, and ſo wrong only himſelf. A narrow and ſtarv'd Diſcourſe, is like thoſe ſlender Bodies, which allow not ſufficient Room for the noble Parts to exerciſe their Functions: *Non enim amputata oratio, & abſciſſa; ſed lata, magnifica, excelſa, tonat, fulgurat & omnia evertit.* The next is, That even where there is but one Judge, 'tis uncertain which of all the Arguments will convince him; but where there are many, as with us, 'tis very well known to ſuch as diſcourſe in private with them upon what has been pleaded, that ſome fix upon one Argument, ſome upon another: The beſt Lawyers differ oft in Opinion upon debatable Points; and 'tis great Vanity for any Pleader to think, that he can certainly know what will take, and what not: This was really not an Apology for my Error, but the Motive of my Choice; and I find it to have been formerly us'd by *Plinius* the younger, (the greateſt Pleader of his Age, and whoſe Epiſtles do, of all other Books, beſt inform us how to plead) This great Man, in his 20 Epiſtle tells us, That *Regulus* ſaid to him, *Tu omnia quæ in cauſa putas exequenda, ego jugulum ſtatim video, hunc premo, reſpondi, fieri poſſe, ut genu eſſet aut tibia, ubi ille jugulum putaret; at ego qui jugulum perſpicere non poſſum, omnia pertento.* But I will not with him add, *Neque enim minus imperſpicua, incerta fallaciaq; ſunt judicum ingenia; quam tempeſtatum terrarumq;: adjiciam quod me docuit uſus, magiſter egregius; aliud alios movet, varia ſunt hominum judicia, variæ voluntates; inde qui eandem cauſam ſimul audierunt, interdum idem, ſæpe diverſum, ſed ex diverſis animi motibus ſentiunt.* Our College of Juſtice is but one Body, in which the Senators are the judicative Faculty, and the Advocates, the Inventive; and as the Judgment is too raſh, when it concludes before the Invention has repreſented to it all that can be ſaid *pro,* and *con,* even ſo Judges ſhould not decide till the Advocate (who is animated by Conſcience, Applauſe, and Cuſtom to find out all can be ſaid) do firſt lay open all the Reaſons and Inconveniencies which he has in his Retirements prepar'd: From which alſo I conclude, That ſeeing the Advocates are in place of the Invention, thoſe Advocates who have the fertileſt Invention, are moſt fitted for that excellent Employment.

WHEN I prefer copious Pleading, I deſign not to commend ſuch as are full of Tautologies and Repetitions, who have more Periods than Arguments, and who, providing they find many Words, care not much how to chooſe them. I love a Diſcourſe which is beautiful but not painted, rich but not luxurious, harmonious but not canting. I am not for many Replies, Duplies, and Triplies; but for one or two ſtrong, full and clear Diſcourſes, and to lengthen thoſe, by ſtretching out thoſe unneceſſary Plies into one juſt Meaſure. Nor do I love long Pleading in the Outer-Houſe, where new Deciſions are not to be made, but where the old ſhould be follow'd, and where the Multitude of Attenders do require a ſpeedy Diſpatch; and in the Inner-Houſe it is only to be practiſed where the Cauſe is new and fertile, and when the Judges deſire a full Information; for it is moſt unfit to vex an unwilling Judge, who will think that he loves not to hear, mere Affectation and Vanity: But Envy muſt not want its Objections, and where it finds not a Fault, it makes one out of the next Virtue; when a Man pleads fully, it terms that Luxuriency; and when he pleads ſhortly, it will have that paſs for Ignorance or Lazineſs: And ſo inconſiſtent are Backbiters not only with the Truth, but in what themſelves invent, that I have heard one and the ſame Pleader blam'd for a too luxurient Pleader by ſome, and for a lazy Pleader by others, becauſe in the Inner-houſe he uſed the full Allowance, and in the Outer-houſe he thought it impertinent to make Speeches, where a ſhort Defence is only neceſſary; for either the Point there is clear, as ordinarily it is, and then it is abſurd to enforce a Principle; or it is dubious, and then he gets the Lords Anſwer, and may be full in his Information; and why ſhould Pains be taken to vex a Lord with Debate, who is not to decide?

FAR be it from me to preſcribe magiſterially a Form of Pleading to others; but I love to tell freely my own Opinion, and if others did ſo too, we ſhould ſhortly, from comparing Notes, come to know what Method were moſt allowable.

IN pleading amongſt the Ancients, and yet amongſt the *French,* there was ſtill a Preface and Epilogue. Amongſt them, he who ſpoke firſt endeavour'd to eſtabliſh his own Opinion, and to anticipate what he thought might be urg'd by his Adverſaries; but with us the Purſuer relates only the Cauſe, which he is only allow'd to adorn with a pertinent Repreſentation of ſuch Circumſtances, as may beſt, either aſtruct the Juſtice of his own Purſuit, or obviate unneceſſary Objections in his Opponent, but without mentioning any Thing *pro* or *con, in jure.* And yet I have heard the Caſe ſo prudently ſtated, as that thereby the Defender was precluded from many Defences he deſign'd to propone; for amongſt able Pleaders, moſt of what is debated, ariſes from a Difference rather in Fact than Law; and it is a great Affront for one to plead in Law, a long Diſcourſe, which the other will grant to be all true, when the Diſcourſe is ended: And yet I have heard ſome concede all was ſaid, and ſeem to difference the preſent Caſe from the Caſe pleaded, when indeed there was none, but when this was done merely to evite a Diſcourſe which could not be anſwered. After the Purſuer has ſtated his Purſuit, and enlarg'd himſelf upon all the favourable Circumſtances, which we call the Merits of the Cauſe, the Defender propones his Defence, but urges it little till he know if it be controverted; but if the Relevancy of the Defence be controverted by the Replier, in a full Diſcourſe, then the Duplier makes a full Anſwer, and ordinarily theſe terminate the Debate; and after that, the Diſcourſes become too thin and ſubtle, and the Judges weary, albeit ſome Cauſes, becauſe of their Intricacy, or of new Emergents, require more Returns.

In theſe Replies, or Duplies, our Cuſtom allows a ſhort Preface upon ſolemn Occaſions, in which the Rule ſeems to be, That theſe Prefaces ſhould not be too general, and ſuch as are applicable to any Debate; as when the Speaker excuſes his own Weakneſs, or recommends Juſtice to the Judges, or ſuch common Places: But it ſhould run upon ſome general Principle, which tho' it be not a concluding Argument, yet tends much to clear that which is the Subject of the Debate: As in the *French* Pleading I have tranſlated, the Pleader being to enforce, that a civil Death purifies the Condition, *Si ſine liberis deceſſerit,* he begins with a Preface, which ſhews, that the Law has a great Empire over Nature, and plies its Events to its civil Deſigns; whereas I being to plead the contrary, I do inſiſt to clear in general, that Matters of Fact eſcape the Regulation of Law, and that Law is ty'd to obſerve Nature.

The Diſcourſe itſelf does conſiſt of theſe Arguments whereby the Defender maintains his Defence, or of theſe Anſwers by which the Purſuer elides thoſe Arguments; and to range them appoſitely into their own Places (ſo that ſuch Arguments as have Contingency, may be ſet together) is a Mark of a clear and diſtinct Wit; and when Arguments are ſo rang'd, each of them adds Strength to another, and they look like Men well marſhal'd into diſtinct Troops: Whereas, Arguments ſtraggling out of that Place where they ought to have been placed, ſeem unpleaſant and irregular, and will hardly be expected where they are. For Inſtance, in pleading againſt the Viſcount of *Stormont*, all the Arguments which can be preſs'd, are either ſuch as endeavour to prove, that the Clauſe of *Stormont*'s Infeſtment is contrary to the Nature of *Dominium* or Commerce, and after that the Pleader had paſt firſt *Dominium*, and then Commerce, to return to thoſe Arguments which ariſe from the Nature of *Dominium*, were irregular; for that were to return to ſhow what he had forgot. And from this I conclude in Reaſon, That all Arguments founded upon that ſame general Principle, ſhould be pleaded together, and in the ordering of theſe Generals, I would chooſe to begin with thoſe which clear beſt either Matter of Fact, or which tend moſt to illuminate the Subject of the Diſcourſe. And thus the Controverſy in *Stormont*'s Caſe being, Whether the Proprietor of tailied Lands may alienate theſe Lands, if he be prohibite to alienate by the firſt Diſponer, or at leaſt if they may be compris'd from him? The firſt Claſs of Arguments to be urg'd, ſhould be theſe which tend to prove, that this Prohibition is inconſiſtent with the Nature of *Dominium* and Propriety, for theſe clear beſt the Nature of Propriety, which is the chief Subject of the Debate.

He who anſwers, uſes with us, to repeat the Arguments which he is to anſwer all with one Breath, before he begin to make diſtinct Anſwers to them; and this proceeds, as I conceive, from the *Ariſtotelic* Way of arguing in the Schools, wherein he who maintains the Theſis propoſed, muſt repeat the Argument before he anſwer it. This Method I love not, for it conſumes unneceſſarily much Time, and ſure it wearies Judges to hear the ſame Argument twice, yea thrice, repeated; for firſt, the Enforcer does repeat them, then the Anſwerer does repeat them, both generally at the Entry of his Diſcourſe; and thereafter he muſt repeat each Argument when he is to make a ſpecial Anſwer; and I ſhould think it much more natural to repeat and anſwer each Argument apart: Ordinarily the Anſwerer follows in his Anſwers the Method of the Proponer; yet ſometimes he chooſes rather to claſs the Arguments as he pleaſes, and to anſwer accordingly. If the Defender deſign to anſwer the Arguments brought againſt his Defence, and to add new ones to aſtruct the Reaſonableneſs of his Purſuit, he uſes firſt to urge his own Arguments, and then to anſwer what is alledg'd for the Defender.

Whether the ſtrongeſt, or weakeſt Arguments or Anſwers ſhould be firſt inſiſted on, was much debated amongſt ancient Orators; ſome thought the weakeſt ſhould be firſt urg'd, becauſe the Judges were then freſheſt, and might poſſibly by Wearineſs ſlight what was delay'd: Others thought fit to leave with the Judges the ſtrongeſt Arguments, that they might be freſh with them when they are to decide: This I think is arbitrary, and they are but weak Judges, who do not weigh all equally. But I think it adviſeable for a young Pleader, to urge the ſtrongeſt Arguments firſt, that he may thereby conciliate Favour to himſelf, and raiſe the Attention of his Judges; and in all Caſes where the Cauſe ſeems unfavourable, the ſtrongeſt Arguments are firſt to be uſed, for the ſame Reaſon, and there ſeems little Reaſon to leave the ſtrongeſt Arguments laſt, if the Cauſe be not preſently to be decided: But where many Anſwers are to be made to one Argument, the weakeſt is ordinarily firſt made, and as it were overly; but the ſtrongeſt is reſerved laſt, becauſe it is moſt to be inſiſted upon: And I think it moſt natural to urge the weakeſt Arguments firſt, becauſe our Diſcourſe ſhould, like ourſelves, and like our Studies, grow from Strength to Strength, and from leſs to more; but ſometimes one Argument grows from another, and then there is no Place to doubt, and always the moſt myſterious Argument is to be left laſt, becauſe it is to be preſumed, that then the Cauſe is beſt underſtood, and myſterious Arguments come to be moſt in Seaſon, when Judges have fully maſter'd the Caſe.

The Epilogue with us is ordinarily, *In reſpect whereof, the Defence ought to be admitted*, or, *repell'd*, &c. But in ſome ſolemn Caſes the Pleader may recapitulate ſhortly his ſtrongeſt Arguments, or may urge the Favour and Merits of the Cauſe; and I ſhould love to preſs this Merit rather here than in the Preface; for Favour is but an Acceſſory of Juſtice, and the Conſequent ſhould not precede its Cauſe.

Action was of old one of the chief Ornaments of Speech, under which was comprehended Geſture and Voice, all which were accommodated to the Orators Deſign, when they ſpoke to Multitudes of ignorant People, to whom Tears or Ejaculations pleaded more than Reaſon did; for that they underſtood better, as more obvious to that Senſe by which they were govern'd: But now the World is become too wiſe to be taken by the Eyes, albeit I confeſs theſe add Grace, tho' not Force.

With us, Action is poſſibly too violent, which I aſcribe both to the violent Temper of our Nation, *præſervidum* Scotorum *ingenium*, and to the Way of our Debate; for Fire ſparkles ordinarily from the Colliſion of two Bodies, one againſt another; ſome debate for Intereſt only, ſome for Honour, but Advocates for Both; yet hardly can he raiſe Paſſion in others, who ſhows it not himſelf; and all Men preſume, that he who is very ſerious and earneſt to convince others, is the Convert of his own Argument. I confeſs, that Paſſion does diſorder very much the kindled Speaker, and that he can hardly clear well his Diſcourſe who is himſelf perturb'd, and we know the Deſign of an angry Man no more, than we can ſee clearly the Bottom of troubled Waters: And therefore it were very adviſeable, that hot and choleric Spirits ſhould calm themſelves before they adventure to enter upon a ſerious Debate; but ſuch as are baſhful are the better to be warm'd, and to loſe prudently a little of their indiſcreet Modeſty. Melancholic Perſons likewiſe, who are ready to loſe themſelves in their wandring Thoughts, need to be a little fretted; for thereby they become intent, and finding themſelves ſomewhat piqu'd, they are gather'd into their Subject. He who fears to be interrupted, will ordinarily ſtammer; for he will be more buſy in thinking upon the being interrupted, than upon what he is to ſay; and there Paſſion does well alſo, ſeeing then he conſiders nothing but what he is ſpeaking.

Railing is of all other Qualities the worſt in a Pleader; for it makes Men judge that his Cauſe needs it, when he rails againſt his adverſe Client, and that he finds himſelf worſted, when he rails againſt his adverſe Advocate; but ſometimes he is oblig'd to found upon Matters of Fact, which tho' they have much of Reflection in them, yet are neceſſary Truths; and ſometimes the Law by which he pleads, obliges him to Terms which may ſeem rude to Strangers; and in both theſe Caſes, not to be ſevere were Prevarication; tho' I have known Advocates very innocently condemn'd, for calling the late Times, *Rebellion*, and ſuch as were forfaulted, *Traitors*, tho' in that they ſpoke their Art, and were not oblig'd to ſpeak their Thoughts: And there are few Clients, who when they loſe the Cauſe, do not diſcharge a great Part of their Fury upon theſe Advocates, by whom they conceiv'd themſelves overthrown.

Too ſubtile ſpeaking convinces few, becauſe few underſtand it, and it is applauded by few, becauſe few can reach to the Practice of it; and in young Men it may be interpret to be but Affectation, or Notionalneſs, tho' in ſuch as have by long Practice eſtabliſh'd their own Reputation, it gains Glory. Many Citations alſo are to be avoided by all, in pleading, (tho' they are neceſſary in writing) eſpecially in young Men, for in Theſe they are thought but common Place-wit; and yet young Men do moſt uſe that Way, becauſe they think thereby to ſupply their own Want of Authority, and becauſe they know not many parallel Caſes, and are not yet ſo intimately acquaint with their Subject, as to draw Arguments out of its retir'd Intrails. Many Parentheſes are to be avoided; for they interrupt the Thread of the Diſcourſe, and make it knotty, and myſterious, tho' theſe Weeds grow ordinarily in the richeſt Soil, and are the Effects of a luxuriant Invention. Frequent Repetition of the ordinary Compellations; ſuch as, *My Lord Chancellor*, or *My Lord Preſident*, are to be likewiſe ſhunned.

Before I propoſe what Phraſe or Stile is fit for a Pleader, 'tis fit to tell, That the Two uſual Stiles, known by diſtinct Names, are, the *Laconic*, or ſhort ſententious Stile, and the *Aſiatic*, or profuſe and copious Stile: The Firſt was us'd by the old *Roman* Legiſlators, as is clear by reading the Digeſts; but when the Empire was transferr'd to *Conſtantinople* in *Aſia*, the Empire chang'd its Stile with its Seat; and we find that *profluvium Aſiaticum* in the *Codex*, and Novels: Yet all the *Grecian* and *Roman* Pleaders, even in their Purity, us'd a full copious Stile, as is clear by *Demoſthenes*, *Cicero*, and others; and tho' Legiſlators or Judges ſhould uſe the *Laconic*, yet the other muſt ſtill reign at the Bar. A Barriſter likewiſe ſhould rather ſtudy not to want Words, than to ſtick at the chooſing fine ones; and the Generality of Hearers are more diſpleaſed at a Gap or Breach in a Diſcourſe, than can be recompens'd by a Multitude of theſe fine Words or Sentences which occaſioned theſe Gaps, whilſt the Speaker waited for theſe delicate Words which he found after that Stop: And as I have known many admir'd for a fluent ſpeaking of pitiful Stuff; ſo I have known others loſe the Reputation of Orators, by ſtudying in their greener Years too much Fineneſs. And I would adviſe my Friends who begin to ſpeak, firſt to ſtudy Fluency, and when they are arriv'd at a Conſiſtency there, they may eaſily refine the large Stock they have laid together.

Many who are not Friends to the Bar, inveigh much at the canting Terms which they ſay is us'd there; but theſe do not conſider, that every Science has its particular Terms, and it were Pedantry to ſubſtitute others in their Place: And as a Man looks ridiculouſly in a Woman's Habit, or a Woman when attir'd like a Man; a Soldier under a Gown, or a Churchman in Buff; ſo it is as ridiculous to hear a Member of Parliament, or a Councellor, ſpeak of Affairs in Terms of Hunting, as it is for a Lawyer to ſpeak in his Terms of other Things: And I laugh as much to hear Gentlemen ſpeak in their canting Terms of Hunting, Hawking, Dancing, as they can do to hear me ſpeak in the Idiom of my Trade. And to ſpeak like a Gentleman at the Bar, is to ſpeak like a Pedant; Pedantry being nothing but a tranſplanting of Terms from what they were fit for, to that to which they are moſt unfit. And I love equally ill to hear Civil Law ſpoke to in the Terms of a Stile-book, or accidental Latin, (as is moſt ordinary) as to hear the genuin Words of our Municipal Law, forc'd to expreſs the Phraſes of the Civil Law and Doctors.

It may ſeem a Paradox to others, but to me it appears undeniable, that the *Scotiſh* Idiom of the *Britiſh* Tongue is more fit for Pleading, than either the *Engliſh* Idiom or the *French* Tongue; for certainly a Pleader muſt uſe a briſk, ſmart, and quick Way of ſpeaking; whereas the *Engliſh*, who are a grave Nation, uſe a too ſlow and grave Pronunciation, and the *French* a too ſoft and effeminate one. And therefore, I think the *Engliſh* is fit for Haranguing, the *French* for Complementing, but the *Scots* for Pleading. Our Pronunciation is like ourſelves, fiery, abrupt, ſprightly, and bold; their greateſt Wits being employ'd at Court, have indeed enrich'd very much their Language as to Converſation; but all our's bending themſelves to ſtudy the Law, the chief Science in Repute with us, hath much ſmooth'd our Language, as to Pleading: And when I compare our Law with the Law of *England*, I perceive that our Law favours more Pleading than their's does; for their Statutes and Deciſions are ſo full and authoritative, that ſcarce any Caſe admits Pleading, but (like an Hare kill'd in the Seat) 'tis immediately ſurpriz'd by a Deciſion or Statute. Nor can I enough admire, why ſome of the wanton *Engliſh* undervalue ſo much our Idiom, ſince that of our Gentry differs little from their's; nor do our Commons ſpeak ſo rudely as theſe of *Yorkſhire*. As to the Words wherein the Difference lies, our's are for the moſt part old *French* Words, borrow'd during the old League betwixt our Nations, as *Cannel* for *Cinnamon*, and *Servit* for *Napkin*, and a Thouſand of the like Stamp; and if the *French* Tongue be at leaſt equal to the *Engliſh*, I ſee not why our's ſhould be worſe than it. Sometimes alſo our fiery Temper has made us, for Haſte, expreſs ſeveral Words into one, as *Stour*, for *Duſt in Motion*; *Sturdy*, for *an extraordinary Giddineſs*, &c. But generally, Words *ſignificant ex inſtituto*; and therefore one Word is hardly better than another: Their Language is invented by Courtiers and may be ſofter, but our's by learn'd Men and Men of Buſineſs, and ſo muſt be more maſſy and ſignificant: And for our Pronunciation, beſide what I ſaid formerly of its being more fitted to the Complexion of our People than the *Engliſh* Accent is; I cannot but remember them, that the *Scots* are thought the Nation under Heaven, who do with moſt Eaſe learn to pronounce beſt the *French*, *Spaniſh*, and other foreign Languages, and all Nations acknowledge that they ſpeak the Latin with the moſt intelligible Accent; for which no other Reaſon can be given, but that our Accent is natural, and has nothing, at leaſt little, in it that is peculiar. I ſay not this to aſperſe the *Engliſh*, they are a Nation I honour, but to reprove the petulancy and Malice of ſome amongſt them, who think they do their Country good Service when they reproach our's.

------*Nec ſua dona quiſque recuſet.*

I know that *Eloquence* is thought to have declin'd from *Cicero*'s Time, and it has ſo indeed, if, with Pedants, we make *Cicero* the Standard, for nothing can be ſtraighter than its Square; but I conceive that the World does, like particular Men, grow wiſer and learneder, as it grows old; but of all Things Eloquence ſhould improve moſt, becauſe of all Things it ripens moſt by Practice; Experience diſcovers daily more and more of the Humour of ſuch whom we are to convince, and the better we know them, we can convince them the eaſier. By Experience alſo we learn to know, what Forms and Sounds pleaſe moſt, and every Pleader and Orator adds ſome new Inventions to that of the laſt Age, and if One being added to Twenty, make Twenty a greater Number, then the Eloquence of this Age, being added to that of the former, muſt make this Age more eloquent than the laſt. But I know ſuch as envy the Orators of the preſent Age, do ſtill endeavour to mortify them, by admiring ſuch as are dead, who in their Time met with the ſame Meaſure; Death alſo removes Men from being our Rivals, and ſo from being envy'd by us; yet we ſhould remember, that even *Cicero* and *Demoſthenes* did complain of the ſame in their Age, tho' they far exceeded their Predeceſſors.

SOME may think that the Eloquence of *Rome*, and others, behov'd to be higher than our's, becauſe the Multitude were in theſe Commonwealths abſolutely govern'd by it, and the Greatneſs of their Reward for Eloquence exceeding our's, their Eloquence behov'd to do ſo too. But I am formally contrary; for ſince our Judges are wiſer and more learn'd than the Commons, there muſt go more Art to Convictions now, than was requiſite then: And tho' we have not Kings nor Commonwealths to defend, as thoſe oft-times had who pleaded in the *Roman* Senate; yet we may ſhow as much Eloquence upon leſſer Occaſions, as one may cut finer Figures upon Steel than upon Gold; it is the Intricacy of the Caſe, and not the Greatneſs of the Prize, which makes the Value of the Pleading, and generous Spirits are more animated by Difficulty than Gain. We have alſo more Laws, Parallels and Citations to beautify our Diſcourſe than they had, and want none of their Topics; ſo that tho' our Spirits did not equal their's, yet in our Pleadings we could not but exceed them. Nor do I value much the Opinion of thoſe, who think the Spirits of ſuch as liv'd in Commonwealths were greater, becauſe freer than our's, who live under Monarchies, and being Subjects to none, they had greater Confidence than we can have. This is but a Fancy, invented by ſuch as live under that Form of Government: But I have not ſeen any *Switzer*, or *Hollander*, ſo eloquent as the *Engliſh* or *French*; and it enlivens me more to ſee Kings and Courts, than to ſee theſe buſie and mechanic Nations: Nor can I think any Spirit can excel much in any one Thing where Equality is deſign'd, and where all ſuch as offer to riſe above the Vulgar are carefully depreſs'd, and ſunk down to a Level, as they are under Commonwealths.

FOR my own Part, I pretend to no Bays; but ſhall think myſelf happy in wanting, as the Fame, ſo the Envy which attends Eloquence: And I think my own Imperfections ſufficiently repay'd by Fate, in that it has reſerv'd me for an Age, wherein I heard, and daily hear my Collegues plead ſo charmingly, that my Pleaſure does equal their Honour.

# A Pleading tranſlated out of *French*, to inform ſuch as underſtand not that Language of the Way of Pleading there.

## *An Eſtate in Land being diſpon'd to a Woman, and another being ſubſtitute, in caſe ſhe ſhould die without Children of her own Body; ſhe being condemn'd for Inceſt, and burnt only in Effigie, the Queſtion is, Whether, by that civil Death, the Condition be purified, as well as if ſhe were naturally dead? And if the Perſon ſubſtitute hath, by that civil Death, Right to the Eſtate, without waiting for her natural Death?*

### *In favour of the Perſon thus ſubſtitute, it was pleaded.*

ALBEIT Matters of Fact do depend entirely upon Nature, and cannot ſubmit themſelves to the Authority of politic Laws, *Ea quæ ſunt facti, nulla conſtitutione infecta fieri poſſunt*; yet Law conſiders them only in ſo far as they are neceſſary and uſeful for human Society, and upon that Account forces this Maxim to ſuffer many Exceptions. Thus *bonæ fidei poſſeſſor*, is *per actionem publicianam*, made to have Right by an imaginary and fictitious Poſſeſſion, to that which he never really poſſeſſed. *Jus poſtliminii*, makes us believe him who is a Priſoner of War, never to have been taken Priſoner. And *Lex Cornelia* doth preſume, that theſe who did teſt whilſt they were Captives, did die in the City to which they belonged, tho' they died really abroad in their Captivity. All which Inſtances prove, that the Law doth not ſubject itſelf blindly to Nature, but that it can ply Matters of Fact to its own Deſigns, and can by an innocent Cheat, adjuſt them to public Utility and Advantage.

THIS Foundation being thus eſtabliſh'd, let us examine this Condition, *If ſhe die without Children*; and let us try if it be ſo bound up to a Matter of Fact, as that it cannot ſubmit itſelf to the juſt and politic Fictions of the Law.

IT is certain, that albeit all Conditions be ordinarily mere Matters of Fact, yet this Condition which depends entirely upon the Intention of the Teſtator, muſt owe its Form to his Will; and ſeeing he did fix his firſt Deſires and Deſigns upon this Woman and her Heirs, and did call the Perſon ſubſtitute for whom I plead, but in the third place, not to ſuſpend and defer his Liberality, but to oblige my Client to wait, becauſe ſhe and her Heirs did precede them in the Order of his Inclinations: Therefore, when Death or Fortune do ſtate her and her Heirs in ſuch a Condition, that neither of them can expect the Succeſſion, there is no Doubt but his Will doth immediately tranſport the Effects of his Liberality to the Perſon ſubſtitute, ſince the Perſons who ſhould precede them, are by the Law remov'd out of the Way. Nor was it the Intention of the Teſtator to enrich the Fisk any more, than if he had adjected a Condition relating nothing to the Purpoſe; *veluti, ſi navis ex* Aſia *venerit.* From this likewiſe it follows, That as Succeſſion is one of the Ways whereby we atquire in Law civil Rights which depend upon the Law, and which the Law doth not allow to any but to its own Citizens, *qui habent teſtamenti factionem paſſivam*; ſo this Condition, *Si ſine liberis deceſſerit*, is not ſo entirely and abſolutely a Matter of Fact, but that Law and Fact are therein mixed together; and therefore, albeit the Death of the firſt Heir without Children, is regularly underſtood according to the proper and natural Signification of natural Death, yet Lawyers have extended this to civil Death, and have purified the Condition by Deportation, and other Kinds of civil Death, as is clear *l. ex facto*, 17. § *ex facto*, ff. *ad Senatuſc. trebel. Ex facto tractatum memini*; *Rogaverat quædam mulier filium ſuum, ut ſi ſine liberis deceſſiſſet, reſtitueret hæreditatem fratri ſuo: Is poſtea deportatus, in inſulam liberos ſuſceperat*; *quærebatur igitur, An fidei commiſſi conditio deficiſſet? Nos igitur hoc dicemus, Conceptos quidem ante deportationem, licet poſtea edantur efficere, ut conditio deficiat*; *poſt deportationem vero ſuſceptos, qnaſi ab alio, non prodeſſe, maxime cum etiam bona cum ſua quodammodo cauſa fiſco ſunt vindicanda.*

THIS Woman is condemn'd to be burn'd and ſtrangl'd, ſhe had no Children, and can expect no Divorce; her Flight has not only baniſh'd her out of the Kingdom, but that Sentence that has reveng'd her Crime on her Memory, and Picture, has rendred her *ſervam pœnæ*, the unfortunate Prey of an infamous Gibbet: How can ſhe then but be reputed dead, ſeeing ſhe is expung'd out of the Number of Subjects? And how can that Law which has executed and kill'd her, belye ſo far its own Authority, as to believe her alive, after it has taken ſo much Pains to make us believe ſhe is dead? And after her civil Death, How can it conſerve for her a Faculty of bearing Children, which may fulfil a civil Condition? I confeſs that Deportation is not ſtill compar'd to natural Death, and that the Liberty which a baniſh'd Man carries with him to a foreign Country, does preſerve for him all the Advantages of the Law of Nations; *ita ut ea quæ juris civilis ſunt, non habeat*; *quæ verò juris gentium ſunt, habeat*, *l.* 17. *ff. de pœnis.* But on the contrary, ſince the being a Slave diveſts Man of his Humanity, and ranks him amongſt Beaſts, § 2. *ff.* ad *l. Aquil.* the Law can no more conſiderhim, but as a Piece of Moveables, living and animated, as a reaſonable Tool belonging to his Maſter; ſo that having no Head, nor Will, but his Maſter's; therefore if the Law allow him to fulfil any Condition, that is upon his Maſter's Conſideration, and not his own. A Perſon condemned is the Slave of his Puniſhment, *ſervus pœnæ, magis enim pœnæ quàm fiſci ſervus eſt*, l. 12. ff. *de jure fiſci*: And therefore the Law reputes him dead, ſince that Gibbet to which it ties him, can communicate nothing to him but a cruel Death, and conſequently he can fulfil no Condition, *l.* 17. §. *Si quis rogatus ad ſenatuſc. trebel. Si quis rogatus fuerit filiis ſuis, vel cui ex his voluerit reſtituere hæreditatem.* Papinianus, *l.* 8. *Reſponſorum, etiam deportato ei tribuit eligendi facultatem*; *cui liber fuctus fidei commiſſum reſtitui velit*; *ſed ſi ſervus pœnæ fuerit conſtitutus, nullo ante concepto filio, jam parere conditioni non poterit, deceſſiſſeq; ſine liberis videtur*; *ſed cum decidit, electionem illam quam* Papinianus *deportato dedit, huic dari non oportet.*

LAW imitates Nature, and uſes the ſame Authority over a Man, as he is ſociable, that Nature exerciſes over him, as he is natural: And hence it is, that the Law governs and regulates Societies, for its own Advantage; and as it can beget Children, and people Families by Adoptions, ſo by the ſame Power, it can cut off unneceſſary Members from Families, by Exhereditations, and can kill them by condemnatory Sentences; *Servus pœnæ in omni jure,* *verè ac ſemper ſimilis eſt mortuo*, Cujac. Obſerv. l. 3. cap. 10. Law then may juſtly bury a Criminal in the infamous Sepulchre of a cruel Servitude, which takes from him his civil Life with his Liberty, and can tie him to a long Death, and exceſſive Torment, which may draw out his Torture to a very long Continuance, and make him, as *Petronius* ſpeaks, paſs but for the pitiful Viſion, and horrid Shadow of his own Perſon.

We muſt then confeſs, That that Sentence which confiſcates his Body and Goods, doth at the ſame time confiſcate his Perſon and Liberty: 'Tis the Sentence which kills him, and his natural Death following thereafter, doth but execute that Sentence; and as we ſay, That a Robber has kill'd a Paſſenger when he gave him the mortal Wounds, tho' he did not then die; *Tunc occidiſti cum vulnerabas, l. Si ita ff. ad l. Aquil.* ſo by the ſame Reaſon, the Judge doth kill a Criminal, the very moment that he pronounces the Sentence; and he truly dies by the Sentence, and not by the Execution. *l. 29. ff. de Pœn. Qui ultimo ſupplicio damnantur, ſtatim & civitatem & libertatem perdunt; itaq; præ-occupat hic caſus mortem, & nonnunquam longum tempus occupat, quod accidit in perſonis eorum qui ad beſtias damnantur; ſæpe etiam adeo ſervari ſolent poſt damnationem, ut ex his in alios quæſtio habeatur.* And as the Authority of the Law may beget a Citizen before his Birth, and receive a Poſthume into the Commonwealth before he come out of the Womb; *Poſthumus pro nato habetur*; ſo its Empire may take away the Life a long time before a Man die: It may prevene his Death, and chaſe him out of the World before Death overtake him; which is likewiſe confirm'd *per l. Si quis, 6. §. Sed & ſi quis*, ff. *de Injuſt. Sed & ſi quis fuerit capite damnatus, vel ad beſtias, vel ad gladium, vel alia pœna quæ vitam adimit, teſtamentum ejus irritum fiet, non tunc cum conſumptus eſt, ſed cum ſententiam paſſus eſt, nam pœnæ ſervus efficitur.* Let us now ſee, if this Way of reaſoning, drawn from the *Roman* Cuſtoms, can be brought home to our *French* Practique.

Lawyers, who deſign'd to found the Principles of their true Philoſophy upon Maxims real, ſolid, and conſtant, were too clear-ſighted to force their Laws to diſcharge their Revenge upon an Image, and an Apparition, to take the Shadow for the Body; and in ſuppoſing the Name of a Criminal for his Perſon, thereby to challenge their Judges of Want of Power and Precipitancy; and therefore they did not allow, that a Perſon who is abſent ſhould be condemned, and that the Law ſhould in vain ſpend its Thunder upon thoſe whom it could not reach, *l. 1. ff. de requirend. reis.* Since then the Law of the *Romans* could not condemn capitally a Criminal who was contumacious, it was eaſy to them to believe, that a Priſoner who was preſent and fettered, did inſtantly receive that Death to which he was condemned. But ſince our Statutes ordain a painted and imaginary Execution, either our Statutes and Cuſtoms muſt confeſs their Weakneſs, and quit theſe, as mere Mommeries, or elſe they muſt neceſſarily oblige us to believe theſe Appearances to be Realities, and eſſay to verify theſe civil Lies, in forcing us to believe, that theſe painted Executions are real; that the Originals of theſe infamous Pictures are no more alive, and that *res judicata pro veritate habetur.*

If the Power of a *Roman* Pretor was ſufficient to beget a Child in ſpight of Truth, and Nature itſelf, *plane ſi denuntiante muliere, negaverit ex ſe eſſe pregnantem, tametſi cuſtodes non miſerit, non evitabit quo minus quæratur, an ex eo mulier pregnans ſit: quæ cauſa, ſi fuerit acta apud judicem, & pronuntiaverit cum de hoc agetur, quod ex eo pregnans fuerit, nec ne in ea cauſa eſſe ut agnoſcere debeat, ſive filius non fuit, ſive fuit, eſſe ſuum*, l. 1. § *ult. ff. de agnoſc. liber.* or may force a Mother to diſown her Child which is really hers; *ſive contra pronuntiatum fuerit, non fore ſuum, quamvis ſuus fuerit; placet enim ejus rei judicem jus facere. l. ſeq. ff, eod.* By much more Reaſon, may a general Law and Cuſtom univerſally receiv'd, force Subjects ſo far to obey their Judges, as to believe that a Woman ſtrangl'd and burnt has loſt her Life upon the Scaffold, where ſhe has been ſo publicly and tragically executed.

It is then more juſt to preſume, That this Woman who is condemned, is dead without Children, and that her Execution has purified the Condition, than that the Purſuer ſhould attend her Death, ſhould ſearch out her wandring Perſon, which lurks under ſo much Shame, and purſue her in her Flight and Baniſhment thro' Countries, which are either unknown, or in Enmity with our's; and therefore I conclude, That it is moſt juſt to put the Purſuer in Poſſeſſion of the Eſtate.

*I have eſſayed thus to anſwer the former Pleading, becauſe there is no Anſwer to it extant in the* French, *and becauſe ſuch Caſes may with us frequently occur.*

THE greateſt Glory of Art is, That it can imitate Nature; and every Thing which forces Nature, is hated by Men, as Folly and Affectation: But amongſt all thoſe Arts which follow Nature, Law is the Chief; for it being the chief Product of Reaſon, it endeavours moſt to reſemble Nature; Reaſon and Nature being in Man, the ſame Thing varied under diverſe Expreſſions, and Reaſon being Man's Nature. And thence it is, that the Law plies all its Conſtitutions to the ſeveral Degrees of Nature, and obſerves it exactly before it begin to form a Statute relating to it; *propter naturam ſtatuitur aliter, quam ſtatueretur aliàs*, gl. ad l. Julianus, ff. *Si quis, omiſſa cauſa*; tho' it appoints that Conſent ſhould oblige, yet it excepts Minors, becauſe of the Frailty of their Nature; tho' it appoints Murder to infer Death, yet it pardons ſuch as are Idiots, or furious; it doth in dubious Caſes, prefer that Interpretation which is moſt ſuitable to the Nature of the Thing controverted; it preſumes *illud ineſſe, quod ex natura rei ineſſe debet*; and it has very well ordained, That *ea quæ dari impoſſibilia ſunt, vel quæ in rerum natura non ſunt, pro non adjectis habentur*, l. 135. *ff. de reg. jur.* Since then there is nothing ſo unnatural, as to force us to believe, that a Perſon who is really alive, is truly dead, and that the Children which a Woman may bring forth, ſhall not be her Children; I ſee not with what Appearance of Succeſs, the Subſtitutes can, in this Caſe, aſpire to the Succeſſion now craved. Nature has a fixt Being, and Men know what it determines by conſulting their own Breaſts, and think themſelves happy under the Protection of what is ſure, and determin'd; but if it were allowed that Law might vary, and that Lawyers might invent ſuch Fictions as theſe, and by them impoſe upon others, who not being of their Profeſſion, could not follow all their Subtilties, and Windings; then Law ſhould become a Burden, and be eſteem'd an Illuſion. And I imagin I hear thoſe amongſt whom this Woman lives, laugh at this Diſcourſe, which would force them to believe that ſhe is dead; and I'm ſure, that any Country Clown may refute it, by preſenting the Woman, as one refuted a wiſe Philoſopher, who maintain'd, *That there was no Motion*, without any other Argument, than by walking up and down.

THE Queſtion then being, Whether the Condition, *Si ſine liberis deceſſerit*, is purified by a civil Death? and, If immediately after ſhe is burnt in Effigie, ſhe can be ſaid *ſine liberis deceſſiſſe*, ſo that the Perſon ſubſtitute may immediately ſucceed, and exclude any Children ſhe ſhall thereafter bear? or, If the Subſtitute muſt attend her natural Death?

THAT the Subſtitute cannot ſucceed immediately after her being burnt, but that any future Children would ſeclude him, ſo that a natural only, and not a civil *Death*, purifies the Condition, is contended by theſe Reaſons; Firſt, The Queſtion being, Whether this Condition, *Si ſine liberis deceſſerit*, reſpects natural, or civil *Death?* We muſt interpret the Word *Death*, ſo as that we follow the more genuin and natural Signification; and I'm ſure, the ordinary and genuin Interpretation of *Death*, is a natural, and not a civil *Death*. And that this Condition can only be purified, or ſatisfied, by a natural, and not by a civil or fictitious Death, is clear by very expreſs Laws, as, *l.* 8. *ff. de cap. dimin.* where it is ſaid, *Eas obligationes quæ naturalem præſtationem habere intelliguntur, palam eſt capitis diminutione non perire; quia civilis ratio naturalia jura corrumpere non poteſt.* Thus *Gaius*, one of the beſt *Roman* Lawyers, hath ſaid, That ſuch Interpretations do corrupt the Law, and in effect mix Things that are very different, invading the Limits of Nature, and ſtretching Fictions further than they ought to go: And therefore ſuch criminal Sentences as do not really kill, *ſed fictione civili caput diminuunt*, are not term'd Death, but a Puniſhment next to Death; *deinde proxima morti pœna, damnatio in metallum*, l. *capitalium*, ff. *de pœnis*. This likewiſe *Papinian* decides, *l.* 121. *ff. de verb. Oblig. In inſulam deportato reo, promittendi ſtipulatio ita concepta, cum morieris, dari non niſi moriente eo committitur:* And upon the ſame Ground, *l. cum pater*, § *hæreditatem*, *ff. de legat.* 2. he determines our Caſe expreſly, and aſſerts, That ſuch Sentences cannot *in fidei-commiſſis*, be accounted Death; *hæreditatem filius cum moreretur, ſuis, vel cui ex his voluiſſet reſtituere fuerat rogatus; quo interea in inſulam deportato, eligendi facultatem non eſſe pœna peremptam placuit; nec fidei-commiſſi conditionem, aut mortem filii hæredis exiſtere:* With whom agrees *Paulus*, *l. ſtatius*, § *Cornelia Fœlici*, *ff. de jure fiſci.* Cornelia Fœlici *mater ſcripta hæres, rogata erat reſtituere hæreditatem poſt mortem ſuam, cum hæres ſcripta condemnata eſſet, & à fiſco omnia bona mulieris occuparentur; dicebat* Fœlix, *ſe ante pœnam eſſe; hoc enim conſtitutum eſt; ſed ſi nondum dies fidei-commiſſi veniſſet,*

*quia poteſt ipſe mori, vel etiam mater alias res acquirere*; *repulſus eſt interim à petitione.* Thus we ſee, that all the *Roman* Lawyers have conſpir'd to allow only natural Death, to ſatisfy ſuch Conditions as this is: Death is the laſt of all Things, *rerum ultima linea*; and therefore theſe Sentences, leaving ſtill Room to Hopes and Expectations, cannot be called Death, which with the Perſon, cuts off all theſe. 'Tis thought by the beſt of Men already, That Death comes too ſoon; Why then ſhould we precipitate it, and force it upon Men before its Time? And ſince one Death is thought by all, a ſevere enough Puniſhment, Why ſhould we multiply a Thing that is but too oft too unwelcome? Death is too ſerious a Thing to be counterfeited by ſuch Fictions, and too ſevere a Thing to be quibbled upon by ſuch Interpretations. II. If we look to the Meaning of the Diſponer, which is the next Rule to be follow'd, in the Interpretation of dubious and equivocal Words, we will find, That 'tis hardly imaginable, that the Diſponer dream'd of a civil Death; and 'tis moſt certain, that any Man, eſpecially who was not a Lawyer, would never have figur'd a civil Death; nor is it denied; for *fictio* is *mens legis, non diſponentis.* But how unſuitable were it to natural Equity, and the Principles of Law, that the Will of the Diſponer ſhould not regulate what is diſponed? Or why ſhould the Law diſpoſe of what it did not beſtow? III. Words are to be explain'd in a Diſponer's Will, as the Diſponer would probably have explained them himſelf, if the Meaning had been controverted at the Time of making the Diſpoſition. But ſo it is, That if it had been propos'd to the Diſponer, Whether the Children of the Woman inſtituted ſhould be cut off, in caſe their Mother ſhould commit a Crime? 'Tis probable, that he would not have puniſhed poor Infants, for a Guilt to which they were not acceſſory; and the Law was never more generous, than when it ſaid, *Non competere beneficium inofficioſi teſtamenti poſthumis, cum exhæredationis cauſam committere nequeant*; *nec debent alieno odio prægravari*, l. 33. § 1. c. *de inoff. teſt.* Nor is it imaginable that the Teſtator would have taken from them what he deſigned, becauſe they fell, without their own Guilt, in a Condition, which made that which was but Liberality, to become Charity: And ſince he deſign'd this for their Mother and them, to ſupply their Wants, it is not imaginable, he would have taken it from them when their Wants were greateſt. The Children would likewiſe ſtill continue to be nearer to the Diſponer, than the Subſtitute; *nam jura ſanguinis, nullo jure civili adimi poſſunt*; and ſince the Blood-relation gave at firſt the Riſe to that Nomination, 'tis probable, that the Effect would not be taken away, whilſt the Cauſe continued. IV. If ſhe can have Children after her being burnt in Effigie, ſhe cannot be ſaid *deceſſiſſe ſine liberis*, upon her being burnt in Effigie; but I ſubſume, That ſhe may have Children, and ſuch too, as the Law would acknowledge to be Children: For by the 22 *Nov. cap.* 8. Marriage is declared ſtill to ſubſiſt, notwithſtanding of any intervening criminal Sentence; for tho' by the old Law, condemn'd Perſons *pro nullis habebantur*, and ſo the Marriage was diſſolved, yet by that excellent Conſtitution this was abrogate, *Si enim ex decreto judiciali, in metallum aliquis, aut vir, aut mulier, dari juſſus eſt, ſervitus quidem erat & ab antiquis Legiſlatoribus ſancita & ex ſupplicio illata, ſeparabatur vero matrimonium, ſupplicio poſſidente damnatum, ſibique ſervientem. Nos autem hoc remittimus, & nullum ab initio bene natorum ex ſupplicio permittimus fieri ſervum, neque enim mutamus nos formam liberam in ſervilem ſtatum, maneat igitur matrimonium hoc nihil tali decreto læſum.* Since then her Husband continued to be ſo ſtill, and that the Law would acknowledge the Children to be her's, Would not the Law contradict itſelf, if it ſhould ſay that ſhe died without Children, and yet ſhould acknowledge that theſe were her Children? V. *Poſthumus pro jam nato habetur, ubi de ejus commodo agitur*; and therefore, by the ſame Reaſon of Juſtice and Equity, the Law ſhould be ſo far from preſuming that there can be no Children born after the Mother is condemned, that if ſhe ſhall bear any, it ſhould rather preſume them to be already born, to the end they may not be prejudged of the Succeſſion, which would be otherwiſe due to them; and if *poſthumus habetur pro jam nato, ubi agitur de ejus commodo*, much more ſhould he be preſumed *natus, ubi agitur de damno vitando*; for we are much more favourable in *damno vitando, quam lucro captando.* VI. By the *Roman* Law *auth. bona damnatorum, C. de bon. preſcript.* the Goods of condemn'd Perſons were not confiſcate in prejudice of the Aſcendents, or Deſcendents, to the Third Degree, except only in the Caſe of *Leſe-majeſty*. If then the Crime be not able to ſeclude Children, it follows neceſſarily, that Children *quoad* their Succeſſion, are in the ſame Caſe as if the Crime had not been committed; and, if the Mother had committed no Crime, here there had been no Place either for the Subſtitute or for this Queſtion. It is juſt that *delicta ſuos debent tenere authores*; and that ſince Puniſhment is only juſtified by the preceeding Guilt, that the Puniſhment ſhould not exceed the Guilt, and that the Right deſigned for the Children by the firſt Diſponer, ſhould not be taken away from them by the Mother's Fault: This were alſo to add Affliction to the Afflicted, to make poor Infants loſe with their Mother, their Patrimony, and to impoveriſh them moſt, at an Occaſion, when to give them were Charity.

I confeſs that Law ſometimes doth recede from Nature, and invents pretty Fictions, as in the Caſes propos'd of *jus poſtliminii, adoptionis*, and *Legis Corneliæ*; but it doth ſo very ſparingly;

ringly; nor are theſe Fictions ever allow'd, except where they are introduc'd by an expreſs Law; for the Law thought it not reaſonable to allow every Judge or Lawyer a Liberty to coin his own Caprice into a Fiction, leſt ſo unreaſonable Fictions might be introduc'd, and leſt the People might be ignorant of what they were to follow. Since then the Purſuer founds his ſtrongeſt Argument upon this, as a privileg'd Fiction, he muſt inſtruct that this Fiction is founded upon expreſs Law: And even in theſe Fictions, Law never inverts Nature, but rather ſeconds it, and it makes not Nature bow to theſe, but theſe to Nature. And amongſt many other Inſtances, this is clear by Adoptions, wherein the younger cannot adopt the elder; becauſe it were againſt Nature, ſaith the Law, that the younger ſhould be Father to the elder, *Inſt. de adopt.* § 4. *Minorem natu majorem non poſſe adoptare placet, adoptio enim naturam imitatur, & pro monſtro eſt, ut major ſit filius quam pater.* And I may by the ſame Reaſon ſay, that it were monſtrous to imagin, that ſhe who may really labour in Child-birth, and who really may give Suck, cannot bring forth a Child, but is dead; and that the Law ſhould not own as Children, theſe whom the Church owns as ſuch. And in theſe Fictions which are allow'd, we will find, upon exact Enquiry, that Law has not deſign'd to overturn Nature, but only has made bold by theſe Fictions to diſpenſe with ſome of its own Solemnities, as is clear by the Law *Cornelia*, wherein the *Romans* did by that legal Fiction imagin, that he who died in Priſon amongſt the Enemies in a foreign Country, died at *Rome* and at Freedom, merely that they might by that Fiction render valid the Teſtament of him who was a Priſoner, for the Honour of their Commonwealth; and whoſe Teſtament could not have ſubſiſted without this Fiction, ſeeing none but a free Citizen could amongſt them make a Teſtament. Since then there is no need of ſuch a Fiction as this, and ſince there is no expreſs Law introducing it ſpecifically in this Caſe, there is no Reaſon that it ſhould be allow'd to take away the Benefit of the Diſpoſition from the Perſon ſubſtitute, which it gave not. *Nihil tam naturale* (ſays the Law) *quam eo genere quidque diſſolvere quo colligatum eſt*, l. 35. ff. *de reg. jur.* Since then the Children owe not their Succeſſion here to the Civil Law, but to the Will of the Diſponer, the Law ſhould not by its Fictions, take away what was not at firſt the Effect of its Liberality.

In the Caſes where the Law allows Fictions, it allows them only for to ſtrengthen natural Equity, and not to overturn it; and by the Definition given of it, it is ſaid to be *indubitatæ falſitatis pro veritate aſſumptio, in caſu poſſibili, & ex juſta cauſa proveniens, ad inducendum juris effectum equitati naturali non repugnantem.* Jaſon. *ad l. ſi is ff. de uſu cap.* Upon which Definition no Subſumption can be founded here; for not only is not this in *caſu poſſibili*, becauſe it is impoſſible, that a Perſon can be both dead and alive at once, and that Children ſhould be and not be, *Verum eſt, neque pacta, neque ſtipulationes, factum poſſe tollere, quod vero impoſſibile eſt, neque pacto, neque ſtipulatione poteſt comprehendi, l. 32. ff. de reg. jur.* But it is alſo repugnant to Juſtice and Equity, that the Eſtate deſtinate by the Diſponer to his Blood-relations ſhould be taken from them, and given otherwiſe than he would have beſtowed it himſelf: And tho' the Law doth ſometimes, in favours of Children, oblige us to believe, that the Child that is in the Mother's Womb is born, there is ſome Foundation for impoſing that upon us, ſince there is a Child extant tho' not born; yet it never uſes that Liberty in puniſhing poor Infants, and to condemn them before it can know them, or that they have tranſgreſſed.

In Anſwer to the ſecond Claſs of Arguments, I do confeſs, that it is true that all civil Rights ſhould periſh by a criminal Sentence, and that *in ſenſu civili, pro nullo habebatur damnatus*; but it is as true, that *ea quæ ſunt juris naturalis* were not thereby taken away, *quod attinet ad jus civile, ſervi pro nullis habentur, non tamen & jure naturali, quia quod ad jus naturale attinet omnes homines æquales ſunt, l. 32. ff. de reg. jur.* But ſo it is, that to bear Children, is in her no Effect of the Civil Law, but of the Law of Nature, and the Children to be procreate by her, will be her Children by the Law of Nature: So that ſince ſhe can bear Children, ſhe can yet fulfil the Condition of the Inſtitution. Nor can ſhe be debarr'd from that, by being *ſerva pœnæ*, at leaſt her Children cannot, ſeeing they are not condemned by her Sentence: Condemnatory Sentences take only from the Perſon condemned, what may belong to the Fisk; for it ſubſtitutes the Fisk in place of the Perſon condemned; but it takes not from him what cannot belong to the Fisk; *Ea ſola deportationis ſententia aufert, quæ ad fiſcum perveniunt.* But ſo it is, that it was never deſigned that the Fisk ſhould ſucceed in place of the Perſon to whom the Diſpoſition was made, as is acknowledged by the Subſtitute who now craves Preference; and if the Fisk would be preferr'd to the Woman's Children, much more would he be preferr'd to their Subſtitutes, who ſucceed only to them. And the Reaſon of the Deciſion, *l. ex. facto. ff. ad. ſc. trebel.* is not founded *in odium* of the Children, but of the Fisk, *maxime cum etiam bona, cum ſua cauſa fiſco ſunt vindicanda.* But the ſolid Anſwer to that, and all theſe other Laws is, that by the old *Roman* Law, *damnatus erat ſervus pœnæ, & ſervus pœnæ parere conditioni non potenat, & pro nullo habebatur*; and therefore, by that Law, *parere conditioni non poterat*, as is clear by the Law cited: But *Juſtinian* did abrogate that, amongſt many other unreaſonable Fictions, and by *Nov.* 22. *cap.* 8. this *ſervitus pœna* is clearly abrogated: And therefore ſince the Foundation of the Deciſion is taken away, the Deciſion can now no longer take Place; and by all the Laws of Chriſtendom, thoſe Servitudes are now abrogated: And our bleſſed Saviour has, by His coming to the World, ſet Mankind at Liberty in all Reſpects; and we can be Slaves to nothing now, but to our Vices.

Nor doth the Law look upon a Perſon condemned, as a dead Perſon, in all Reſpects, which is the Third great Foundation of all that is pleaded againſt my Client; for it allows her to propone her juſt Defences, and it would puniſh him who kill'd her upon a private Revenge; it would acknowledge her Children to be lawful, and until ſhe be really dead, her Husband could not marry another: For tho' the Law, to deter Men from committing Crimes, doth oft-times raiſe its Terrors by civil Fictions; yet it is the Nature of theſe civil Fictions, that they cannot be ſtretch'd *de perſona ad perſonam*: Tho' then it will not allow ſuch to be thought ſtill alive, who are ſtruck with its Thunder; yet this Fiction reaches only to the Offender, in ſo far as concerns her civil Capacities, and the Puniſhment of her Guilt. And therefore, ſeeing the Blood is not tainted by this Sentence, ſhe not being here condemn'd for Treaſon, which is the only Crime that taints the Blood; her Children, tho' born after the Sentence, would ſtill ſucceed to her: And ſince they would be acknowledged to be her Children, ſhe cannot be ſaid *deceſſiſſe ſine Liberis:* Which is the Condition upon which the Subſtitute craves to be preferr'd.

*THE Parliament of* Burgundy *found, That a natural Death could only purify this Condition,* Si ſine liberis deceſſerit.

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FOR

# *HAINING*

AGAINST

# The Fiſhers upon *Tweed.*

## The First Pleading.

### *How far a Man may uſe his own, tho' to the Prejudice of his Neighbours?*

*HAINING* being prejudged by a Lake which overflow'd his Ground, and which by its Nearneſs to his Houſe, did, as is ordinary for ſtanding Waters, impair very much the Health of his Family: He did therefore open the ſaid Lake, whoſe Waters being received by *Whittater*, did at laſt run with *Whittater* into *Tweed*. The Fiſhers upon that River, pretending that the Water which came from that Lake did kill their Salmond, and occaſion their leaving the River, do crave that *Haining* may be ordain'd to cloſe up that Paſſage. This being the State of the Caſe, it was alledged for *Haining*,

That ſince Men had receded from that firſt Community, which ſeem'd to be eſtabliſh'd amongſt them by Nature, the Law made it its great Task, to ſecure every Man in the free and abſolute Exerciſe of his Property, and did allow him to uſe his own as he thought fit, and whatever did leſſen this Power and Liberty, is by the common Law term'd a Servitude, or Slavery; nor can a Servitude be impoſed upon a Man without his own Conſent. And ſuitably to this Principle, every Man may raiſe his own Houſe as high as he pleaſes, tho' he ſhould thereby obſcure the Lights of his Neighbour's Houſe: Or if I ſhould abſtract from my Neighbour's Ponds, that Water which formerly run into them from my Lands, the Law doth not think him prejudged, nor me obliged to prefer his Conveniency to my own Inclinations, as is clear by *l.* 26. *ff. de damno infect.* For as that Law very well obſerves, He is not prejudged who loſes a Benefit, which flow'd from him who was no Way ty'd to beſtow it, *l.* 26. *ff. de dam. infect.* Proculus *ait, Cum quis jure quid in ſuo faceret quamvis promiſiſſet damni infecti vicino, non tamen eum teneri ea ſtipulatione: Veluti ſi juxta mea ædificia habeas ædificia eaque jure tuo altius tollas, aut ſi in vicino tuo agro cuniculo, vel foſſa aquam meam avoces. Quamvis enim & hic aquam mihi abducas, & illic luminibus officias, tamen ex ea ſtipulatione actionem mihi non competere:* ſcil. *quia non debeat videri is damnum facere, qui eo veluti lucro quo adhuc utebatur, prohibetur: Multumque intereſſe utrum damnum quis faciat, an lucro, quod adhuc faciebat, uti prohibeatur.* And if I dig a Well in my own Houſe, which may cut off thoſe Paſſages whereby Water was conveyed to my Neighbour's Well, one of the greateſt Lawyers has upon this Caſe reſolved, that my Neighbour will not prevail againſt me; *For*, ſaith he, *no Man can be ſaid to be wrong'd by what I do upon my own Ground, for in that I uſe but my own Right, l.* 24. § 12. *ff. eod. In domo mea puteum aperio quo aperto venæ putei tui præciſæ ſunt, an tenear? Ait* Trebatius, *Me non teneri damni infecti, neque enim exiſtimari operis mei vitio damnum tibi dari, in ea re, in qua jure meo uſus ſum:* Where the Gloſs obſerves, that *in ſuo quod quiſque fecerit, in damnum vicini id non animo nocendi facere preſumitur.* And if by a Wall or Fence upon my Land, the Water was kept from overflowing my Neighbour's Land, I may throw down my own Fence, tho' my Neighbour's Land be thereby overflowed, *l.* 21. *ff. de aqua pluvia.* And therefore, ſeeing the Ground doth belong to *Haining*, and that the Fiſhers of *Tweed* have no Servitude upon him, he may uſe his own as he pleaſes, eſpecially ſeeing he doth not immediately ſend his Water into *Tweed*, but into another Rivulet, which carries it very far before it doth diſgorge there. So that if the Fiſhers upon *Tweed* did prevail againſt *Haining*, they might likewiſe prevail againſt all from whoſe Ground any Moſs-water runs into *Tweed*, tho' at Fifty Miles Diſtance; and they may forbid all the Towns from which any Water runs into *Tweed*, to throw in any Excrements, or any Water employ'd in Dying, leſt it prejudge their Salmon-fiſhing; whereas, *Alteri prodeſſe, ad liberalitatem, non ad juſtitiam pertinent.*

It is (My Lords) referr'd to your Conſideration, that public Rivers have been very wiſely by Providence, ſpread up and down the World, to be eaſie, and natural Vehicles for conveying away to the Sea, (that great Receptacle of all Things that are unneceſſary) Excrements, and other noxious Things, which would otherwiſe have very much prejudged Mankind; and that they may the better perform this Office, Providence has beſtow'd upon Rivers a purifying and cleanſing Quality, ſo that after a little Time, and a very ſhort Courſe, all that is thrown in there, doth happily loſe their noxious Nature, which is waſh'd off by the Streams by which they are carried.

Rivers are Nature's High-ways by Water, and we may as well forbid to carry any Thing that ſmells ill, upon our High-ways by Land, as we may forbid to throw in ſtinking Waters into our Rivers. The proper Uſe of Rivers is, that they ſhould be portable, and fit for Navigation, or for tranſporting Things from one Place into another; and Salmon-fiſhing is but an accidental Caſuality, and therefore the only Interdicts or Prohibitions propon'd by the Law, relating to public Rivers are, *Ne quid in flumine ripave ejus fiat, quo pejus navigetur, tit.* 12. *lib.* 53. and, *ut in flumine publico navigare liceat, tit* 14. *ff. eod. lib.* But in Rivers that are not navigable, the Law has forbidden nothing, but that their Courſe and natural Current be not alter'd, *Ne quid in flumine publico fiat, quo aliter fluat aqua, atque uti priore eſtate fluxit, tit.* 13. *ibidem.* So that ſince the Law doth not forbid the throwing in any Thing into public Rivers, it doth allow it; for it is free for every Man to do what the Law hath not prohibited: And if upon ſuch capricious Suggeſtions as theſe, Men were to be reſtrain'd from uſing their own, no Man ſhould ever adventure to drain his Land, to open Coal-ſinks, or Lead-mines, or to ſeek out any Minerals whatſoever, whoſe Waters are of all other the moſt peſtilentious, becauſe after he had beſtow'd a great deal of Expence, he might be forc'd to deſiſt, for ſatisfying the Jealouſy, or Imagination of melancholy or avaritious Neighbours. And if this Purſuit find a favourable Hearing, Malice and Envy will make uſe of it, as a fair Occaſion whereby to diſturb all ſucceſsful and thriving Undertakers. But your Lordſhips may ſee, that the World, both learn'd and unlearn'd, have hitherto believ'd, that ſuch a Purſuit as this would not be ſuſtain'd, in that tho' Intereſt and Malice did prompt Men to ſuch Purſuits, yet not one ſuch as this has ever been intented, for ought I could ever read, ſave once at *Grenoble*, where an Advocate did purſue a Smith to tranſport his Forge from the chief Street, becauſe it did by its Noiſe diſturb not only him, but the People who frequented ed that Street; from which Purſuit the Smith was abſolved, as *Expilly* obſerves in his Pleading.

Yet, my Lords, the Fiſhers upon *Tweed* want not ſome apparent Reaſons which give Colour to the Purſuit; and it is urg'd for them, “ That no Man is ſo Maſter of his own,
“ but that the Commonwealth has ſtill an Intereſt with him in it; and Law being invented
“ to protect the Intereſt of Societies, as well as to ſecure the Property of private Perſons:
“ Therefore tho' every private Man inclines to ſatisfy his own Humour and Advantage, in
“ the Uſe of what is his own; yet it is the Intereſt of the Commonwealth, that he do not
“ abuſe his own Property; and therefore it is, that the Law doth interdict Prodigals; nor
“ will the Law ſuffer that a Man uſe his own *in emulationem alterius*, *l.* 3. *ff. de oper.*
“ *pub.* and a Man is ſaid to do any Thing *in emulationem alterius*, when others loſes more
“ by what is done, than the Proprietar can gain: As in this Caſe, tho' *quilibet poteſt facere*
“ *in ſuo*, yet *non poteſt immittere in alienum*, which is their Caſe; and all the Arguments
“ brought for *Haining* do not meet, ſeeing they only prove, that a Man may uſe what is
“ his own as he pleaſes, *ubi nihil immittit in alienum*; as is clear by the Inſtances given, of
“ throwing down his own Wall, or the digging up a Well in his own Land, which differs
“ very much from our Caſe, wherein *Haining* doth pour in his poyſonous Water into the
“ River of *Tweed*.

“ That Men are reſtrain'd for the Good of the Commonwealth in the Uſe of their own
“ Property, is very clear from many Inſtances in our Law, as Men are diſcharg'd by Acts
“ of Parliament to burn Moors, to kill Smolts; the Way and Manner of Fiſhing upon *Loch-*
“ *leven* is preſcribed to the Heritors by Act of Parliament, and Men are forbidden to ſteep
“ Lint by public Acts likewiſe. Likeas, the common Law will not ſuffer Men ſo to uſe
“ Water running thro' their own Land, as that they may thereby prejudge Mills belonging
“ to their Neighbours, which uſe to go by that Water: And whatever may be alledged in fa-
“ vour of any Innovation in running Waters; yet Lakes being appointed by Nature, ſeem
“ to have from Nature a fix'd Being; nor ſhould they be open'd to the Prejudice of others,
“ contrary to their Nature.

These Objections may (my Lords) be thus ſatisfied. To the Firſt, it is anſwered, That the only Two Reſtrictions put upon Men in the free Exerciſe of their own, are, *ne in alterius emulationem fiat, vel materiam ſeditionis præbeat*, as is clear by the foreſaid *l.* 3. *ff. de oper. pub.* neither of which can be ſubſumed in this Caſe. And when the Law conſiders what is done *in emulationem alterius*, it acknowledges, *illud non factum eſſe in emulationem alterius, quod factum eſt principaliter ut agenti proſit, & non ut alteri noceat, l. fluminum* § *fin. ff. de dam. infect.* and the Gloſs formerly cited upon that Law determines, that *Animus nocendi* is not preſum'd, if any other Cauſe can be aſſigned: And in this Caſe, *Haining* can aſcribe his opening this Lake to the Prejudice it did to his Land, and to his Health; whereas it cannot be alledged, that he ever expreſs'd any Malice againſt the Fiſhers upon *Tweed*, many of whom are his own Relations. As to the Inſtances given, wherein the Law doth reſtrict the free Uſe of Property, the Principle is not deny'd, but it is miſapply'd. For the Law only bounds the Proprietar's Power in ſome Caſes, wherein his Loſs may be otherwiſe ſupply'd; as in Moor-burn, and killing of Smolts at ſuch a Seaſon of the Year, and in ſteeping Lint in running Waters, which may be as commodiouſly done in ſtanding Pools; but theſe Purſuers crave this Lake to be ſtopt at all Times. Nor is there an apparent Reaſon here as there, this Purſuit being founded only upon a conjectural Prejudice; and in theſe Caſes, the Prohibition is made neceſſary by the Generality and Frequency of Occurrences, and yet tho' ſo circumſtantiated, there is ſtill a public Law neceſſary. And when a public Law diſcharges the free Exerciſe of Property, it ordains him in whoſe Favours the Prohibition is, to refound his Expences who is prohibited. Nor is the Commonwealth here prejudg'd ſo much by this, as it would be by the contrary; for thereby all Coal-heughs, Lead-mines, and the winning of other Minerals would be diſcharg'd: Whereas it is uncertain if this Water chaſeth away the Salmon, which are at beſt but a Caſuality, and which will go but from *Tweed* to other Rivers in *Scotland*; for they cannot ſtay in the Sea. Salmon-fiſhing is but an Accident to Rivers, but theſe being the common Porters is their natural Uſe. Thus (my Lords) you ſee that we contend for what is natural to Rivers; they for what is but caſual; we are founded upon the Nature and Privilege of Property, they upon mere Conjectures.

*THE Lords enclin'd to ſuſtain* Haining's *Defence; but, before Anſwer, they granted Commiſſion for examining upon the Place, what Prejudice was done.*

FOR

# The Viſcount of *Stormont*,

AGAINST

# The Creditors of the Earl of *Annandale*.

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## The Second Pleading.

### *Whether a Clauſe prohibiting to ſell, will prejudge Creditors?*

THE deceaſt Viſcount of *Stormont* having, by His Majeſty's Favour and his own Induſtry, acquired the Lordſhip of *Scoon*, he did tailie the ſame to *Mungo* Viſcount of *Stormont*, and the Heirs-male of his Body; which failing, to *John* Earl of *Annandale*, and the Heirs-male of his Body; which failing, to *Andrew* Lord *Balvaird*, and the Heirs-male of his Body; and to perpetuate his own Memory, as the Reward of his Induſtry, he did cauſe inſert this Proviſion in the Charter and Saſine, *viz.* That it ſhould not be lawful to the ſaid *Mungo* to diſpone or wadſet any of the ſaids Lands ſo tailied, or to do any Deed whereby the ſaids Lands might be evicted or appriſed from them, without the Conſent of all the Perſons contained in that Tailie, or their Heirs; which if they contravened, that they ſhould, *ipſo facto*, loſe all Right or Title to the ſaids Lands, and the Right ſhould accreſce to the next Heir.

THE late Earl of *Annandale*, having very profuſely and unneceſſarily ſpent not only his own Eſtate, but likewiſe contracted Debts, for which the Lordſhip of *Scoon* is appriſed; this Viſcount of *Stormont*, as immediate Heir of Tailie, craves that it may be declared, That the Right to the ſaid Lordſhip of *Scoon* is devolved upon him by the foreſaid Contravention, and that he ſhould enjoy the ſaid Eſtate free from any Debts contracted by the Earl of *Annandale*.

THO' this Purſuit appears clearly to be founded upon the expreſs Will of the Firſt Diſponer, who as he might not have diſponed, ſo might have qualified his Diſpoſition with any Conditions he thought fit; and albeit ſuch Clauſes as theſe tend effectually to preſerve illuſtrious Families; yet the Creditors of the late Earl of *Annandale* do alledge, “ That tho' this his contracting of Debt may furniſh Action againſt the Earl of *Annandale*'s Heirs, for any Prejudice they can ſuſtain by his contravening the foreſaid Proviſion; and tho' by Virtue of this *pactum de non alienando*, all the Perſons in the Tailie were bound up from ſelling the ſaids Lands; yet no Paction, nor Proviſion, could annul Debts which were *bona fide* lent by them, to a Perſon who ſtood in the Fee. *Which Defence they urge by many ſpecious Reaſons*; *as Firſt*, That there is nothing ſo contrary to the Nature of *Dominium*, and Property, as that he who is Proprietar ſhould not have the free Exerciſe of his Right and Property; which free Exerciſe conſiſts in the Liberty to alienate, and to make uſe of what is his own, for defraying his juſt Debt, and anſwering his neceſſary Occaſions: *And they pretend*, That it were moſt abſurd and inconvenient, That a Perſon ſhould be rais'd to the Title and Dignity of a Nobleman, and ſhould be confeſt by the Law, to have an abſolute Right to an Eſtate; and yet that, tho' he were Captive in the *Turkiſh* Galleys, he ſhould not be able to raiſe Money for redeeming himſelf from that Bondage; and, which ſeems yet more repugnant to the Inclination and Intereſt of the Diſponer, That if a Fine were impos'd with Aſſurance, that if the Fine were not payed, the Eſtate ſhould be forfaulted, yet the Proprietar behoved idly to ſtand and ſee the Eſtate ſink. And tho' an advantagious Occaſion offered of buying his own Superiority, his Multures, or any ſuch Advantage; yet the Heir of Tailie could not raiſe Money for that Uſe, nay not for alimenting himſelf, if the Rents periſh'd by War, or other Accidents. This is to have, and not to have an Eſtate, a paralitic Property, and an uſeleſs Right. To allow, that ſuch a Clauſe in a Charter, might annul all the Debts contracted by him to

“ whom it is granted, were to deſtroy and ruin Commerce, which is the very Soul of a Commonwealth, and which, by how much it is incumbred by unexpected Clauſes, is by ſo much impar'd and burdened. Commerce doth oft-times require ſpeedier Returns and Diſpatch, than can allow a ſerious Conſideration of all the Securities and Evidents of thoſe with whom we deal; neither are theſe always ready to be produced; nor doth the Law, in what relates to Commerce, conſider all that a Lender may do for ſecuring himſelf, but what is ordinarily done: And 'tis moſt certain, that the moſt exact Men do not enquire into the Securities of thoſe with whom they contract in lending Money; and tho' ſomething may be pleaded in favour of ordinary Clauſes, which either Law, Cuſtoms, or Deciſions have allowed; yet it were extraordinarily prejudicial to Commerce, to make a Man forfault his Sum, becauſe he did not guard againſt *pactum de non contrahendo debitum*; a Paction as unſuitable to the Nature of Propriety, as unuſual in this Kingdom: And tho' the Legiſlators do in ſome Places allow ſuch Pactions as theſe, as is clear *in Lege Majoratus* in *Spain*; yet they are made tollerable there, becauſe, being introduc'd by a public Law, they are univerſally known; and he who contracts with Perſons ſo prohibited there, forfaults his Sum, becauſe he neglects a public Law, and not becauſe he contemns the private Prohibition of a Diſponer. Nor are ſuch Pactions as theſe to be ſeverely obſerved, as neceſſary for preſerving noble Families, and ſo fit for our Kingdom, which ſubſiſts by theſe; for if the Nature of Propriety were to be alter'd, in ſo high a Meaſure, as it is by this Paction, it could, in Juſtice, only be alter'd by a public Law, wherein the Eſtates of Parliament (who are, with us, only Judges of what is convenient for the Nation in general) might declare, that it were fit to turn ſuch a Paction as this into a Law: And ſince for ſo many Ages, the Parliament has not thought this fit, nor have private Families ever introduc'd any ſuch Pactions till now, we muſt either judge, That theſe are not fit for private Families, or, That thoſe underſtood not their own Intereſt.

“ As to ſtrict Law, whereupon this Purſuit is only founded; the Creditors do repreſent, That tho' Lawyers have allowed *pactum de non alienando*; yet they have extended it no further, than to annul Diſpoſitions made contrary thereto; but they never ſtretch'd it ſo far, as to annul all Debts contracted by the Perſon prohibited to diſpone, *l. ea lege, C. de cond. ob. cauſ. dat.* II. Tho' they allow'd theſe Prohibitions, *quando inductæ erant à lege, à judice, aut à teſtatore per ultimam voluntatem*; yet they did not allow ſo much Favour to Prohibitions, which are only founded *ſuper pactis viventium*, as is clear by *Craig, l. primo diages.* 15. *Omnes terræ (inquit ille) in feudum dari poſſunt, niſi quæ à lege, judice, aut teſtatore in ultima voluntate dari prohibentur.* III. Lawyers do not allow, that ſuch Prohibitions as theſe, tho' reſolutively conceived, ſhould abſolutely annul all Alienations made by the Perſon prohibited, except the Prohibiter reſerve ſome *Dominium* and Property to himſelf in the Thing diſponed; by Virtue of which Reſervation, he has Power to quarrel all Deeds done; and the Perſon to whom he diſpones is, becauſe of that Reſervation, not ſo abſolutely in the Fee, or Property, as that his Diſpoſition ſhould be unquarrellable; as is clear by *Bartol.* and *Baldus*, both *ad l. Sancimus. Cod. de reb. alien. non alienand.* Where they conclude, *Quod ſi is cui promiſſum eſt, de non alienando, reſervavit ſibi jus aliquod in re, hypothecæ, vel dominii, impeditur tranſlatio, aliter non, & etiamſi pactum adhibitum ſit in ipſa traditione, & cum pacto reſolutivo, tamen non impedit dominii tranſlationem, ſed illo caſu alienans tenetur tantum ad intereſſe.* And therefore, ſeeing the Diſponer reſerv'd no Right to himſelf, but that the late Earl of *Annandale* was fully in the Fee, it were againſt the Principles even of ſtrict Law, that Debts contracted by him ſhould be annull'd, as contrary to the Prohibition. IV. When a Perſon is prohibited to alienate, that Prohibition is ſtill reſtricted to voluntary and unneceſſary Alienations; the Deſign of the Diſponer being, to curb ſuch of his Succeſſors as ſhould be luxurious, but not to bind them up, when frugal, in Occaſions that are neceſſary and advantagious; and the Law is content to own ſuch Pactions, *in odium* of ſuch as have fed the Luxury, or prey'd upon the Simplicity of thoſe with whom they contracted, without any Deſign to vex Commerce, or to preclude thoſe Succeſſors from being reliev'd in their honourable and neceſſary Occaſions: *Prohibita alienatione, tantum voluntariæ prohibitæ cenſentur, non vero neceſſariæ; neceſſitas enim legem non patitur*, as *Reiters* obſerves, *tract. de alien. cap.* 6. *ſec.* 4. which may be further clear, *per l.* 5. *ff. de pet. hæred.* & *l.* 69. § 1. *ff. de legat.* 2. And ſuitably to this, tho' in our Law Ward-lands recognize, if they be voluntarily diſponed, without the Conſent of the Superior; yet he is allow'd to ſell the leſs Half of his Lands, without the Superior's Conſent, which is allow'd by the Law, to relieve his Neceſſities; and tho' he cannot voluntarily alienate the greater Half; yet all the Feu may be appris'd from him by his Creditors, for Satisfaction of his juſt Debt. And therefore, ſeeing the late Earl of *Annandale* was known to be a judicious Perſon, and to have liv'd very ſoberly, and that theſe Debts can be inſtructed to have been contracted for relieving him out of the Neceſſities into which he was thrown by the Iniquity of the Times, and his conſtant adhering to His Majeſty: 'Tis by theſe Creditors pretended, that theſe Debts cannot be annull'd, as contrary to that Prohibition, which they neither did, nor were oblig'd to know. And ſince our Law has thought, That Inhibitions and Interdictions ſhould be publiſhed and regiſtrated, for putting the Sub-

“ jects *in mala fide*, it can never allow, that ſuch Clauſes as theſe which are neither publiſhed “ nor regiſtrate, ſhould produce the ſame Effect.

*TO theſe Argument they add*, “ That God Almighty has oft-times teſtified His Diſpleaſure “ againſt ſuch Clauſes, whereby His Providence is inſolently bounded by vain Man, who endeavours to build himſelf a Babel againſt Heaven; and by which Clauſes likewiſe, Man will “ endeavour to perpetuate his own Memory here, and call his Land, to all Ages, by his own “ Name, againſt the expreſs Advice which the Scripture gives.

I do confeſs, (My Lords) that thoſe ſpecious Pretences, eſpecially when preſt with ſo much Zeal and Eloquence, may make Impreſſions upon ſuch as are not intimately acquaint with the Principles of Law; but I hope, where we have ſuch Judges as your Lordſhips, there can be little Hazard from ſuch Objections: But before I endeavour to ſatisfy theſe, I crave Leave to lay out before your Lordſhips, thoſe Grounds whereupon my Client founds his Purſuit.

'Tis an uncontroverted, and Firſt Principle of Law, That *Quilibet eſt dominus & arbiter rei ſuæ*, and therefore may diſpoſe upon his own, as he thinks fit; nor can any Thing leſs than a Law, bound the Exerciſe of this Power; and every Man being Judge of his own Conveniency, Lawyers do very properly term the Conditions adjected by a Diſponer, *Leges contractus*; and the Feudaliſts call the Conditions under which a Feu is diſponed, *Leges feudi; feuda* (ſaith *Zaſius*) *a pactis contra naturam ſuam ſunt tranſmutata, pacto prægravante naturam feudi:* And albeit our Law has deferr'd very much to Equity, and to the Principles of the Civil Law; yet private Tranſactions betwixt Parties are not to be limited by thoſe; but Pactions are to be obſerv'd amongſt them in their full Extent, as is ordain'd with us by an Act of *Sederunt*, 1573. Law may be receded from by private Pactions; and therefore, much more muſt private Pactions bind where they are contrary to no expreſs Law: And ſince *pactum in re familiari æquipollet juri publico, Reg. Maj. lib.* 3. *cap.* 10. & *lib. eod. cap.* 31 it neceſſarily follows, That as a Law or Deciſion might have eſtabliſhed their Pactions *de non alienando, & non contrahendo debitum*, which is acknowledg'd by the Creditors themſelves, that a Condition inſert in a Charter may do the ſame as effectually: And if the Pretence of public Equity and Commerce might alter the Deſtination of a Diſponer, or mutual Pactions of private Perſons, What Uncertainty would this occaſion in human Affairs? Or who could be ſecure, that the Tranſaction he made ſhould hold? For there are few Men who do not differ in their Conceptions about public Commerce; this were to unhinge all private Pactions, which Perſons had at firſt ſuited to their own Neceſſities and Inclinations, and to make Judges, who ſhould be tied to a fix'd Rule, unreſtrain'd Arbiters over the Affairs and Fortunes of the People: For they might, almoſt in all Caſes, recede from private Tranſactions, upon Pretext that they are contrary to public Good, Equity or Commerce. But if any Conditions adjected by Diſponers are to be obſerved, ſurely thoſe which are adjected in a free Gift and Donation are moſt to be obſerved; and 'tis certainly contrary to Reaſon, that he who needs not diſpone his own Land, except he pleaſe, may not diſpone it as he pleaſeth.

As the Law hath been very tender of the Intereſts of all Proprietars, ſo of all others, it hath been moſt tender of thoſe Rights, whereby Men have declared how their Will ſhould be obeyed, and their Memory perpetuated after their Death; Law deſigning thereby at once to encourage Men to be frugal, becauſe they may know that what they have gain'd by their Induſtry, ſhall be diſpos'd of according to their Will; and to comfort Men againſt Death, becauſe they may know, that their Will ſhall be as exactly execute, as if they themſelves were ſtill alive; *Uti quiſq; de re ſua legaſſit, ita jus eſto.* The Law, in all Contracts, conſiders moſt what was the Deſign of the Contracters; and when any Thing is diſponed for a particular Cauſe, when that Cauſe fails, the Diſpoſition falls, as *cauſa data, cauſa non ſequuta*, & *ſi ea lege donavi, defectus cauſæ impulſivæ reſolutionem contractus inducit, quia ea lege donavi, cum alias non eſſem donaturus, l. cum te. c. de pact. inter empt.*

That ſuch Pactions as theſe are very lawful and ordinary, is clear both from the Civil and Feudal Law: For by the Civil Law, tho' there were not Tailies, yet the *Romans* had their *fidei-commiſſa*, which did very much reſemble them, and by which the Perſon *cujus fidei res erat commiſſa*, could neither diſpone nor impignorate; and if he did diſpone or impignorate, that Perſon in whoſe favour the *fidei-commiſſum* was granted, might not only purſue the Diſponer for Damage and Intereſt, but might likewiſe annul what is done contrary to the Truſt, as is clear, *l. fin. cod. de reb. alien. non alienand. Sancimus, ſive lex alienationem inhibuerit, ſive teſtator hoc fecerit, ſive pactio contrahentium hoc admiſerit, non ſolum dominii alienationem, vel mancipiorum manumiſſionem eſſe prohibendam, ſed etiam uſus fructus dationem, vel hypothecam, vel pignoris nexum penitus prohiberi; ſimiliq; modo, & ſervitutes minime imponi, nec emphytenſeos contractum, niſi in his tantummodo caſibus, in quibus conſtitutionum auctoritas, vel*

I *teſta-*

*teſtatoris voluntas, vel pactionum tenor qui alienationem interdixit, aliquid tale fieri permiſerit.*

THESE Clauſes, *De non alienando, & non contrahendo debitum,* are moſt allowable by the Feudal Law; where ſuch Tailies are called, *Feuda Gentilitia, & Feuda ex pacti providentia*; yea and by the Feudal Law, it was not in the Power of him to whom it was firſt diſponed, to alienate or affect the Feu, either in Prejudice of the Superior, or of him who was next to ſucceed: And what is more ordinary with us, than ſuch Obligations in Contracts of Marriage? Sir *Thomas Hope* is of Opinion, That a Right granted to a Man and his Heirs, ſecluding Aſſignies, could not be compris'd by a Creditor; and ſure, that Excluſion is not ſo valid as a Clauſe irritant and reſolutive; which is *actus maxime explicitus & geminatus.*

FROM theſe Principles, there do ariſe very natural Anſwers to the Alledgances proponed for the Defenders: for whereas it is contended, That ſuch Reſtraints as theſe are inconſiſtent with Property; it is anſwered, That there is nothing more ordinary than to qualify Propriety, as appears clearly by the Nature *fidei-commiſſi, pacti gentilitii,* and very many other Inſtances; and even in our Law, Ward-lands cannot be diſponed upon, without the Conſent of the Superior: And it is more contrary to the Nature of Property and *Dominium,* that a Man cannot diſpone upon what is abſolutely his own, under what Reſtrictions and Qualifications he pleaſes, than that he who hath only a qualified *Dominium,* ſhould be in a Capacity to diſpone abſolutely, upon what was not abſolutely his own. That Maxim whereupon we found, that *quilibet eſt moderator & arbiter rei ſuæ,* has no Exception expreſs'd in it; whereas the Definition of *Dominium* inſiſted upon by them, which is, that it is *Jus de re ſua libere diſponendi,* has an Exception adjected to it, which is, *Niſi quis lege prohibeatur*; under which Word *Lex,* the Doctors always comprehend *Pactum,* and to prevent all Miſtake, ſome do expreſly ſay, *Niſi quis Lege vel Pacto prohibeatur:* So that in vain do they found upon the Nature of *Dominium,* ſince the very Definition of it doth contradict what is alledged.

TO the ſecond Difficulty, bearing, That theſe Clauſes are deſtructive of Commerce; it is anſwered, That the Liberty of diſponing upon our own as we think fit, doth more nearly concern us than the Liberty of Commerce; eſpecially in this Kingdom, which ſtands more by ancient Families than by Merchants. And therefore ſeeing theſe Clauſes tend neceſſarily to perpetuate Families, and the other doth only tend to the better being of Trade, we ought to prefer the Purſuit to the Defence. And to what Purpoſe ſhall we gain an Eſtate by Commerce, when we cannot ſecure it by ſuch Clauſes? Nor are theſe Clauſes deſtructive of Commerce, as is alledged, more than Inhibitions or Interdictions; and it is eaſier to read a Charter, than to try the Regiſters: And *England* and *Spain,* which are more intereſted in Commerce than we, have, by allowing ſuch Clauſes, evidently declared, that they think them not abſolutely inconſiſtent with Commerce. But the Truth is, real Rights are not the Foundation of Commerce; for Commerce is maintain'd upon the Stock of perſonal Truſt, and the main Thing which Traffickers rely upon, is the perſonal Truſt which is amongſt them, and not the Conſideration of any real Rights.

I do not conceive myſelf obliged to take much Notice of the Creditors being in *bona fide* to contract with the Earl of *Annandale*; for if *Annandale* had no Power to burden that Eſtate, their *bona fides* could not give it him; nor could a Creditor appriſe from him that to which he had no Right, no more than I can compriſe one Man's Eſtate for another Man's Debt. And if *Annandale* had only given a Backbond, declaring that the Eſtate was only in his Perſon by way of Truſt, the Creditors could not have appriſed it for their Debt, tho' they might likewiſe have alledged that they were in *bona fide* to lend. For, the Law conſiders only *bona fides,* where thoſe who alledged the *bona fides* did exact Diligence, which theſe Creditors cannot alledge; for if theſe Creditors did not at all call for *Annandale*'s Rights to *Scoon,* they cannot be ſaid to have laid out their Money in Contemplation of thoſe Rights, but in Contemplation of his other Eſtate, or upon the Account of a perſonal Truſt; or if they did call for thoſe Rights, they might have very clearly ſeen his Prohibition, and conſequently would have been ſecured againſt lending upon the Faith of this Eſtate.

WHEREAS it is urged, That ſuch Prohibitions as theſe are only allow'd, when they are introduc'd by Teſtament, by a Law, or by a Judge; but not when they are introduced by Contracts or Diſpoſitions *inter vivos*: It is anſwered, That if it be allowable the one Way, it ſhould be the other; for the Deſign is rather more deliberate in a Diſpoſition than in a Latter-will: For the one uſes to be an Act of Health, and the other of Sickneſs, and the one is as contrary to Commerce as the other is: And if any Weight be laid upon the Favour allow'd by the Law to *ultima voluntas,* upon the Account of conſoling the Teſtator in obeying what he deſigns, this Favour is equally communicable to both; for in both there is a Deſignation made of the Way and Manner of Succeſſion, in which a dying Man is as much concerned, when he makes a Deſignation by a Diſpoſition, as when he makes it by a Teſtament; and therefore, *Les ſubſtitutions contractuelles ont les meſmes Effects en* France, *que les Teſtamentaires, dans la prohibition d' aliener*, as *Lowet* obſerves, *tit.* 5. *num.* 9. and for which he cites many Deciſions; and where he obſerves very judiciouſly, That the Reaſon why the *Roman* Law did not allow theſe Subſtitutions and Prohibitions in Contracts, as it did in Teſtaments, was, Becauſe Teſtaments was the only Way amongſt them of diſponing upon Eſtates, and of making Subſtitutions, and *fidei-commiſſa*; to make which was not allow'd by Contracts, *quia auferebant teſtandi liberam facultatem*: Which Subtilty is not now allow'd in this Age; for on the contrary, Tailies and Contracts of Marriage are now the ordinary Ways of diſponing Eſtates; and if Men might alter ſuch Deſtinations of Contracts, ſuch as do contract with them would be in a hard Condition.

NOR is there more Weight in that Part of the Alledgance, which bears, That thoſe Prohibitions do only annul Deeds done in favour of him who has reſerved ſome Right in his own Perſon; for Tailies with ſuch Prohibitions do imply a Reſervation in favours of thoſe who are to ſucceed, and the Tailie is in that Caſe but a Right of Truſt to the Behoof of the Family; and the Proviſion in their Favours is equipollent to a Reſervation. The Deſign of both is the ſame, and therefore they ſhould both operate the ſame Effect.

DISCOURAGE not (My Lords) ſuch as love to be frugal, becauſe they hope their Eſtate may remain with their Poſterity; encourage not ſuch as reſolve to ſhake looſe, by their Prodigality, what was eſtabliſh'd by their wiſe Predeceſſors: By favouring the Creditors Defences, you will but gratify the Prodigality of Heirs, or the Lazineſs of Creditors; whereas, by ſuſtaining my Client's Purſuit, you will ſecure us as to our own Pactions, and as to your Deciſions; you will perpetuate Noble Families, and bound the Luxury of ſuch as are to ſucceed.

*THE Lords ſuſtain'd the Purſuit, and repell'd the Defences propon'd for the Creditors.*

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### FOR

# The Lady *Carnegy* and her Lord,

### AGAINST

# The Lord *Cranburn*.

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## The Third Pleading.

### *Whether Tax'd-wards be liable to Recognition?*

*My Lord Chancellor,*

THE late Earl of *Dirleton* having no Children, beſides two Daughters, and having an Eſtate conſiſting of Lands in *Scotland* and *England*, did very judiciouſly at firſt reſolve to marry one of them in *Scotland*, and the other in *England*; and in Purſuance of this Deſign, he beſtowed *Elizabeth* the eldeſt upon *William* Earl of *Lanrick*, Secretary of *Scotland*, Brother to Duke *Hamilton*, but which was more, a Perſon admir'd for his heroic Virtues, and whoſe Alliance was courted at any Rate, by the moſt eminent Families of both Kingdoms. The younger of theſe Daughters, named *Diana*, was match'd thereafter to the Lord *Cranburn*;

*burn*; and as the Earl of *Lanrick* could not but have juſtly expected all, or at leaſt the far greateſt Share of that Eſtate, ſo the Lord *Cranburn* could ſcarce have expected thereafter any Thing above an ordinary Portion: Yet, ſuch is the Capriciouſneſs of old Men, that the Earl of *Dirleton* did, in *Anno* 1649, by the Impreſſions of ſome who were inveterate Enemies to the Family of *Hamilton*, diſpone the Lands of *Innerweek*, *Fenton*, &c. failing Heirs-male of his own Body, to *James Cecil* his Grand-child, and the Heirs-male of his Body.

His Majeſty finding, that the ſaid Eſtate was moſt illegally diſpon'd to *James Cecil*, without His Conſent as Superior, they holding Ward of Him, and that he had thereby defrauded the juſt Expectations of ſo worthy a Perſon as the Earl of *Lanrick*, and ſo the Lands recogniz'd by the ſaid Diſpoſition, did gift the ſaids Lands to the Lord *Bargany*, for the Behoof of the Earl of *Lanrick*: Upon which Gift of Recognition, there is now a Declarator purſued by the Lady *Carnagie*, eldeſt Daughter to the ſaid Earl of *Lanrick*, who thereafter became Duke of *Hamilton*, wherein ſhe craves, that it may be declar'd by you, that ſhe has the only Right to theſe Lands.

There are very many Defences propon'd for the Lord *Cranburn*, which I ſhall endeavour thus to ſatisfy.

The Firſt is, “Recognition has only Place *in feudo recto & proprio*; whereas theſe “Lands hold Tax'd-ward, in which Manner of Holding, all the Caſualities are taxed to a “very inconſiderable Sum, which Sum is deſigned to be the only Advantage that ſhall accreſce to the Superior: And the Reaſon why Ward-lands recognize when they are ſold “without the Superior's Conſent, is, becauſe the Superior having ſo great Intereſt in the “Lands which hold by ſimple Ward, as to have the Ward and Marriage of the Vaſſal, the “Law did therefore oblige him not to alienate that Land, without the Superiors Conſent; “which Reaſon ceaſeth, where the Ward is tax'd, the Superior's Intereſt becoming very inconſiderable by the Tax: Nor can it be imagin'd, but that the Superior, having diſpenſed “with the great Caſualities of Ward and Marriage, has conſequently diſpenſed with the “ſaid Reſtraint, *cui datur majus, datur minus, præſertim ubi minus inhæret majori & eſt* “*ejus acceſſorium.*

For ſatisfying which Difficulties, your Lordſhips will be pleaſed to conſider, That our Law appoints all Ward-lands to recognize, if ſold without the Superior's Conſent, and makes no Diſtinction betwixt ſimple and Tax'dward; the General is founded upon expreſs Law, and there is no expreſs Warrant for excepting Tax'd-ward. II. Seeing theſe Lands could not have been ſold before they were tax'd, By what Warrant can they be ſold ſince they were tax'd? Seeing, tho' the Caſualities of Ward and Marriage were tax'd, and thereby theſe Caſualities expreſly remitted, except in ſo far as they are tax'd; yet there is no Power granted to ſell, without the Superior's Conſent: Nor is that Privilege remitted by the Superior, *& feudum alteratum in una qualitate, non intelligitur alteratum in aliis & actus agentium non operantur ultra conceſſa.* III. The Power of ſelling without the Conſent of the Superior, is different from the Caſualities of Ward and Marriage, which are here only tax'd; for Feu-holdings are oft-times burdened with this Reſtraint, and this Reſtraint was of old taken off expreſly by Warrants under the Quarter-Seal, without taxing the other Caſualities: So that this Privilege differs from theſe, and the one cannot be comprehended under the other.

The Second Defence is, “That by the Feudal Law, Recognition *ob alienationem feudi* “*eſt crimen & delictum feudale*, againſt which Error, *etiam probabilis ignorantia excuſat*; “as is clear, *lib.* 2. *tit.* 31. The Words are, *Quod enim dicitur alienatione feudum aperiri* “*domino, intelligendum eſt cum a ſcientibus alienatum eſt beneficium*, which are the Words of “the ſaid Law: Whereupon *Socinus*, reg. 153. tho' he do give it as a Rule, that *Emphyteuta* “*rem emphyteuticam vendens a jure ſuo regulariter cadit*, conform to the Civil Law, *l. final.* “*C. de jure emphyteutico*, he ſubjoins theſe Words, *Fallit ubi emphyteuta venderet ignorans* “*rem eſſe emphyteuticam*; and acordingly *Craig, de recognitione, lib.* 3. *diages* 3. and in the “Caſe of Diſclamation, *lib.* 3. *diages.* 5. lays down for an undoubted Principle, That *ignorantia craſſa excuſat feudalia delicta.* And here, the Subject of the Queſtion is not *in jure* “*& in theſi*, Whether Wardlands ſhould recognoſce? But *in facto, & hypotheſi*, his Right being of the Nature, and in the Terms foreſaid, he might diſpone without Hazard, as to “which, an Error in him, who was an illiterate Man was very excuſable, eſpecially having “conſulted *peritiores*, and having been aſſur'd by very eminent Lawers, that there was no “Hazard in diſponing thoſe Lands without the Superior's Conſent, they holding Tax-ward, “which was ſufficient to have defended him *in feudo amittendo.*

To which it is anſwered, That Ignorance of the Law excuſes no Man; and the Caſe having been at beſt dubious, the Vaſſal ſhould not have hazarded upon what the Law might conſtruct to be a diſowning of his Superior; and ſince every Man is obliged to know the Nature of his own Feu, the Law doth preſume, that every Man doth know it, *Nam quod ineſſe debet, ineſſe præſumitur*; and therefore, *Craig* doth very well conclude, Pag. 344. *tit. De recognitione*, that *Ignorantiam pretendens vix audiendus eſt, cum ſit craſſa ignorantia, feudi ſui conditionem ignorare*: And tho' he obſerves there, that *excuſabitur, qui feudum ſuum non militare credidit, cum militare eſt*; yet, that cannot be extended to this Caſe, wherein the Vaſſal certainly knew that his Feu held Ward: And tho' the Law ſometimes doth excuſe a Vaſſal, who had Reaſon to doubt the Condition of his own Feu, becauſe of ſome myſterious Clauſe, or becauſe he was a ſingular Succeſſor, and had not recovered the Writs of the Feu as to which he tranſgreſſed, or was neceſſitate to do the Deed, for which he was challenged, by Poverty, or ſuch other Occaſions; yet, that in the general, Ignorance did not excuſe *delicta feudalia*, is very clear by the Opinion of the learn'deſt Feudaliſts, *Laur. Silv. de feud. recog. queſt.* 60. *præpoſ. in cap.* 1. § *præterea de prohib. feud. alienat.* And in our Law, it was never found, that Ignorance did defend againſt Recognition, the falling of an Eſcheat, Diſclamation, *&c.* And if the Superior were obliged to prove the Vaſſal's Knowledge, it were impoſſible ever he could prevail in any Purſuit; Knowledge being a latent Act of the Mind, which can never be proven but by Oath; and to refer Knowledge to the Oath of the Vaſſal, were not only to fruſtrate the Superior, but to tempt the Vaſſal to commit Perjury. And albeit the Feudal Law did allow the Vaſſal to purge his Guilt, by deponing in ſome Caſes upon his Deſign; yet that was only allow'd in Caſes where the external Act was of its own Nature indifferent, ſuch as the ſpeaking of contumelious Words, that were to receive their genuin Interpretation from the Deſign of the Speaker; and that did never take Place in clear Acts, ſuch as this is, wherein the Vaſſal hath ſold his Feu without the Conſent of the Superior.

THE Third Defence, "That where there is no Contempt there can be no Recognition; but ſo it is, that as the Preſumption of Contempt is taken off by the conſtant Tenor of the Earl of *Dirleton*'s Reſpect for his Maſter, the King; ſo the Diſpoſition is given to be holden of the King, and that implies as much as if it had been expreſly provided, that the Alienation ſhould be null, if the Superior ſhould not conſent and confirm the ſame; and ſuch an expreſs Proviſion ſhould have certainly, in the Opinion of all Feudaliſts, defended againſt Recognitions.

TO this it is anſwered, That the Clauſe, *Si Dominus meus conſenſerit*, doth not defend againſt Recognition, tho' expreſs'd, *verbis geminatis, & prægnantibus*; and unleſs it be reſolutively conceived, bearing that it ſhall not be valid *alias, nec alio modo*: And altho' all theſe Cautions be adhibite, yet many Feudaliſts are clear, that this will not defend againſt Recognition, where the Perſon to whom the Feu is diſponed attains to Poſſeſſion, as *Cranburn* here did; for they think, that in that Caſe it is but *proteſtatio contraria facto, & plus valet, quod agitur quam quod ſimulate concipitur*: And if this were ſuſtain'd to defend againſt Recognition, no Feu ſhould ever recognize, for the Vaſſal ſhould ſtill defraud his Superior of any Advantage, by inſerting a Clauſe, *Si dominus conſenſerit*. Upon which Conſiderations your Lordſhips Predeceſſors have, by a Deciſion the 16. of *February* 1631, found, That Lands may recognize notwithſtanding of this Condition. 2. The diſponing of Lands to be holden of the Superior, is not equivalent to the Clauſe, *Si Dominus conſenſerit*; for the diſponing Lands to be holden of the Superior, *Provenit non ex facto vaſſali, ſed ex natura feudi, & ex ſtilo*; all Feus being given in *Scotland*, to be holden either of the Superior or the Diſponer, *a me, vel de me*, as ſhall beſt pleaſe the Receiver; ſo that the diſponing the Lands to be holden of the Superior, doth not ſhew any clear Deſign the Vaſſal had to require the Superior's Conſent, and conſequently cannot defend againſt Recognition.

TO fortify this Point, it is urged by the Defender, "That where there is no Prejudice to the Superior, there can be no Recognition; and there is no Prejudice to the Superior in this Caſe, ſeeing the Superior's Prejudice is either upon the Account that the Vaſſal *redditur pauperior*, or that the diſponing without the Superior's Conſent obtrudes upon the Superior a Stranger *ex aliena familia & inimica*; whereas in this Caſe the Diſponer was not *pauperior*, having reſerved his own Liferent, and in effect, the Fee itſelf, and Power to burden the ſame, and contract Debt, and alter the Tailie, and diſpoſe of the Eſtate notwithſtanding of the ſame; and the Lord *Cranburn* cannot be ſaid to be a Stranger, being deſcended of the Earl himſelf, and being his Grandchild.

TO this it is anſwered, That in Law, all ſuch Perſons as are not *alioqui ſucceſſuri, ſunt extranei ex tenore inveſtituræ*; and by Two expreſs Deciſions related by P. *Spotiſwood* and *Hope*, it was found, That Diſpoſitions made to the Brother or Grandchild did infer Recognition, tho' they were likewiſe *ex familia, Nec licet* (ſaith *Craig*, Pag. 345.) *Vaſſalo unum ex liberis ſuis eligere. ſed vel naturæ, vel juris ordo ſequendus, vel domini electioni res eſt permittenda.*

THE Fourth Alledgance was, " That only *perfecta tranſlatio domini*, can infer Recog-" nition; whereas the Saſine here is null, becauſe it is given to be holden of the Superior, " and Saſines of that Nature are intrinſically null, *quoad omnes effectus*, except the Superior " confirm the ſame.

TO this 'tis anſwered, That *ſi vaſſallus fecit omne quod in ſe erat*, to alienate the Feu without the Conſent of the Superior, that Alienation will infer Recognition, tho' the Alienation was null otherwiſe, as is clear by *Craig*, pag. 344. *Quod ſi traditionem vaſſallus fecerit, ea tamen ſit invalida & nulla; exempli cauſa, ſi chartam dederit de fundi alienatione tenendam de domino Superiore, quam ſaſina ſequatur, & dominus Superior neq; confirmaverit, neq; ratam habuerit; videtur hanc alienationem nihil periculi ſecum trahere, cum conditionalis videatur, & ſub hac conditione contracta, Si dominus ratam habuerit, aut confirmaverit: quæ conditio, cum non evenit, & alienatio nulla ſit ex defectu conſenſus Superioris, & paria ſunt, in jure, omnino non fieri, & non jure fieri; ſed profectò, in hoc caſu puto etiam feudum domino aperiri; nam quandocunq; vaſſallus id omne fecit & exequutus eſt quod in ſe erat, licet factum illud de jure non teneat, tamen quatenus in ſe eſt, domini mutationem ſe velle teſtificatus eſt, fidemq; fregit; in hoc etiam caſu a feudo cadet, licet alienatio nulla ſit.* Suitable to which, *Baldus* has very well obſerved, That *licet alienatio ſit nulla, ob vitium litigioſi feudum tamen fit caducum, quia in prohibitis non requiritur juris effectus; quod enim prohibitum eſt, effectum ſortiri nequit:* And if only effectual Alienations could infer Recognition, it could never be inferred; for all Alienations to which the Superior doth not conſent, are null; and by the Act of Parliament 1633, all Saſines of Ward-lands granted to be holden Feu, are declar'd null, and yet are declar'd to be the Ground of Recognition. And whereas it is alledged, That *Craig*, pag. 344, relates the Caſe betwixt *Mackenzie* and *Bain*; in which it was found, That Lands did not recognize, becauſe not regiſtrate within Fourty Days. 'Tis anſwered, That there the Vaſſal *non fecit omne quod in ſe erat*, not having regiſtrated the Saſine timeouſly, and ſo the Tradition was complete; nor did the Perſon to whom it was diſponed poſſeſs, in the Caſe cited, the Land diſponed, as *Cranburn* did in this: And by the Opinion of *Roſenthal*, *cap.* 9. *concluſ.* 4. *Feudum* (*inquit ille*) *abſq; domini conſenſu aperitur, etiamſi alienatio ex alia aliqua cauſa, forte omiſſa ſolennitate legis aut ſtatuti, aut ſimili, eſſet nullo modo poſſeſſio vera, & actu tradita ſit; nam doctores in hac materia conſiderant prejudicium ipſius domini, magis in traditione rei quam in alienatione. Vide* Curtium, *Jun de feudis, pag.* 4. *num.* 85.

WHEREAS it is alledged, " That the Saſine is null, as given upon a general Letter of At-" torney out of the Chancellary, nor are general Mandates ſufficient *in prejudicialibus*; and " that this Saſine was given to a Minor, who was extremely leas'd." To both theſe, the former Anſwers are opponed, wherein I have endeavour'd to prove, That the Alienation may be null, and yet may infer Recognition. Our Law conſiders not Minority as to Caſualities competent to the Superior, as is clear in the Caſes of Nonentry and Rebellion; and ſince the Act of the Diſponer is that which only infers Recognition, it imports not, what the Condition of the Perſon was to whom it was granted.

'TIS alſo pretended, " That the Saſine is null, as being *actus legitimus, qui non recipit* " *diem nec conditionem, l.* 77. *ff. de reg. jur.* for ſince *executione actus ſtatim perficitur*, 'tis " inconſiſtent, that *actus* ſhould be *perfectus & exequutus*, and yet ſhould be ſuſpended upon " a Condition, as this Saſine is, which bears, *Failing Heirs-male of the Earl of* Dirletoun's " *Body*.

TO this 'tis anſwered, That this Saſine cannot be called *actus legitimus*, that being ordinarily a Term appropriate to judicial Acts; whereas there is nothing more ordinary, than that Saſines ſhould be conditional, as we ſee in Saſines given upon Warrandiſe-lands, and in Saſines following upon Wadſets; nor is it denied, that Saſines may bear reſolutive Conditions; and if ſo, Why not other Conditions, theſe being of all others moſt ſevere? Nor have any Lawyers written upon this Subject, who have not divided Saſines *in puram & conditionatam*.

THE Fifth Alledgance was, " That there can be no Recognition where the Vaſſal had " Power to diſpone; and the Earl of *Dirletoun* had by his Charter Power to diſpone; for " theſe Lands are diſponed in his Charter *hæredibus & aſſignatis*, which implies *poteſtatem alienandi*; which the Defender's learned Advocates do found upon *tit.* 48. *lib.* 2. *feud.* " *Si quis enim ea lege alicui feudum dederit, ut ipſe, & ſui hæredes, & quibus dederint, habeant,* " *qui ſic accepit, poterit vendere vel alienare ſine conſenſu domini*; for which likewiſe they " cite *Craig, dicta. diag.* 3. *Clarus*, *Hottoman*, and other Feudaliſts.

TO this 'tis anſwered, That this general Clauſe, *Hæredibus & aſſignatis*, is only mere Stile; and the Word *aſſignatis* is us'd here improperly, as it is uſed in Bonds in which a Man binds himſelf, his Heirs and Aſſignies; whereas 'tis impoſſible for a Man to bind his Aſſignies. *Argumentum a ſtilo* is not ſtill probative, eſpecially in this Age, wherein Stiles are become too lax; and in our eldeſt Stiles there is a Luxuriancy, which deſerves rather to be corrected, than allowed: Thus Inhibitions forbid us to alienate Moveables, and ſingle Eſcheats give Right to Reverſions, albeit our Law reprobates, our Stile in both theſe; and this Clauſe was not deſign'd to import a Liberty to alienate, for elſe there could be no Recognition in *Scotland*, ſeeing all Charters bear that Clauſe, and ſuch as have that Clauſe, have oft-times been found to recognize; *& generales clauſulæ non extenduntur ad illicitum:* And that by the Feudal Law, the Word *Aſſignatis* is not equivalent to *quibus dederit*, is clear; ſeeing the Feudaliſts uſe no ſuch Term as *Aſſignati*; and in our Law, *hæredibus legitimis & aſſignatis*, muſt not be interpreted as if it were equivalent to *quibus dederit*, but to that Clauſe us'd by Doctors, *Quibus legitimè dederit*; and all Feudaliſts are poſitive, That the Clauſe, *Quibus legitimè dederit*, implies neceſſarily, that the Superior's Conſent is ſtill neceſſary.

LIKEAS, *Generalis clauſula non extenditur ad prohibita, ubi fieri poteſt congrua interpretatio:* But ſo it is, that the Word *Aſſignati* may be underſtood of Compriſers, or of ſuch to whom the Vaſſal ſhould diſpone the leſſer Half of the Feu: So that when a Feu is granted *hæredibus & aſſignatis*, it is lawful for Creditors to compriſe that Feu, or for the Vaſſal to diſpone any Part thereof, not extending to the Half; but that Clauſe can never import, that it ſhould be lawful for him to diſpone the Whole, without the Superior's Conſent, that being an Interpretation which the Parties themſelves never deſigned; and Privileges which are inherent in the Nature of a Feu, (as this is) are never underſtood to be diſcharg'd, except where they are diſcharg'd expreſly.

THE Defender, My Lords, hath told you, That he propones all theſe Defences jointly, which may diſcover to you, how frail his own Advocates judge theſe Defences to be. Arguments which are weak, being join'd, may by their mutual Aſſiſtance, plead Pity, but they can never aſtruct the Proponer's Right, no more than many Cyphers can make a Number, nor many Uncertainties, a Certainty. This is a Shift which Eloquence, not Law, has invented, and may prevail with Arbiters, but ſhould ſeldom convince Judges.

*THE Lords found, That theſe Lands, tho' holding only Tax'd-ward, did recognize; and repelled alſo all the other Defences.*

## FOR
## *Alexander Carmichael*,
## AGAINST
## The Town of *Aberbrothock*.

# The Fourth Pleading.

## *How far the Borrower* in commodato æſtimato, *is liable, if the Thing be loſt* vi majore?

WHEN the Town of *Dundee* was ſo fortified, that its Inhabitants had Reaſon to expect Security to the Ships which lay under their Walls, either by Way of Defence, or Capitulation; the Town of *Aberbrothock* did crave the Loan of ſome Cannons from *Alexander Carmichael*; but becauſe the ſaid *Alexander*, as a Burgeſs in *Dundee*, might have expected from the foreſaid Garriſon, or from his being able to ſail his armed Ship where he pleas'd, perfect Security to his Guns; he therefore refus'd to lend the ſame, till *Patrick Wallace*, and other private Burgeſſes of *Aberbrothock*, ſhould eſtimate the Guns, and oblige themſelves to re-deliver the ſaids Guns, free from all Skaith, Harm or Danger, or elſe to pay the Sum of Five Hundred Pounds, as the Price agreed upon; and that in reſpect he foreſaw, that the Guns were not only liable to great Danger, *ex ſua natura*, but likewiſe becauſe *Aberbrothock* was a naked Town, wanting Walls, Men, and Skill. And albeit the Town of *Aberbrothock* did owe to the ſaids Guns, the Reſiſtance they made to *Cromwel*'s Ships, in Three ſeveral Attacks, wherein if they had wanted Guns, their Town had been burnt; yet ſo unjuſt are the ſaids *Patrick Wallace* and others, that when the foreſaid liquid Sum is charg'd for, they ſuſpend, upon this Ground, *viz.* That this Contract is *commodatum, & commodatarius non præſtat caſus fortuitos:* But ſo it is, they ſubſume, " That theſe Guns were loſt *caſu fortuito*, in ſo far as the " Defenders endeavour'd to carry them to *Dundee*, but being beat in by *Cromwel*'s Ships, " they were forc'd to bury them in Sands, out of which they were rais'd and taken by " thoſe Enemies.

To which 'twas anſwered, That tho' *in commodato ſimplici, commodatarius non præſtat caſus fortuitos*, yet *in commodato æſtimato*, it is otherwiſe, which is moſt clear from *l.* 5. § 3. *ff. commodato*; the Words whereof are, *Et ſi forte res æſtimata data ſit, omne periculum præſtandum ab eo qui æſtimationem ſe præſtaturum receperit*; which holds not only *in commodato*, but in all other Contracts where any Thing is eſtimate; as is clear in the general, by *l.* 1. § 1. *ff. de æſtimatoria*; *Æſtimatio autem periculum facit ejus qui ſuſcepit, aut igitur rem ipſam incorruptam debet reddere, aut æſtimationem de qua convenit.* Many Inſtances of which General may be given in ſeveral Contracts; but it ſhall ſatisfy me to name *Dos æſtimata*; wherein 'tis very clear, that the valuing of Things delivered, did oblige the Receiver to re-deliver either the Thing valued, or its Price, tho' the Thing valued did periſh *caſu fortuito*; as is clear *l.* 10. *ff. de jur. dot. Plerumq*; (*inquit* Ulpianus) *intereſt viri res non eſſe æſtimatas, ideo ne periculum earum ad eum pertineat, maxime ſi animalia in dotem acceperit, vel veſtem qua mulier utitur*; *eveniet enim ſi æſtimata ſint, & mulier attrivit ut nihilominus maritus earum æſtimationem præſtet:* Which is alſo moſt clear, *l.* 10. § 6. *ff. de jur. dot.* And if at any Time the Law relax any Thing of this alledg'd Severity, in favour of him who receives the Thing valued, 'tis upon the Account that the Thing valued was deliver'd for the Uſe and Advantage, not of him who receiv'd it, but of him by whom it was entruſted; as if in our Caſe, my Clients had entreated the Citizens of *Aberbrothock* to receive their Guns, and had valued them at the Delivery; the Law in that Caſe would not have burden'd the Receivers with the Loſs, where they gave no Occaſion to the Lend: But in the Caſe where the Thing valu'd was lent at the Deſire of the Citizens of *Aberbrothock*, and for their Advantage, without any poſſible Advantage for the Lenders, in that Caſe, which is our preſent Caſe, the Law doth in expreſs Words tie the Receivers to re-deliver either the Thing lent, or the Eſtimation, *l.* 17. § 1. *ff. de Eſtimatoria*; *Si Margarita tibi eſtimata dedero ut eadem mihi adferes, aut pretium eorum, deinde hæc perierint ante venditionem, cujus periculum ſit. Et ait* Labeo *quod &* Pomponius *ſcripſit, ſi quidem ego te venditorem rogavi meum eſſe periculum, ſi tu me tuum, ſi neuter noſtrum ſed duntaxat conſenſimus teneri te hactenus ut dolum & culpam mihi præſtes.* Nor can this be well doubted, if we conſider the Nature of Eſtimation or Valuing, and the Deſign of theſe who enter into ſuch Contracts, by their eſtimating the Thing lent.

All Lawyers and others are of the Opinion, that *commodatum* becomes by Eſtimation, *anomolum & irregulare*, and the Eſtimation were to no Purpoſe if it did not bind the Receiver of the Lend to more than what would follow, *ex natura commodati ſimplicis.* And therefore, ſeeing *commodatarius* was here liable *ex culpa leviſſima* from the Nature of the Contract, becauſe the Lend was given only for the Advantage of the Lender; it muſt neceſſarily be inferr'd, that the Receiver of a Lend that is valued and eſteem'd, muſt be further liable, elſe there would be no Difference betwixt a Thing lent ſimply, and lent after it is valued, and conſequently the valuing before lending, ſhould operate nothing: So that ſeeing in an ordinary Lend, the Receiver would be liable in *culpam leviſſimam*, the Receiver muſt be liable in *caſus fortuitos*, where the Thing lent is eſtimate before lending, there being no Caſe *ultra culpam leviſſimam præter caſus fortuitos.* II. The Lender did ſecure himſelf by a Bond and the foreſaid Obligation, to reſtore the Price, if the Thing lent were not free of Skaith, Hurt, or Damage. III. If there was any Thing ambiguous in this Caſe, yet the Clauſe behoved to be extended, *ad caſus fortuitos*, and that muſt be thought to be the Meaning of the Parties from the following Rules, whereby ambiguous Contracts are to be interpret, *viz.* 1. A Writ is always to be interpret againſt the Subſcriber, who ſhould impute to himſelf that he did not clear what he intended; and it were unreaſonable that his Obſcurity ſhould be a Snare to another Perſon, *ſcriptura ſemper eſt interpretanda contra proferentem.* 2. That in Reaſon ſhould be conſtitute to be the Meaning of the Writ, which if it had been treated of, had certainly been condeſcended to by all Parties: But ſo it is, that if at the Time of the lending of the ſaids Guns, the Lender had refuſed to lend them upon any other Terms, than that he ſhould have been ſecur'd againſt all Events, it is not to be imagin'd that the Borrowers would have hazarded their Lives and Fortunes, and the Honour both of their Country and Town, for the Hazard of Five Hundred Pound; and it is as improbable, that the Lenders would have given the Guns, they being ſtated under all the Circumſtances above-narrated. 3. It may appear, both from the Circumſtance of Time, and the Nature of the Thing lent, that they foreſaw the Risk theſe lent Guns were like to run; for none but Idiots would not have foreſeen the ſame: And it were againſt Reaſon to think, that a Man would ſecure himſelf againſt an open and ſeen Hazard, eſpecially being to lend them to Perſons who behov'd to buy others, if they had not got the lend of thoſe, and who would have bought theſe Guns, if the Lender would have ſold them, and if they had been ſold, the Buyers had run all Risks.

To this it was replied, “ That 1. *Commodatum æſtimatum* was only ſo called when the
“ Lender did eſtimate the Thing lent, and did take the *Commodatarius* only obliged to reſtore
“ not the Thing lent ſimply, but either the Thing or Value, at the Option of the Receiver;
“ as was clear, becauſe the Receiver might have oppon'd Compenſation againſt the
“ Lender, when he was purſuing for the Thing lent, or might make uſe of the Thing lent
“ as he pleaſed, which was not our Caſe; becauſe the Receivers of the Guns could not
“ have retained the ſame, or have rejected Compenſation againſt the Lender, tho' the Lend
“ had been damnified; but it was in the Option of the Lender to have call'd either for the
“ Guns or the Eſtimation, and this Eſtimation and Value was agreed upon, to the End that
“ the Value might be repeted, if the Guns were loſt thro' Negligence or Deterioration,
“ but not if they were loſt *vi majore*, or *caſu fortuito*. 2. By the expreſs Words of the
“ Bond, the Value is only to be reſtored in caſe the Guns be damnified; but there is no
“ Proviſion made againſt their being loſt; nor can that be preſumed to be the Meaning of
“ the Parties, becauſe *ille præſumitur ſenſus verborum qui eſt rei gerendæ aptior*, and *caſus*
“ *fortuitus* is very contrary to the Nature of *commodatum*. 3. This is not only *caſus fortuitus*,
“ but *inſolitus*, to which no Contract is ever extended; and this Caſe of the Cannons
“ being taken out of the Sands, could never have been foreſeen, ſeeing it is abſolutely extrinſic,
“ both to the Uſe of Cannons, and to the ordinary Hazards of Cannons; and it was
“ unuſual and ominous for a *Scotſman* to provide againſt their being over-run by the Uſurpers.
“ 4. Theſe Guns had been loſt, if the Lender had retained them, ſeeing the Uſurpers,
“ after the taking in of *Dundee*, made Prize of all their Ships and Guns.

To which it was duplied, That the former Law was oppon'd, bearing that the Receiver *commodati æſtimati* in general *ſuſcepit omne periculum*, and that is properly *commodatum æſtimatum ubi intervenit taxatio pretii*: And tho' there may be ſuch a *commodatum æſtimatum* as is mentioned in the Reply, yet that *omne commodatum æſtimatum* is of that Nature, is denied: And ſeeing the Anſwer is founded upon an expreſs and general Law, it cannot be taken away but by a Law as expreſs, clearing, that there is no *commodatum æſtimatum* but in the Caſe inſtanced in the Reply. Likeas the Interpreters, and particularly *Faber. ad h. l.* give Inſtances of *commodatum æſtimatum*, in the Caſe where the Thing eſtimate is to be reſtored; and *æſtimatio* in general produces that Effect of transferring the Hazard, as will appear *per l.* 1. § 1. *ff. de æſtimatoria*; by which it is likewiſe clear, that if the Thing itſelf be not given back, the Eſtimation muſt be delivered, and that the Eſtimation extends not only *ad deteriorationem, ſed etiam ad interitum*. Likeas in the general, *æſtimatio* is called a kind of Vendition, as is clear by *Calvin*, in his Lexicon upon that Word, and the Citations there adduced; and in Venditions the Receiver undergoeth all Hazard, and therefore he ſhould run the ſame Hazard *in commodato æſtimato*. As to the Second, it is anſwer'd, That he who is obliged to deliver any Thing free from all Hurt and Damage, is much more obliged to deliver back the Thing itſelf, for it is probable, that he who guarded againſt the leſs Danger, would guard againſt the greater.

Whereas it is alledged, That this muſt be the Meaning of the Parties, the former Rules are oppon'd, and it is added, that this Caſe could never be called *caſus inſolitus*, nor *fortuitus*, in reſpect that is *caſus fortuitus* which the skilfulleſt or wiſeſt Man could not foreſee; but ſo it is, every wiſe or prudent Man might have, and could not but foreſee this; and the Brocard *rei gerendæ aptior* is only extended to regular Contracts, but not to irregular Contracts as this is, wherein it is confeſt, by both Parties, that they intended to tranſgreſs the ordinary Rules and Nature of *commodatum æſtimatum*, and to wreſt the Nature of this Contract to their particular Caſe: And certainly *ſenſus aptior rei gerendæ* at that Time was, that the Lender, who might have ſecured his own Guns, and who was not obliged to lend them, did deſign to ſecure himſelf againſt all Hazards, when he cauſed eſtimate his Guns; elſe, Why ſhould he have cauſed eſtimate them? And to the Third, where it is alledged, That the raiſing of Guns out of Sand is not the Hazard which Guns ordinarily run. It is anſwered, That the burying and ſinking of Cannons is very ordinary; but it being foreſeen in general, that theſe Guns might periſh by the Uſurpers, and in that Quarrel, that was ſufficient, tho' every particular Circumſtance was not foreſeen: For if the Guns had been ſtollen away by

Night, or had been taken in the Return, certainly the Receiver would have been liable; and yet that is not a more ordinary Way of loſing Guns, than this now inſtanced.

To the Fourth, bearing, That thoſe Cannons had been loſt however; it is anſwered, That the Charger is not obliged to debate what Hazard they would have run, he having ſecured himſelf by a Bond, as ſaid is; and that might be as well alledged in Venditions, and yet none ever alledged that the Buyer did not run all Hazards of the Thing bought, and was not obliged to pay the Price, becauſe the Seller would have loſt the Thing ſold, if it had remained with him: But the Truth is, the Skipper, nor no Burgeſs of *Dundee*, wants any of thoſe Guns which were aboard in their Ships at that Time; and it is probable, that tho' the Ship and Goods had been taken from this Purſuer, he had none to blame but theſe Defenders, who by borrowing his Goods, diſabled him to venture to Sea with his Ship. Nor can it be imagin'd, that the burying of Goods in Preſence of the whole Town, and leaving their Carriages open to the Uſurpers, was exact Diligence; nor did ever the Receivers, after the Guns were taken away, either inform the Chargers that they might do Diligence, or make Application to the Uſurpers for Reſtitution, as *Dundee*, St. *Johnſton*, *Crail*, and other Towns did; and wherein they prevail'd ſo, that theſe Defenders are not only liable *ad caſus fortuitos ex natura commodati æſtimati*, but for not doing exact Diligence, *ex natura commodati proprii*.

*THE Lords found, That the Borrowers were not liable to pay the Price, ſince the Cannons were loſt* caſu fortuito, & vi majore.

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### FOR

## Sir *Thomas Stewart* of *Gairntully*.

### AGAINST

## Sir *William Stewart* of *Innernytie*.

# The Fifth Pleading.

## *How Fury and lucid Intervals may be proven.*

THE deceaſt Sir *William Stewart*, finding his Daughter *Jean* fit enough to marry, did provide her to a Portion of Twenty Thouſand Merks; in which, tho' he ſubſtitute Sir *William* her Brother and others, yet your Lordſhips did, by a ſolemn Deciſion find, That ſhe remained ſtill in the Fee, and might have diſponed, notwithſtanding of the Quality of the Subſtitution, and therefore you did ſuſtain a Right and Aſſignation made by her in favours of Sir *Thomas* her Brother.

Sir *William* reſolving rather to hazard the Honour of his Family and Siſter, than the Loſs of the Sum; did at laſt alledge, That the Aſſignation was not valid, ſeeing his ſaid Siſter was furious, both before and after the granting of that Right: Whereas Sir *Thomas*, in Maintenance both of his Siſter's Honour, and of the Right made by her to him, did contend, That ſhe had dilucid Intervals, and at the Time when the Diſpoſition was granted, ſhe was *ſanæ mentis*: For proving of which, mutual Probation was allowed

to both Parties, and the Teſtimonies having been publiſhed, it is now alledged for Sir
*William*, “ That albeit your Lordſhips had found that his Siſter was in Fee, when the Caſe
“ was at firſt debated, without relation to the Condition in which ſhe was when ſhe made the
“ ſaid Right; yet tho' the Subſtitution was found by your Lordſhips not to be a ſufficient Ground
“ to take from her the Power of Diſponing, it behov'd, at leaſt, to qualify the ſaid Power, as
“ that ſhe ſhould not be allow'd to diſpone upon that Sum, expreſly againſt the Father's Deſtina-
“ tion, except ſhe were proven to be a Perſon of an entirely ſound Judgment; and it behov'd
“ to be thought, That the Father perceiving the Frailty of her Wit and Spirit, did only deſign
“ ſhe ſhould have an Aliment during her Life, but that after her Deceaſe, the Sum provided
“ ſhould deſcend to the Perſon ſubſtitute by himſelf. 2. Furioſity is a Diſeaſe which ſo diſorders
“ the Judgment, that thoſe who labour under it are, in Law, accounted unfit to make any
“ Right, or to adhibite any Conſent; and Fury being once proven, is ſtill preſum'd to continue:
“ So that it being proven, that this Gentlewoman was once furious, in ſo far as ſhe tore her
“ Clothes, and did beat them who attended her, it muſt be preſum'd that this Fury did conti-
“ nue, except this were taken off by a moſt pregnant Probation, wherein ſhe could be proven
“ not only to have done Acts of Folly during the Time that ſhe was about the completing of
“ that Right, but that ſhe had for a long Time, both before and after, enjoyed not only *adum-*
“ *bratam quietem*, but an entire Soundneſs of Judgment, neither tainted with, nor clouded by
“ that Fury, which did formerly incapacitate her to make the Right that is now quarrelled:
“ For all Lawyers, and particularly *Zackeus*, do diſtinguiſh betwixt a Madneſs, which hath only
“ *remiſſionem, ſed non intermiſſionem*, where Simplicity continues when the Fury ceaſes, and
“ that Fury which doth ſometime totally recede. In the Firſt of which they require, That
“ the Perſons, *quorum furor eſt intervallatus*, do not only *actus ſapienti convenientes, ſed etiam a-*
“ *ctus ſapientis*, and that they ſhew not only a preſent Madneſs, but that they teſtify by a long Tract
“ of continued Recipiſcence, a Sagacity, which proves that they are fully return'd to the Vigor
“ of their Judgment, and which is able to take off the Preſumption which lies againſt them, that
“ *ſemel furibundus, ſemper furibundus præſumitur*: Whereas in the Caſe here controverted, 'tis
“ prov'd, That the ſaid *Jean* was at beſt of a very weak Judgment, never able to converſe with
“ others, nor to adminiſtrate her own Affairs; and at the Time ſhe made the Diſpoſition, there
“ is nothing proven which could have demonſtrated her to have been in ſuch a lucid Interval,
“ as might have ſuſtain'd the Act ſhe was then doing, ſhe having diſcours'd to no Man at that
“ Time, nor ſo much as read the Diſpoſition, which no wiſe Perſon would have omitted, and
“ having contradicted her Father's expreſs Will, without gratifying any of her other Relations.

BUT before any diſtinct Anſwer can be return'd to the former Repreſentation, your Lordſhips will be pleas'd to conſider, That the Two greateſt Privileges of Mankind are, That by Nature he is a reaſonable Creature; and, That by Law he may freely diſpone upon what is his own: Whereas this unnatural Brother, deſigns to rob his Siſter's Memory of both theſe Allowances, and by denying her every Thing that is fit for a reaſonable Creature, burdens himſelf to prove her a Brute: Somewhat is due to the Modeſty of her Sex, more to the being dead, (that great Sanctuary againſt all Malice) but moſt of all is due to the Name of a Siſter; and therefore, ſeeing by how much the Danger is great that may reſult from the Probation, by ſo much the Probation ought to be the more concluding and pregnant. It doth neceſſarily follow, That the Probation to be deduc'd in this Caſe, ought to be moſt concluſive, ſeeing it tends to take away the greateſt Privileges which were competent to the Defunct, either by Law or Nature. And albeit our Law allows not the Depoſitions of Witneſſes, to prove, in Caſes exceeding One Hundred Pounds; yet by this Method, Diſpoſitions of the greateſt Conſequence may be enervate upon the Depoſitions of Witneſſes, and that juſt Law not only diſappointed, but cheated: And what Danger are we expos'd to, when Two Fellows may, by their Aſſertions, prove us to be mad, after our Death, and thereby defame our Memories, and alter our Deſtinations? The Settlement whereof, is the moſt ſerious earthly Satisfaction which we have in that laſt Agony.

IT is very remarkable, That Law puts a Difference betwixt Fatuity and Furioſity. Fatuous Perſons, whom we call Idiots, are theſe who want Spirit enough, *tardi, bardi, moriones, maccarones, qui inopia caloris & ſpirituum laborant*: But furious Perſons are, ſuch as have too much Heat and Spirit; and our Law hath plac'd a Diſtinction betwixt theſe Two; for tho' neither Idiotry nor Furioſity can *regulariter* be proven, otherwiſe than by the Cognition of an Inqueſt, upon Brieves rais'd out of the Chancellary, as is clear by *Craig*, and by the 66. Act, 8. P. *J.* III. Which Inqueſt muſt conſiſt of Fifteen Neighbours, who knew the Perſon who is alledg'd to be furious or Idiot, and who muſt call for that Perſon before them, and examin her: So zealous our Law hath been for our Honour, and ſo jealous of Witneſſes: Yet ſometimes it hath permitted open and notorious Fury to be proven, after the Death of the furious Perſon, as in the Caſe cited; but no Inſtance can be given, wherein Fatuity or Idiotry was ever ſuſtain'd to be proven after the Idiot's Death: Which was moſt reaſonable; for Idiotry conſiſting in the Want of Wit and Judgment, which Habitude is not ſubject to the

Senſes, but muſt be inferr'd by Conference and Conſequences; therefore it ſhould not be ſuſtain'd upon the Depoſitions of Witneſſes ſimply, but upon the Knowledge of an Inqueſt, who are, in our Law, both Judges and Witneſſes, and are in Quality and Prudence, above Witneſſes. And if a Perſon can count their Ten Fingers, they are not accounted Idiots, nor fatuous; for *fatui ſunt* (as *Zackeus* obſerves) *illi tantum, qui omni ratiocinatione & judicio carent.* So that this Gentlewoman cannot be proven to have been fatuous, being now dead: But tho' ſhe were alive, and that the Probation led might be legally receiv'd, yet ſhe cannot, upon that Probation, be ſaid to be fatuous, ſeeing 'tis proven, That ſhe gave Money to buy Neceſſaries; that ſhe came to Table, went to Church, convers'd with Neighbours, and ask'd for her Friends at Strangers who had ſeen them; and that ſhe carried herſelf, ordinarily, as other Gentlewomen did, or ought to have done.

LAWYERS ſome Times ſpeak of *imbecillitas & debilitas judicii eorum quæ ſenſum aliquem habent, licet diminutum*; and ſuch are by all Lawyers allow'd to marry, and make Teſtaments, *&c.* as is obſerved by *Gomez. Reſol. Tom.* 1. *c.* 6. *Graſs. in* § *Teſtam. quæſt.* 21. And thus it was decided 27 *Octob.* 1627. in *Friezland*, as *Sand. lib.* 2. *Def.* 2. relates; and this at worſt is our Caſe: For all that can be alledg'd againſt this unfortunate Gentlewoman is, That ſhe was of a ſlow and dull Humour, as Melancholians are, theſe hypocondriac Vapours being to their Spirits, what Storms are to the Sea; which tho' they diſturb them for a While, yet cannot they hinder them from returning fully to their former Calm.

BEFORE I come to clear, that ſhe was not furious, your Lordſhips will be pleas'd to know, That *furor* is defin'd to be, *Dementia cum ferocia, & horrenda actionum vehementia*; Fromanus *de jure furioſorum, p.* 6. In Law he is ſaid *omni intellectu carere, l.* 14. *ff.* de officio præſid. *qui nec ſcire nec diſcernere poteſt, l.* 9. *ff. de acquir. hæred. qui caret affectu, l.* 7. § 9. *quib. ex cauſ. in poſſeſſ. qui caret omni judicio, l.* 12. § 2. *ff. de judici.* And becauſe Prudence is *qualitas quæ ineſſe debet, ideo nemo præſumitur furioſus, ſed potius ſanæ mentis*; and Two Witneſſes, deponing *de ſana mente*, are preferred, and believed more than a Hundred who depone upon Fury. *Menoch, lib.* 6. *præſumpt.* 45.

LAWYERS divide Fury, *in continuum, ubi animus continua mentis agitatione ſemper accenditur, & interpolatum, ſeu intervallatum, qui dilucida habet intervalla, quorum furor habet inducias, & quos morbus non ſine laxamento aggreditur,* l. 9. c. *qui teſt. facere poſſ. & quos furor ſtimulis ſuis variatis vicibus accendit,* l. 6. c. *de contr. empt.* In whom Fury is but an Ague; Madneſs is but a Diſeaſe in the one, but it is the Temperament and the Complexion of the other; in the one, the Judgment is but darken'd as by an Eclipſe; but in the other, it lies, like the *Cimmerians*, under a conſtant Night. That this was not a continued Fury, is clearly proven; for the Depoſitions bear, That ſhe was only ſeiz'd with theſe Fits that troubl'd her, Twice or Thrice in a Year, and that at other Times ſhe had, *non ſolum remiſſionem, ſeu adumbratam quietem, ſed etiam intermiſſionem, & recipiſcentiam integram*; for they depone, At other Times ſhe was as well as Gentlewomen are, or ought to be.

THAT which is contended then is only, "That the lucid Intervals are not clearly proven, "at leaſt, it is not proven, that ſhe, at the Time of the ſubſcribing that Aſſignation, and "for a conſiderable Time before and after, was in a lucid Interval. But the Contrary will, I hope, appear from theſe Poſitions.

FIRST, By the Probation it will appear, That ſhe was never mad and furious; for ſhe at no Time wanted all Senſe and Judgment, albeit ſhe was at ſome Times oppreſt with an overflowing and abounding Melancholy; which Diſtemper differs clearly from Madneſs, as *Zackeus* obſerves very well, *lib.* 2. *quæſt.* 9. *Melancholici* (ſaith he) *ſunt timidi & mærentes, vel ridiculi; furioſi vero, in perpetuo motu audaces ac præcipites.* And it will appear from the Probation, That ſhe went to Table, to the Church, and to all Societies, which is not allow'd to mad People; that in her Fits ſhe did only laugh and ſing, and when ſhe did begin to talk idly, the leaſt Sign would have made her recover herſelf, which is a clear Sign of Melancholy, but not of Madneſs. And the Father, who beſt knew the Condition of his own Daughter, was ſo far from thinking her mad, (as is pretended) that he left her a conſiderable Portion, which implies not only a Liberty, but an Invitation to marry: Whereas if he had thought her mad, doubtleſs he had only left her an Aliment, but no Portion, and would have recommended, that ſhe ſhould not marry; For what Father deſires to have his Family diſgrac'd, by giving out a mad Daughter? And the Phyſician alſo depones, That ſhe was only troubled with a Melancholy; which Humour, tho' when it boils over, will occaſion great Diſtempers, yet that Stock of Vapours being ſpent, the Brain returns, or rather continues, in its natural and exact Temper.

II. The Witneſſes who depone can give no ſuch Account of their *cauſa ſcientiæ*, as can infer Madneſs; for ſhe being, as they confeſs, always removed to her Chamber, when her Diſtemper did ſhew its firſt Twilights, they could not exactly know that Habit of the Mind, that is neceſſary to be known in ſuch Caſes: Whereas, the *cauſa ſcientiæ* they give is, That they heard her commonly repute mad: And one depones, That paſſing by her Chamber-door, he ſaw her laugh and ſing, and heard her talk idly, which was too tranſient a Way to know the Nature of a Diſtemper, which the Law ordains to be known by Conference, and frequent Converſation.

III. Albeit in Law, *Semel furioſus ſemper præſumitur in furore perſtitiſſe*, yet when lucid Intervals are once proven, as is very clearly proven here, *Quod actum erat, potius præſumitur in dilucido intervallo, quam in furore geſtum, ſi actus ita geſtus fuerit, ut nullum ſtultitiæ ſignum appareat*. This *Maſcard.* gives for a Rule, *concluſ.* 826. and there he cites, *afflict. deciſ.* 143. *Jaſon. ad. l. furioſum, C. qui Teſtamentum facere poſſunt*, and *Covarr. de ſponſal.* Part 2. Cap. 2. And thus the *Roman* Senate decided of old in *Teſtamento* Tuditani, cited by *Val. Max. lib.* 7. *cap.* 8. So that albeit where the Intervals are not proven, it is requiſite that *actus ſapientis*, and the Condition of the Perſon before and after for a conſiderable Time, be proven, to make the Act appear to be wiſely done; yet, where the lucid Interval is proven, *actus ſapienti conveniens* for the preciſe Time, is ſufficient; for elſe the proving prior lucid Intervals ſhould be unneceſſary, ſeeing tho' prior lucid Intervals were not proven, yet it would be ſufficient, that the Act were *actus ſapientis*, for that *per ſe* is excluſive of Madneſs.

IV. The Notar doth aſſert in the Aſſignation, That at the Time ſhe was of a ſound Judgment, upon which certainly he would have depon'd, had he been alive; ſo that he is now a proving Witneſs: And *Froman. p.* 81. thinks the Notar's Aſſertion, in ſuch a Caſe, of great Moment. But above all, that which convinces me is, that Sir *Thomas* being interrogate upon his Oath, Whether he believ'd ſhe was then of a ſound Judgment? Doth depone *affirmative*; and tho' this be only an Oath of Calumny, yet it is equivalent to an Oath of Verity, nor do they differ: Nor could an Oath of Verity be more expreſs, and ſo not more proving.

And whereas it is contended, " That this Act was of its own Nature, rather a Sign of " Madneſs, than of Prudence; ſeeing ſhe did not read over the Aſſignation which ſhe ſub- " ſcribed; and ſeeing ſhe obliged herſelf therein, not to marry without her Father's Conſent, " and that ſhe therein alter'd that Deſtination made by her Father.

It is anſwered, That at the Time of her ſubſcribing that Paper, ſhe deſired that a Notar might ſubſcribe for her, becauſe ſhe could not write; and when the Notar told her that ſhe behov'd to ſubſcribe herſelf, elſe the Paper would be null, ſhe called for it then and ſubſcribed the ſame; which ſhew that ſhe could reaſon and deduce Conſequences, and that ſhe deſired earneſtly to have her Brother Sir *Thomas* ſecure of what ſhe did: And albeit Women can (becauſe of their Sex and Employments) ſhow but little *Sagacity*; yet in this ſhe diſcovered *actus ſapientis*, as well as *ſapienti conveniens*. And albeit it be not proven, that the Paper was not read over, yet ſince the contrary is not proven, it muſt be preſumed to have been done *per argumentum a ſolitis*. And ſeeing Sir *Thomas* was the eldeſt Brother, and had entertained both her and her Mother, it was moſt reaſonable that ſhe ſhould have left him her Eſtate, being the Stock of the Family; and ſhe being bred up in a Kindneſs for him by their Mother, whoſe Choice ſhe was obliged to approve, being then in one Family with them, and her only Parent. And it was moſt juſt, that her eldeſt Brother coming in place of her Father, ſhe ſhould have taken his Advice in her Marriage: Which Advice was not in Law binding, nor would ſhe have fallen from the Right of her Proviſion, tho' ſhe had refuſed his Advice: So that in this, ſhe honoured her Brother, and pleaſed her Mother, without prejudging herſelf.

Secure then (My Lords) in this Precedent, our Names againſt Infamy, and our Eſtates againſt the Lubricity of Witneſſes, and Arbitrarineſs of Judges; and give not Occaſion to Witneſſes in one Act, to perjure themſelves, and ruin us and our Poſterity: And gratify not the Avarice of a Brother, who digs up the Aſhes of his defunct Siſter, to find that ſacrilegious Prey which he hunts after; but let him ſee by your Sentence, as an Earneſt of God's juſt Judgment, what he deſerves *who calls his Brother a Fool*; much more, who for Money takes Pains to prove his Siſter ſuch.

***THIS Caſe was ſubmitted to the Lords, and the Sum was divided equally by them, as Arbiters.***

FOR

# The Laird of *Miltoun*,

AGAINST

# The Lady *Miltoun*. *November* 1669.

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## The Sixth Pleading.

### *In what Caſe a Sentence may be reduc'd, by a* Reprobator *of the Depoſitions of the Witneſſes whereupon the Sentence was founded, and by what Probation Sentences may be reprobated.*

I Tremble (My Lord) to think, that the Fortunes of the beſt of His Majeſty's Subjects, ſhould be, by the fatal Neceſſity of our Law, laid open to the Malice and Avarice of the meaneſt and worſt Witneſſes: And tho' we know, there be Thouſands who would hazard their own Damnation, to ſatisfy either their Revenge or Avarice; yet if any Two of theſe Witneſſes ſhould conſpire to ſatisfy their Deſigns, either by deponing that which is abſolutely falſe, or by concealing what is really true, to the Ruin of our Lives or Eſtates, it is pretended, that our Law hath invented no civil Remedy. This (My Lord) were to make the Law authorize the robbing of Innocents, and to ſuffer no Man to poſſeſs his Fortune longer than two Raſcals pleaſes; wherefore, it is my Deſign to vindicate both our Law and my own Client, and to ſhow that your Lordſhips Juſtice is appointed as a City of Refuge, and that you can, by your Reprobators, defend us againſt their Depoſitions. But becauſe this Subject hath been but very unfrequently and darkly handled amongſt us, albeit it have in it very much both of Intricacy and Concernment; I hope your Lordſhips will allow me ſo much more of Time; and ſeeing *ex facto jus oritur*, I ſhall, to the End the Point of Law may be the better underſtood, thus open to you the Matter of Fact.

THE deceaſt Laird of *Miltoun* did match himſelf in a ſecond Marriage to this Lady, to whom he did, with the greateſt Part of his Eſtate, give his chief Houſe in Jointure; and after his Deceaſe, ſhe having married *John Maxwel* her preſent Huſband, they did take as much Pains to deſtroy the Houſe, as the Law obliges them to take in preſerving it: Which Abuſes did put a Neceſſity upon Sir *John Whiteford* my Client, to whom the Eſtate belongs, as Son and Heir to the deceaſt *Miltoun*, to buy the ſaid *Maxwel*'s Right, which he had to her Jointure *jure mariti*; and after that her Huſband and ſhe had received a ſufficient Price for it, they did enter upon an unworthy Deſign, of retaining both the Land and the Price; and in order thereto, it was plotted, that the Huſband *Maxwel* ſhould go off the Country, and that this Lady his Wife ſhould purſue a Divorce againſt him, as having committed Adultery. During the Dependance of which Proceſs before the Commiſſars, finding, that the Reduction of this Right (which fell in Conſequence of the Reduction of the *jus mariti*) was chiefly aim'd at, *Miltoun* offer'd to appear, and object againſt the Witneſſes, who were led to prove the Huſband's Adultery, and which Witneſſes were Perſons known to be of very torn and unſound Fame, and very liable to all Impreſſions; but he was not admitted: Whereupon he rais'd Reduction of the Commiſſars Decreet before your Lordſhips, upon ſeveral Reaſons; Two whereof were, 1. That the Lady had brib'd the Witneſſes. 2. That ſhe had ſuggeſted to them what they ſhould depone, inſtructing them what Faces and Cloaths theſe Women had. Which Reaſons your Lordſhips found not competent by way of Reduction, but by way of Reprobator.

When this Reprobator was, in Obedience to your Ordinance, raiſ'd, it was alledged, That there could be no Reprobator now purſued, ſince it was not proteſted for at the Time when the Witneſſes were led. But this was repelled, both becauſe your Lordſhips had reſerved a Reprobator already, which was equivalent to a Proteſtation; and becauſe the Grounds of this Reprobator are but lately emergent, ſince the receiving of the Witneſſes, and were not then known. And as *Durandus*, that learn'd Practitian obſerves, *tit. de reprob. teſtium num.* 2. *Quod ſi actor paratus ſit jurare, quod ad hoc, ex malitia non procedit, vel quod poſt publicationem, didicit id quod nunc objicit, tunc auditur ſine proteſtatione*; and cites for this, *cap. preſentium extra de teſt.*

The Lady finding herſelf in Hazard to loſe both her Jointure and Reputation by the Event of this Purſuit, ſhe now alledges, “ That theſe Grounds of Reprobator are not relevant, nor receivable; 1. Becauſe when Witneſſes are ſworn they are purg'd of partial Counſel, of the Receipt or Expectation of good Deed; ſo that this being *res hactenus jurata*, it cannot be thereafter ſearch'd into by him who referr'd the ſame to Oath, & *detulit juramentum*; *nam dum detulit, tranſegit*. 2. Tho' the Corrupter or Suggeſter may be puniſh'd *pœna falſi*, yet the Sentence pronounced upon theſe Depoſitions, can never be reduced. 3. If this were allow'd, there ſhould be no End of Pleas, *ſed lites eſſent immortales*; for the firſt Witneſſes might be reprobated by other Witneſſes, and theſe by others, and theſe by others; & *ſic daretur progreſſus in infinitum*. 4. Tho' Corruption were receivable, yet it were only probable by the Oath of him who obtain'd the Decreet.

Before I come to make particular Anſwers to the Difficulties propoſed, I ſhall remember your Lordſhips in the general, that Probation being defined by Lawyers to be *fidem facere Judici*, to convince the Judge of what is alledged, Probation by Witneſſes is no infallible, but only a preſumptive Probation; for it is founded upon no other Warrant, than that it is preſumable, that two diſintereſted Perſons will not, by loſing of their own Souls, gain any Thing for a third Party; ſo that this Kind of Probation ſeems rather to be introduc'd by Neceſſity, than Choice. And albeit at firſt, when the Fear of a Deity did ſway the World, and before Men had abſolutely loſt their primitive Innocence, and in place of it had learn'd thoſe Cheats and Falſhoods, which have grown up with Time; that Probation ſeem'd to be very well founded, and two Witneſſes were ſufficient in all Caſes: Yet, Lawyers finding Infidelity daily to grow, have accordingly daily leſſened their Eſteem of that Proof; ſo that the Civil Law did begin to require ſometimes Five, ſometimes Seven Witneſſes: Our old Predeceſſors eſtabliſh'd Aſſizes of Fifteen ſworn Neighbours, who becauſe they were both Judges and Witneſſes, had Liberty to allow as much of the Depoſition of Witneſſes as they thought fit; and thereafter, upon further Experience, it is ſtatute with us, That no Witneſſes can be received in Caſes above an Hundred Pounds: And in *Holland*, *Italy*, and ſeveral other Countries, the Depoſition of Witneſſes cannot prove a Crime, and are made no further Uſe of, than to ſubject to the Torture the Perſon againſt whom they are led.

Lawyers have likewiſe, as a further Check upon theſe Depoſitions, even in theſe Caſes when they are neceſſary, ordain'd the Puniſhment of Perjury to be ſevere, *ob vindictam publicam*, and allow'd an Action of Reprobator for redreſſing of the Parties wrong'd, ſuitable to the Two Wrongs which Witneſſes commit in their falſe Teſtimonies; in the one whereof they prejudge the Commonwealth by the Example, and by the other, the private Party, in the Depoſition itſelf.

Reprobator is by Lawyers defined to be, an Action, whereby the Judge reſcinds a former Sentence, becauſe of the Falſeneſs of the Depoſition, or becauſe of the Corruption of the Witneſſes. And the Depoſition of every Witneſs hath in it two Parts, *viz. Initialia teſtimoniorum*, & *dicta teſtium: Initialia teſtimoniorum*, are, the previous Circumſtances premiſed by the Practique to the Depoſitions, whereof the Chief are, Whether the Party be married? Of what Age they are? Where they dwell? &c. which would be very impertinent Interrogators, if the Law did not intend to make uſe of theſe as Marks, whereby to try the Faith and Truſt of the Deponers. There are likewiſe other Interrogators, which, tho' they be uſed as *initialia*, yet certainly are *eſſentialia*, and Grounds of Reprobator, tho' the Witneſſes do not at all depone upon them; ſuch as, Whether the Party hath ſuggeſted to them what they ſhould anſwer? or hath corrupted them? Yet, the Parties uſe ordinarily to depone, if they get good Deed, or were inſtructed. The *dicta teſtium* are the Body or Matter of the Depoſitions, which relate principally to the Thing controverted; and albeit ſome Lawyers diſpute, Whether the Depoſitions of the Witneſſes can be reprobate *quoad dicta teſtium*, becauſe the Witneſſes are there *conteſtes*, and when two of them agree in one, to reprobate theſe, were in effect to overturn a formal Probation; yet in *initialibus* they are not *conteſtes*, but every one depones ſingly upon what concerns himſelf, and is likewiſe concern'd himſelf in what he there depones: So that in theſe, both Singularity and Intereſt derogate very much from the Truth of what is depon'd; and in this Caſe, I intend not to quarrel the *dicta teſtium*, but the *initialia teſtimoniorum*.

THESE Grounds being laid down, my Anſwer to the Firſt Difficulty is, That the Firſt Defence, wherein it is contended, "That the Witneſſes having been interrogated, Whether "they were bribed or inſtructed? And having denied the ſame upon Oath, their Depoſitions "cannot be now reprobated, upon the Heads of Suggeſtion or Corruption," is moſt irrelevant, for theſe Reaſons; 1. The Party againſt whom the Witneſſes are led, hath no Time allow'd him to enquire what the Witneſſes are, who are to be led; and tho' he have relevant Objections, *v. g.* If he be informed, that they are inſtructed or corrupted, he muſt inſtantly verify theſe Objections, elſe they are not receivable: So that to deny him the Liberty of cauſing the Judge purge the Witneſſes by their Oath, of any Suſpicion, were, in effect to take from the Party his greateſt Security; and ſure, no Perſon would deſire that Purgation, if he thought that he would be thereby cut off from the Benefit of Reprobator. 2. If this were allow'd, it were eaſy to cut off all Reprobators; for the Leader of the Witneſſes might ſtill cauſe purge them; and oft-times the Judge doth it *ex proprio motu*; neither is it marked in the Depoſition, whether the Witneſs is purg'd by the Judge, at the Deſire of the Purſuer or Defender; but ſingly, That he being interrogate, deponed, &c. So that in this Caſe the Perſon, againſt whom the Witneſſes are led, ſhould be prejudg'd without any Act of his own. 3. Tho' a Witneſs have purg'd himſelf of partial Counſel; yet if he depone falſly, he may be purſued by him againſt whom he deponed, for Perjury; *Ergo*, 'tis much more competent to the Perſon, to purſue Reprobator in that Caſe; for Reprobator being but a civil Action, is far leſs dangerous. 4. *Juramentum purgationis* is not *juramentum deciſivum*, and is taken, as Lawyers ſay, *non ad finalem deciſionem, ſed ad majorem cautelam*, and being introduc'd for the Advantage of the Party againſt whom the Witneſs is led, it were moſt unjuſt, that it ſhould be detorted to his Prejudice. 5. A Witneſs who purges himſelf of partial Counſel, is but *unicus teſtis*, and depones upon his own Innocence, and conſequently doth not prove; and it were moſt unjuſt, that he ſhould, in that Caſe, be better believ'd, than Two famous Witneſſes, *omni exceptione majores*, and who depone upon his Prevarication; and if this Privilege were given to an Oath of Purgation, it would tempt Men to lead debauch'd Witneſſes, and them, when they are led, to depone arbitrarily; knowing, that they can by their own Oath, clear themſelves of any Thing that might be objected againſt them, and that the Oath which they give, cannot only ſecure the Party for whom they depone, but themſelves againſt all Hazard. And *Laſtly*, Lawyers who have treated very largely of this Subject, have made no ſuch Diſtinction as this; but on the Contrary, by doubting only, Whether *dicta teſtium* can be reprobate, becauſe the Witneſſes there are *conteſtes*, as ſaid is; they clearly inſinuate, That in all Caſes, where the Witneſſes are not *conteſtes*, their Depoſitions may be reprobated.

TO the Second Defence, wherein it is contended, "That the Effect of a Reprobator is "not to reduce civilly the Sentence; *nam ſententia ſemel lata pro veritate habetur*; but that "the only Effect of it would be, to puniſh the Parties Corrupters, or the Witneſſes corrupted, by a criminal Sentence. To this it is anſwered, That the Alledgance is contrary to the Grounds of all Law, and to the Opinion of all Lawyers. 1. A Reprobator is, in their Opinion, *ſpecies Reviſionis*, as is clear by *Fairn. Durandus, practica Ferarien*, and many others; and *Reviſio*, in the Dialect of Lawyers, is the ſame Thing that Reduction is with us. 2. Seeing Witneſſes wrong both the Commonwealth by the Example, and the private Party by the Depoſition, and ſince it is very juſt, that every Wrong ſhould have a ſuitable Remedy, and ſeeing the Prejudice done by the Example, is only remedied by the criminal Action; it is neceſſary, that the Party leſ'd ſhould be aſſiſted by a civil Reduction: And it ſeems very unjuſt, that the Witneſſes ſhould be puniſh'd criminally, and that it ſhould be acknowledged, that the Party was wrong'd by the falſe Witneſſes, and that yet the Loſs ſhould not be repair'd. 3. *Per l. 33. ff. de re judicata* (which I may call the fundamental Law of Reprobators) it is clear, that both a civil and criminal Remedy are granted; the one, in theſe Words, *Rem ſevere vindica*, and the other, in theſe Words, *In integrum reſtitue*. The Law itſelf runs thus, Hadrianus *aditus per libellum a* Julio Tarentino, *& judicante eo, falſis teſtimoniis, conſpiratione adverſariorum, teſtibus pecunia corruptis, religionem judicis circumventam eſſe, in integrum cauſam reſtituendam; in hæc verba reſcripſit, Exemplum libelli dati mihi a* Julio Tarentino *mitti tibi juſſi; tu, ſi tibi probaveris, conſpiratione adverſariorum, & teſtibus pecunia corruptis, oppreſſum ſe, & rem ſevere vindica; & ſi quæ a judice, tam malo exemplo circumſcripto judicata ſunt, in integrum reſtitue:* Which is likewiſe confirm'd, *per l. ſi quis. c. de adult. Et ita voluerunt* Alexander, *conſil.* 148. & Lud. Bologn. *conſil.* 5. And by our Practique, Sentences have been reduc'd, and the Party reponed, when the Depoſitions whereupon the Sentence proceeded, were convell'd by a Reprobator: Clear Inſtances whereof are to be ſeen, the 23 of *June*, 1633, and 22 of *December*, 1635, and upon the 5 of *March*, 1624, in an Action of Reprobator, rais'd againſt a Divorce; it was found, That the offering to corrupt one of the Witneſſes, was ſufficient to reduce the Decreet of Divorce: Whereas here, it is offered to be proven, that both the Witneſſes were corrupted: And if the Depoſition could not be quarrelled in order to a civil Effect, there needed no Reprobator at all; for the criminal Action of Perjury would reach the other Effect; and the Lords of Seſſion, before whom Reprobators are intended, would not be at all Judges competent. 4. This Opinion, both of the Civil, and of our Law, is founded upon very juſt Principles; for the Sentence being in that Caſe, founded upon the Depoſitions, theſe being remov'd, the other ſhould fall in Conſequence, nam *ſublata cauſa, tollitur effectus*: And therefore Lawyers ſay, That *teſtes reprobati pro non teſtibus habentur*. Durand, *ibid.* And to allow a Decreet after Witneſſes were reprobated, were, in effect, to allow a Decreet without Probation. 5. When a Decreet is founded upon a Writ, if that Writ be found falſe, the Sentence is reduced; as is clear by the whole Title, *Cod. Si falſis inſtrumentis*, &c. And therefore, much more ſhould Decreets be reduc'd, depending upon the Depoſitions of Witneſſes which are reprobated, there being at leaſt *eadem paritas rationis*.

As to the Third Difficulty propoſed, which is, "That this would *progredi in infinitum*, "and there ſhould be no End of Pleas; which Objection is propon'd by *Abbas, ad cap. propoſuiſti de probat.* 'Tis anſwered, That this Argument, if it prove any Thing, will prove, That no Perjury ſhould be purſued, nor proven; becauſe it is urg'd in this Caſe, it may be urg'd there likewiſe, That theſe Witneſſes who prove the Perjury, may be proven perjur'd by others, and theſe by others: And by the ſame Argument alſo, we ſhould have no Aſſizes of Error, becauſe, if a firſt Aſſize may be tried for Error, Why not that Aſſize by another, *&c.*? But this Difficulty is eaſily ſav'd; for Reprobators ſhould not be ſuſtain'd in all Caſes; and it is only *remedium extraordinarium, ex nobili officio proveniens*, and ſhould only be granted, when the Reaſon of Reprobator is found moſt relevant, and is offered to be proven by Witneſſes, *omni exceptione majores*; and to deny it in that Caſe, were great Injuſtice: As for Inſtance, If I ſhould offer to prove, That albeit it were proven by Two Fellows, that I married *Bertha* in *Paris*, ſuch a Day, whereas I offered me to prove, That the ſame Day I pleaded before your Lordſhips in this Houſe, and which were notour to all your Number; Were it not unjuſt to refuſe to reduce a Sentence, which were founded upon that firſt Probation?

'Tis moſt groundleſly alledged in the laſt Place, "That tho' Corruption of Witneſſes "were allow'd to be reprobated, by an Action of Reprobator, intented before a Deciſion in "the principal Cauſe; yet no Reprobator could be purſued, after a Decreet obtain'd in the "principal Cauſe; for elſe no ſingular Succeſſor could be ſecure, ſince his Right might ſtill "be reduc'd or reprobated by Witneſſes; and ſo Sentences could be no ſufficient Security to "ſuch as were aſſign'd to them: As alſo, *poſt publicata teſtimonia & ſententiam*, the Loſer of "the Cauſe ſhould ſtill intent Reprobator, knowing what the Witneſſes deponed, at leaſt the "Corruption of the Witneſſes, ſhould not be then probable any other Way, than by the Oaths "of the Corrupter himſelf. To which 'tis anſwered, That Reprobators are, in Law, allow'd as well *poſt ſententiam, quam durante primo proceſſu*; as is clear by *Farinacius*, and others; and there is no Hazard of the Publication of the Teſtimonies, becauſe the Queſtion is not, Whether the Teſtimonies, *& dicta teſtium* can be reprobated? For that is not here contended. But, Whether the *initialia* can be reprobated? Which *initialia* uſe to be interrogated in Preſence of the Parties; and ſo there is no Hazard of Publication there. Nor did ever any Lawyer alledge, That Corruption was only probable by the Corrupter's Oath; and this were moſt unreaſonable, as will appear from theſe Arguments: 1. Corruption is *facti*, and falleth under Senſe; and therefore is, of its own Nature, probable by Witneſſes. 2. Corruption could caſt or ſet a Witneſs, before he were examined, and *eo caſu* would be probable by Witneſſes: Why not then after he has deponed? For by our Law, as by the Civil, *noviter provenientia ad notitiam & emergentia*, are receivable and probable, *eodem modo & ordine*, as they ought to have been, if they had been ſooner known. And ſeeing all Objections againſt Witneſſes are only receivable with us, if they be preſently proven, it were unjuſt, not to admit emergent Objections or Proofs. 3. This were to make Witneſſes moſt licentious and arbitrary; for the Parties may give, and the Witneſſes take Bribes, *ſub ſpe impunitatis*, if they knew that they could not be found out, but by their own Confeſſion; and in effect, this were to allowe Perjury, and to invite Men to it. 4. 'Tis moſt preſumable, that theſe who have brib'd, will perjure, and ſo their Oaths cannot be believ'd; and therefore the Law muſt either declare, that Corruption is no Ground of Reprobator, elſe that it is probable by other Witneſſes, and *media probandi*, than the Oaths of the Bribers, or bribed. It was never denied, but that a Decreet obtain'd by Colluſion of Advocates or Clerks, might be reduc'd upon full Probation of the Colluſion, by the Oaths of thoſe Advocates or Clerks, elſe any of theſe, by compearing, or omitting a Defence, might bind One Hundred Thouſand Pounds upon any of the Lieges. And ſince it is confeſt, That the Civil Law and the Doctors do, in this Caſe, allow Probation by Witneſſes, I ſee not why our Law ſhould not admit it: They were as zealous for the Authority of Sentences, as we are; and Perjury is more frequent now, than of old. And tho' our Law doth not allow Probation by Witneſſes, in Caſes above One Hundred; Pounds yet that Law was only made to regulate the original Probation of Debts in the firſt Inſtance, but not the reprobating Sentences. And it were againſt Reaſon and Juſtice, that a Decreet that was obtain'd upon the Depoſitions of Witneſſes, ſhould not likewiſe be quarrellable upon the Depoſitions of other Witneſſes proving Corruption, theſe reprobating Witneſſes being above Exception, and ſuch Perſons as the Judges may think fit to admit, whoſe Choice will, in this Caſe, cut off the Hazard of a *proceſſus in infinitum*: Seeing it is not probable, that Judges will allow any ſuch Perſons, as may endanger the Intereſt of him againſt whom they are led, this Power can be no where more ſecurely depoſitated, than in this illuſtrious Senat, whoſe Frailty is much leſs to be jealous'd, than is that of Witneſſes: And tho' the Conſtitution of a Debt cannot be proved by Witneſſes, where there is no other Probation; yet it follows not, that a Decreet founded upon a Matter of Fact, and upon the Depoſitions of Witneſſes, may not be taken away or reprobated by other Witneſſes: For tho' where Debt is lawfully conſtituted, it cannot be taken away by Witneſſes; yet the Caſe here controverted is, Whether the Debt was lawfully conſtituted? And the Alledgances are Corruption, *alibi*, and other Matters of Fact; and tho' a Decreet has intervened, yet that doth not ſo alter the Nature of the Thing, as to make it leave to be a Matter of Fact, and the Defences emergent, ſince the Decreet and Matters of Fact are ſtill probable by Witneſſes.

'TIS unjuſt, that what was firſt purchaſed by Witneſſes, ſhould not be try'd by the Depoſitions of Witneſſes, *Eum debet ſequi incommodum, quem ſequitur commodum*; *& nihil eſt tam naturale, quam unumquodque eodem modo reſolvi, quo colligatum eſt.* And as when I purſue upon a falſe Bond, the Falſhood of that Bond is to be try'd by Witneſſes, our Law doth not force the Defender to refer the Truth of the Debt, or of the Matters of Fact, to the Oath of the Purſuer: Even ſo, when a Man is purſu'd upon a Decreet, which is obtain'd upon falſe Grounds or Corruption, why ſhould our Law force me to refer the Truth to the Purſuer's Oath?

SURE, if ever Reprobator was granted, it ought to be in this Caſe; wherein my Client offers to prove, That this Lady (whoſe Sex I am loth to wrong in her Perſon) did bribe theſe Witneſſes, and inſtructed them *verbatim* what they ſhould depone; this is offer'd to be proven, not only by their own Confeſſion, but by the Depoſition of many, who are more numerous, and more famous, tho' their own Confeſſion proves them to be vacillant and faithleſs Raſcals; and who tho' they ſhould not be believ'd in any Caſe, yet ought to be believed as well in this Retraction, as in their firſt Depoſition; and who can enervat, tho' they cannot aſtruct their own Teſtimonies. And this Probation ought to be received againſt the Depoſition of two Villains, who ſtand condemned by common Fame, which is ſufficient to hinder them from being Witneſſes *omni exceptione majores*, and are condemned by the Kirk-ſeſſion for keeping Baudy-houſes, wherein they have ſhak'd off that Fear of God, which is the Ground of the Faith we give to Witneſſes, and have learn'd, by pimping Perſons, to pimp Pleas. I am here in Defence of a Marriage *quæ eſt cauſa maxime favorabilis*, and the Diſſolution whereof requires a Probation *per teſtes omni exceptione majores*; and it is very probable, that a Woman who is ſo impatient in thoſe holy Bonds, and ſo malicious againſt her own Huſband, as to aſperſe him with every Thing that may leſſen his Reputation with your Lordſhips, would not ſpare to have dealt ſo with the Witneſſes as might beſt effectuate her Deſigns, knowing that if ſhe prevail'd not, ſhe behov'd to return to the Society of a Huſband whom ſhe had ſo highly diſobliged, to miſs the Enjoyment of that Jointure, which ſhe ſo ardently expected; and to be juſtly branded, for having ſo maliciouſly and cauſeleſly defam'd ſo ſacred a Relation.

***THE Lords ſuſtain'd the Reaſons of*** **Reprobator,** ***to be proven by Witneſſes,*** **omni exceptione majores.**

FOR

# The Lord *Balmerinoch*,

AGAINST

# The Lady *Coupar*, *February* 1670.

## The Seventh Pleading.

### *How far a Diſpoſition, made by a Man, in favours of his Lady, of his whole Eſtate, is reducible, as done* in lecto ægritudinis.

MY Clients (My Lord Chancellor) this Day, are not the Lord *Balmerinoch* only, but all ſuch as either may be Heirs, or Husbands; and by how much greater their Eſtates are, by ſo much the more they are concern'd in this Diſcourſe: Wherein I deſign to aſſiſt them when they are upon Death-bed, which is an Occaſion, at which not only their Wit and Memory leave them, but wherein they are oft deſerted by all other Friends, beſides theſe who deſign to prey upon them. And I am ſo zealous in this Service, that I cannot detain myſelf any longer from opening to you the Matter of Fact in this Cauſe, which may be ſaved by its very Merits, if ever any was.

THE Caſe (My Lords) ſtands thus. The late Lord *Coupar* had, by his Father's Kindneſs, and out of the Eſtate of the Family, a conſiderable Fortune beſtowed upon him, and what Addition it has receiv'd ſince, is rather the Product of ſo conſiderable a Stock, than of that Lord's Induſtry: So that he having died without Heirs, this Eſtate ſhould have return'd to the Family, not only by a legal Succeſſion, but by the Rules of Gratitude. Yet having in a ſecond Marriage, at the Age of Threeſcore and Ten, married a Lady, by whom he got no great Fortune, ſhe induc'd him to diſpone his whole Eſtate, Honours and Title in her favours, and in favours of the Children to be procreate betwixt her and any other Husband, (the firſt Bribe was ever given by a dying Husband to invite a Wife to a ſecond Marriage; and tho' a Brother may raiſe up Seed, yet we never hear, that a Woman rais'd up Seed to her Husband:) Of which Diſpoſition, there is a Reduction rais'd by the Lord *Balmerinoch*, who is Nephew to the Defunct, and ſhould have been his Heir, wherein he quarrels this Diſpoſition, as made upon Death-bed by the Lord *Coupar*, after contracting of that Sickneſs, whereof he died, and as done in prejudice of him who is apparent Heir.

MY Lord, I know, that *Legis eſt jubere, non ſuadere*, and that *omnium quæ fecerunt majores noſtri, non eſt reddenda ratio*; yet, this Law, or rather ancient Cuſtom, whereby Perſons upon Death-bed can do nothing in prejudice of their Heirs, can juſtify itſelf equally well, by Reaſon and Authority.

THE Reaſons inductive of this excellent Law, are, Firſt, That after Men are ſick, their Judgments grow frail with their Bodies; and the Soul of Man wants not only then the pure Miniſtry of well-diſpoſed Organs, but is likewiſe diſorder'd by the Infection of the languiſhing Body; wherefore the Law obſerves, *Lib. 2. Reg. Maj. cap.* 18. *verſ.* 9. *Quod ſi quis in infirmitate poſitus, quaſi ad mortem, terram ſuam deſtribuere cæperit, quod in ſanitate facere noluit, præſumitur hoc feciſſe ex fervore animi potius, quam ex mentis deliberatione.* Which Preſumption ſeems to be very well founded; for it is not imaginable, that any Man who is reaſonable, would pull down his own Houſe; and Nature and Reaſon being the ſame Thing varied under different Expreſſions, he who overturns the one, cannot be ſound in the other. The Second Reaſon is, Becauſe Men ordinarily upon Death-bed, being ſurpriz'd with the

Approach of Death, and terrify'd with the Proſpect of what follows it, do ſo little value the Affairs of this World, which they begin now to find ſo little able to repay their criminal Pains and Love, that, to evite the Importunity of ſuch Aſſiſtants, as are like Vultures, buſie about the Carrion upon ſuch Occaſions, they are content to ranſom Time and Quiet with the careleſs Loſs of their Eſtate: And who would not buy Time then at a dear Rate? So that this Law is the great Fence of our Sick-bed, as well as of our infirm Judgments. The Third Reaſon is, The great Reſpect our Law bears to ancient and noble Families, who are the Corner-ſtones of the Kingdom, to whoſe Valour our Law has oft ow'd its Protection, and ſo could not refuſe its to them. And ſure, if either the Importunity of Mothers for their younger Children, or of Wives for themſelves, could be ſucceſsful, the Heirs would ſucceed to a heavy and empty Title: And upon this Conſideration, the Parliament did lately refuſe to allow Parents the Power of providing their younger Children to ſmall Portions upon Death-bed. I know alſo, that ſome add, as an original Reaſon for this Law, the Avarice of Monks and Churchmen, who perſuaded Men to wadſet for themſelves Rooms in Heaven, with great Donatives to pious Uſes; to reſtrain which Exceſs, *Venice* and other Kingdoms have tax'd the Value of what can be ſo beſtow'd. And albeit the Reſtriction impoſed by this Law may ſeem deſtructive of *Dominium*, which is *jus diſponendi*, and that by the Law of the Twelfth Table, *Ut rei ſuæ quiſque legaſſit ita jus eſto*; ſo that this ſeems to want all Foundation either in Common, Feudal, or the Laws of other Nations. Yet, if we examine, we will find *Dominium* is in very many more Caſes than this, and in more favourable, reſtricted by all Laws; and that *quærela inofficioſi Teſtamenti*, is founded upon the ſame Reaſon with this Law; and that by the Laws of *Spain* and *Flanders*, (ſo great is the Favour of Noble Families) Noblemen cannot at any Time diſpone their Eſtates, but muſt tranſmit to their Poſterity whatever Lands they got from their Predeceſſors. But tho' no Nation joined with us in this Law, this ſhould rather induce us to maintain it, as being truly a *Scots* Law; and we muſt be ſo charitable to our Predeceſſors, as to believe, that they would not, without very cogent Motives, have reſtricted their own Power of Diſponing, and have receded from the Cuſtom of all other Nations; and we ſhould be as careful of our Fundamental Laws, as the *Spainards* are of their private Eſtates. And of all Perſons, againſt whoſe Importunity the Law ſhould guard us, ſure our Wives are the Chief; for they have the neareſt and frequenteſt Acceſſes, the moſt prevailing Charms and Arguments, and of all Creatures Women are moſt importunate, and are moſt dangerous when diſobliged; wherefore the Law hath wiſely forbidden all Donations betwixt Man and Wife, fearing in this mutual Love and Hatred, tho' in Modeſty it hath only expreſs'd the Firſt. And ſure, if this Donation ſhould ſubſiſt, every Woman would think herſelf affronted, as well as impoveriſhed, if ſhe could not elicite a Diſpoſition from her Husband, of ſome Part of his Eſtate. And to what Condition ſhould a poor Man be reduc'd, and with what Inconveniencies urg'd, when he behoved either to diſoblige his Wife, or ruin his Heir, and to load his Fame or his Eſtate. So that the Lord *Coupar* hath in this prejudg'd Husbands and Heirs, and hath violated *& jus parentale, & maritale*.

IT is alledged for the Lady, “That the Reaſon is not relevantly libelled, ſeeing we do not condeſcend upon a form'd Diſeaſe, under which the Lord *Coupar* laboured the Time of the Diſpoſition, and of which Diſeaſe he thereafter died: Nor is Tenderneſs and Infirmity ſufficient of itſelf, to maintain this Reaſon of Reduction, eſpecially in old Men, whoſe Age is a continual Infirmity, and yet is not by Lawyers called a Sickneſs, Sickneſs being a Preter-natural, whereas Age is a natural Infirmity. And this Law being mainly founded upon the Preſumption, That theſe who are upon Death-bed, have their Judgments and Memories ſo clouded and diſorder'd by the Sickneſs which preſſeth them, that they are either altogether diſabled from doing Affairs, or at leaſt from doing them judiciouſly, and according to the Rules of Reaſon: Therefore ſuch a Diſeaſe ſhould be condeſcended on, as influences the Judgment, and incapacitates the Diſponer to underſtand his own Affairs. Whereas it were abſurd, that old Men who keep the Houſe, ſhould be generally interdicted, merely becauſe they come not abroad, and are ſomewhat tender, albeit they be otherwiſe very ripe and mature in their Judgment, as ordinarily old Men are, Nature having beſtow'd Prudence upon them, in Exchange of that bodily Vigour which remains with thoſe who are young: And it were unreaſonable, that if any Perſon were a little tender, and had not Occaſion thereafter to come abroad, that a Diſpoſition made by him ſhould *ex eo capite* be reduced, albeit it cannot be qualified that he died of that Diſeaſe. Wherefore our Law having reſtricted the Power of Heritors ſo far, that as they cannot diſpone their Eſtate upon Death-bed, in prejudice of their Heirs, it hath moſt juſtly appointed, that the Diſeaſe wherewith they are infected ſhould be condeſcended upon, to the end it may be known, whether it could influence the Judgment or not; or whether or not the Diſponer died of that Diſeaſe: And in all the Deciſions which concern Caſes of this Nature, it is remarkable, that the Diſeaſe is ſtill condeſcended upon. Likeas by the 18. *cap. lib.* 2. *Reg. Maj.* the Reaſon whereupon this Law is founded, is ſaid to be, *quia*

“ *tunc poſſet in modico contingenti ejus hæreditatem deſtribuere, ſi hoc permitteretur ei, qui* “ *fervore paſſionis inſtantis, & memoriam, & rationem amittit.*

To which 'tis replied, That it is libelled in the Reaſon of Reduction, That the Lord *Coupar* Diſponer, had contracted a Sickneſs, before he had granted the Diſpoſition; which is all is neceſſary. And it were moſt abſurd to think, that the Purſuer ſhould be neceſſitated to condeſcend upon a particular Diſeaſe, and deſign it by a Name: For this were to make Two Phyſicians abſolutely neceſſary in all Diſeaſes, ſince none are preſum'd to know the Names and Nature of Diſeaſes but they: And there is ſometimes ſuch a Complication of Diſeaſes, and new Diſeaſes do ſo often creep in amongſt Mankind, that hardly even a Phyſician can deſign them exactly by a particular Name. And 'tis very obſervable, That when the Name of a Diſeaſe is condeſcended upon in any Deciſions, it is not by the Purſuer, but by the Defender, who condeſcends upon the ſame, for clearing either that the Diſeaſe was not mortal, or that it did not affect the Brains. But yet when we conſider theſe Deciſions, we will find, that if the Perſon had been proven to have been once ſick, the Diſpoſition is ſtill reduced, tho' the Diſeaſe be not proven to be ſuch as could affect the Brain. Thus a Diſpoſition was reduc'd, albeit it was offered to be proven, That the Diſponer was *mentis compos, February,* 1622. *Robertſon* againſt *Fleeming*; and that he did his Affairs, and ſat at Table as at other Times. Nor is it requiſite the Diſeaſe be *morbus ſonticus, pen. July,* 1635. and 7 *July,* 1629. The Alledgance of *judicii minime vacillantis* was alſo repelled; and a Proviſion was not ſuſtain'd made to a Child, tho' the Father had only a Palſey in his Side, and liv'd 28 Months, *July,* 1627. And this is moſt reaſonable, becauſe the Soundneſs of the Judgment being that which is not ſubjected to the Senſes of Witneſſes, they cannot properly cognoſce thereupon, and they would in that Caſe, be rather Judges than Witneſſes. For if it were otherwiſe, Servants who are the only ordinary Witneſſes that are preſent, would have it left arbitrary to them, to make the Diſpoſition valid or not, as they thought fit; and they might depone very boldly, becauſe without Hazard, ſince in ſuch Gueſſings as theſe, they might aſſume to themſelves a very great Liberty. And thus tho' the Law thought it fit, not to put it in the Power of the Heritor, to prejudge his Heir upon Death-bed, by Diſpoſitions, your Lordſhips ſhould, by your Deciſion, put it in the Power of Servants to prejudge them by their Depoſitions. And if it were neceſſary to prove, that their Judgment was diſordered by the Sickneſs, then this Law had been abſolutely unneceſſary; for whatever Diſpoſition is made by any Perſon, whatever Condition he be in, as to Health, yet if he be not *ſanæ mentis,* it is ſtill reducible: And as Unſoundneſs of Judgment without Sickneſs, in that Caſe, were ſufficient; ſo the Law hath made Sickneſs without Unſoundneſs of Judgment, to be ſufficient in this. For, to the End there might be nothing arbitrary in this Caſe, where the greateſt of Subjects (ſuch as are the Nobility) are concerned in their greateſt Intereſt, which is the Diſpoſition of their old Heritage, the Law hath appointed, That if the Perſon be once ſick who diſponed, the proving that Sickneſs, without any Thing elſe, ſhall be ſufficient for reducing that Deed, except it can be proven, that the Perſon who granted the Diſpoſition went thereafter to Kirk and Mercat, to which none go, till they be entirely recovered, and fit for Buſineſs; theſe being Places, wherein ſound Men are ſtill preſum'd to be ſerious, becauſe theſe Places are not fit for Recreation, and ſo not fit for ſuch as are ſick; and which are Acts that fall under Senſe, and ſo may be depon'd upon by Witneſſes; and are Acts expos'd to the View of very many; and the Heir cannot be thereby prejudged, by either the Want of Witneſſes, or by being tied to the Depoſition of domeſtic, packed Witneſſes; for ſuch only are uſually admitted to viſit the Defunct (and ſo are only the Perſons who can be Witneſſes) by theſe, who had him ſo much in their Power, as to elicit ſuch Diſpoſitions from him.

The Defender (My Lord) finding herſelf ſtraitned by this Debate, joins to her former Defence, another, which is, “ That going to *Kirk and Mercat* are not abſolutely neceſſary Qua-“ lifications of Health, but it is ſufficient, if the Defunct might have gone to either of theſe, “ or did equivalent Deeds, whereby it might have been known that he had recovered his Health; “ for that is the Scope and Deſign why the others are condeſcended upon: And it were un-“ reaſonable, that the going down a Stair within Burgh, and the buying of an Apple at a “ Crame, ſhould be a greater Sign of Health, than the riding of a Journey: So that going to “ *Kirk and Mercat* may be ſupplied by equivalent Acts; and the Lord *Coupar* did equivalent “ Acts for evidencing that he was in Health, at, and after the granting of the Diſpoſition, “ in ſo far as he roſe from, and did go to his Bed at his ordinary Times, did come to Table, “ entertain Strangers, wait upon them without Doors to their Horſes, ſell his Corns, take “ in his Accounts, and write long Letters all with his own Hand; in which Letters he ſhew “ a former Deſign he had to make that Diſpoſition. Likeas, former Letters can be produ-“ ced, long prior to his Sickneſs, wherein he ſhewed his Deſign; whereas your Lordſhips “ have by former Deciſions found, That equipollent Acts were ſufficient, as in the Caſe be-“ twixt *Sym* and *Graham, in Anno* 1647. Wherein it was found, That the writing of a Diſpo-“ ſition of a Sheet and a Half of Paper, all with the Diſponer's own Hand, was ſufficient to

" ſuſtain the ſame, and to defend againſt the Reaſon of Reduction upon Death-bed: And in *February*, 1668, in the Action *Pargillis* againſt *Pargillis*, it was found, That the riding on Horſe-back, tho' the Diſponer was proven to be ſick, and that he was ſupported upon his Horſe, were ſufficient Qualifications of Health: And if the going to Kirk and Mercat were ſtill requiſite, the Lieges could never be *in tuto*, when a Diſpoſition is made to them, ſeeing very many Men, who are in perfect Health, do oft die ſuddenly, before they have Occaſion to go to Kirk and Mercat, and when the Perſons to whom the Diſpoſitions are made, cannot ſuſpect there is any Need of their going there.

" BUT tho' Kirk and Mercat were requiſite, yet it can be proven that the Lord *Coupar* went to both; and albeit he was ſupported, yet that was only in a Piece of the Way which was rough, and at which he us'd to be ſupported at other Times, when he was in Health; and was therein ſupported now, not becauſe of the Sickneſs, but becauſe of the Way.

TO which it is replied, I. That the Law and continual Deciſions having fix'd upon Kirk and Mercat, as *indicia ſanitatis*, no other Acts can be ſuſtain'd as equivalent; for where the Law requires Solemnities, ſuch as theſe are, *ſolennia non poſſunt per æquipolentia adimpleri*: Thus Earth and Stone being required as Symbols, in Saſines; Three Oyeſſes at Mercat-croſſes, *&c.* Acts equipollent to theſe would not be ſuſtain'd: And the Law having appointed that a Child ſhould be heard cry, to the end Marriage may not be diſſolved, tho' the Woman die within Year and Day, the Law ſuſtains not that the Child was a lively Child, or might have cried; for, ſaith that Law, It was fit that ſome certin Sign ſhould be fix'd upon, to prevent the Arbitrarineſs of Witneſſes. And ſeeing it would not be ſuſtain'd to elide the Reply of Kirk and Mercat, and the Alledgance of Health founded thereupon, that the Defunct was not in Health, tho' he went not to Kirk and Mercat; ſo the Reaſon of Reduction founded upon Sickneſs, becauſe he went to Kirk and Mercat, ought not to be elided, by alledging that the Defender was in Health, tho' he went not to Kirk or Mercat: And if equivalent Acts were ſuſtain'd, this Law might be eaſily eluded, and the Effect of it would become altogether arbitrary.

II. THE Acts condeſcended on are not equivalent Signs of Health, to the going to Kirk and Mercat: Firſt, Becauſe theſe Acts of going to Kirk and Mercat, are fix'd upon by a long Tract of Deciſions, and ſo are *ſolennia jure recepta*; but theſe other Acts, are not ſuch as have been found equivalent by any former Deciſion: But on the contrary, Acts of more adjuſted Equipollency than theſe, have been repelled, when propon'd to take off the Reaſon of Death-bed: And thus in the foreſaid Deciſion, *February* 1. 1622, it was alledged, That the Diſponer was able to go to Kirk and Mercat, and that he went about his Affairs within Doors, and came to his own Table, as formerly: And tho' it was alledged upon the *penult. June*, 1635, That the Granter of that Diſpoſition then quarrelled, and which was made upon moſt deliberate Grounds, was able to manage his own Affairs, as formerly, having only a Palſey in one Arm, which did not affect the Judgment. And the 1. *July*, 1637, it was alledged, That the Diſponer, who had granted a Bond of Proviſion to his own Son, had no Diſeaſe which could be *impedimentum rebus agendis*, and that he liv'd 28 Months thereafter, and went about his Affairs. Yet all theſe Condeſcenſions upon Health were repelled, tho' the Time of ſurviving were much longer there than here, the Caſe of the granting of the Diſpoſition much more favourable; (and indeed, none can be leſs than this Defender's Caſe) and the Perſons who did diſpone, of a much greater Conſiſtency both of Health and Spirit, than the Lord *Coupar*, who was known to have needed little Sickneſs; and much leſs Importunity and Deſign, was us'd in this Caſe, to make him do Acts both irregular and unwarrantable. As to the Deciſion, *Sym* againſt *Graham*, 'tis Anſwered, That it was proven there, that the Defunct went upon his own Feet to the Apothecary's Shop, and to his Phyſician's Houſe; which implies neceſſarily, in *Edinburgh*, a going thro' the Mercat, whereby the Law is ſatisfied; and a public Act was done, which might be proven by unſuſpect Witneſſes. And as to *Pargillis*'s Caſe, the Diſpoſition there, was made in favours of a Grandchild, with whoſe Mother the Grandfather had promis'd the Eſtate, at the contracting of the Marriage, he having been Party-contracter for her, tho' that Promiſe was not inſert in the Contract; likeas the Diſponer went to the Ground of the Lands, unſupported, and gave the Saſine himſelf: And albeit he rode to the Mercat, becauſe he was goutiſh, which is the only Diſeaſe that was proven, and which is, in the Opinion of Phyſicians, rather a Pain than a Diſeaſe; yet he went to the Mercat, unſupported, from his Lodging.

III. ALL theſe Acts condeſcended on were done at ſeveral Times, and might have been very eaſily done ſingly, by a Perſon who was ſick, and none of them are ſuch Acts as require Health both of Body and Mind, as doth the going to Kirk or Mercat; nor did they require the coming abroad to open Air, which is the ſevere Trial of Health: And all theſe Acts were tranſacted *intra privatos parietes*, and ſo ſubject to Suggeſtion and Colluſion, the Witneſſes being ſuch as were under the Power of the Defender, who did elicite the Diſpoſition, and the apparent Heir being abſent, and very remote, as is ordinary in ſuch Caſes: Whereas the going to Kirk and Mercat, are Acts wherein the apparent Heir may hear a conjunct Probation; and wherein tho' the Witneſſes to be led for the Defender, deſign to prevaricate, yet the Fear of being control'd by a Multitude, would hinder them to adventure upon the deponing an Untruth.

IV. All the Acts condeſcended on ſeem to be done *ex affectata diligentia, & affectata diligentia pro negligentia habetur*; nor can any Acts be eſteemed equivalent, except they were ſuch, as clearly evidence, that if he had deſign'd to have gone to Kirk and Mercat, he could have done the ſame: Whereas in this Caſe, when the Defunct deſign'd to go to Kirk or Mercat unſupported, as Law requires, he could not perform the ſame, but behoved to be ſupported, as ſaid is. By which it clearly appears, he did not any Acts that were equipollent.

To his actual going abroad to the Kirk or Mercat, I make no Anſwer, ſince our Law requires his going unſupported, which cannot be alledged in this Caſe; for as going to Kirk and Mercat is an Exception which takes off the Reaſon of Death-bed, ſo the being ſupported eludes the Exception of going to Kirk and Mercat. And ſo unfavourable have their Reductions always been in our Law, that the Purſuer offering to prove Supported, is preferred to the Defender, who offers to prove Unſupportable, as was found, 27. *July*, 1629, albeit *regulariter* the Defender is preferred to prove his own Defence. Nor needs the Purſuer debate from what Cauſe the Supportation proceeded; for it cannot be known to Witneſſes upon what Account he was ſupported, and that might have proceeded from Infirmity, as well as from the Ruggedneſs of the Way: And ſo this Law would in its Execution and Application return ſtill to be arbitrary, if Witneſſes or Judges might gueſs at the Occaſion of the Supportation. But without Debate, the Purſuer contends, that this Privilege of eluding a Reduction *ex capite lecti*, being only competent to the going to Kirk and Mercat unſupported; he who is ſupported gains not the Privilege, becauſe he fulfils not all the Qualities; and it is very well known that the Way is ordinary Cauſey, and that the Houſe and Mercat are not diſtant three Pair, and the Lord *Coupar* uſed ordinarily to walk there unſupported: So that when he took Support, eſpecially at a Time when he deſigned ſo much to go unſupported, it ſhews convincingly, that his Infirmity, tho' not himſelf, remained ſtill diſobedient to all their Deſigns; and tho' they could force him to diſpone, yet they could not force him to be ſound. And your Lordſhips may eaſily judge, that theſe who were at ſo much Pains to make this Diſpoſition ſubſiſt, were not wanting to uſe all Endeavours for carrying him over this laſt Difficulty; ſo that this Support proceeded not from Chance, but from Neceſſity.

Seeing then your Lordſhips have been ſo rigid Obſervers of the Law, in prejudice of poor Children, and poor Relicts, who were unprovided, I hope you will not proſtitute it in favour of a Stranger, who had formerly gotten all the Defunct's Eſtate in Jointure: Reward not thus the Importunity of Wives, and bribe not avaritious Perſons to trouble us at a Time, when we ſhall think all Time too ſhort, to be employed in the Service of Him, whom we have ſo much, and ſo often offended; and take not from us in one Deciſion, the Protection of the Law when our Judgments are frail, the Quiet of our Souls when we are ſick, and the Love of our Succeſſors when we are dead.

*THE Lords reduc'd the Diſpoſition.*

FOR

# The Counteſs of *Forth*, &c.

AGAINST

# E. *C.*

# The Eighth Pleading.

## *How far Reſtitutions, by way of Juſtice, are prejudged by Acts of Indemnity.*

I Might ſtand in the next Degree of Guilt to thoſe who forfaulted the Earl of *Bramford*, if I thought that his Merit, or your Lordſhips Loyalty needed, that I ſhould urge much the Favour of his Caſe. He was a Perſon who carried the Honour of our Nation as far, and as high as could be expected from the happieſt Subject in much better Times: For after that his Merit, armed merely by his own Valour, had rais'd him to be a General in *Sweden*, he was choſen General in *England*, in a War, wherein all his Nation were ſuſpected, and did there Actions worthy of our Praiſe, and their Wonder. But whilſt he had refus'd to draw a Sword againſt his Countrymen, even whilſt they were Rebels, they forfaulted him, for fighting in a Kingdom, over which they had no Juriſdiction, and forfaulted him by His Majeſty's Laws, and at the Purſuit of His Majeſty's Advocate, when he was hazarding his Life for His Majeſty, by His own Command, and in His own Preſence; and the very Day after he had gain'd that Battle for Him, which, if proſecuted according to that brave General's Advice, might have ſecur'd to Him that juſt Power, which thoſe Rebels were ſcruing out of His Hands. The Earl of *Forth* being, with His Majeſty, reſtor'd to his own, his Lady and Daughter purſue ſuch as intrometted with his Eſtate, and inſiſt now againſt E. C. who, for being General to the then Eſtates, got 40000 Pounds out of the Eſtate of the Earl of *Forth*; which was a Part of that Sum, which was due to his Lordſhip, upon an heritable Security, by the Earl of *Errol* and his Cautioners. In which Debate, if I uſe Terms which may ſeem indiſcreet and zealous, I muſt be pardon'd, ſince I ſhall uſe none, but what are forc'd upon me by that Act of Parliament by which I plead; ſince E. C. is a Perſon to whom I wiſh much Succeſs in every Thing, ſave this Debate, and to whom my Reſpects are above Jealouſy.

It is alledged for E. *C.* “That tho' ſuch as are reſtored againſt Forfaultures, by way of Juſtice, may by virtue of their Reſtitution, repete all that is extant of their Eſtate, yet they cannot repete what Money belonged to them; for Money being *res fungibilis*, and naturally ſubject to Conſumption, it paſſeth from Hand to Hand, without bearing any *Impreſſa*, whereby ſuch as intromet with it may know how it came, and whoſe it was: Nor doth the Nullity of a Title in the firſt Obtainer, infer Repetition of Money from ſuch as derive a Right from them, as may be clear'd in many Inſtances; for if Money had been paid to one, who obtain'd an unjuſt Sentence from the late Uſurpers, yet they would not be liable in Repetition, after that Sentence were revived and declared null.

“If one ſhould ſerve himſelf Heir unjuſtly, and as Heir aſſign a Sum to one of his Debitors, tho' his Service were thereafter reduc'd, as unjuſt, yet could not his Aſſigney be obliged to reſtore what he recover'd by virtue of that Aſſignation. If the Exchequer ſhould preſently gift an Eſcheat, tho' the Eſcheat, and Horning whereupon it proceeded, were thereafter reduced, yet a Sum paid by virtue of that Gift, when ſtanding, could not be repeted: And if this Principle were not ſuſtain'd, all Commerce would be deſtroyed; and tho' E. C. his Title be now reduc'd, yet it was valid the Time of his Intromiſſion, which is ſufficient to aſtruct his *bona fides*: And Lawyers, even in Intromiſſions with Mo-

“ ney, which was at firſt robbed, conſider only *Vim illam quæ intervenit tempore numerationis*; whereas here, tho' the Eſtates did moſt unwarrantably and rapinouſly forfeit the Earl of *Forth*, yet his Money being brought in to the public Treaſure, and confounded with their Caſh, it ceas'd to be his, and became their's: And therefore, E. C. being Creditor to them, as he might have taken any Precept juſtly from them, payable out of their Treaſure; ſo might he have taken Precepts upon his Eſtate, which ceas'd to be his. Nor can the Earl of *Forth* be ſaid to be a Loſer by E. C. ſeeing the Eſtates for the Time would have brought it in, and converted it to their own Uſe; in which Caſe, *Forth* would not have got Repetition againſt the Perſons to whom it were paid.

To theſe Grounds, it is (My Lords) replied for the Earl of *Forth*, That there is a Difference ſtated in Law, betwixt Reſtitutions by way of Grace, and Reſtitutions by way of Juſtice: In Reſtitutions by way of Grace, the Guilt remains, tho' the Puniſhment be remitted, and the Perſon forfeited is reſtored, not to his Innocence, but to his Eſtate; and therefore he recovers only what is extant of his Eſtate. But in Reſtitutions by way of Juſtice, the Sentence forfeiting is declar'd never to have been a Sentence; and therefore it can never be ſuſtain'd as a Warrant to any Effect, *Sed comparatur juri poſtliminii & fingitur nunquam interveniſſe, & tantum reſtituit juſtitia quantum abſtulit injuſtitia*; and therefore, not only what is extant, but all that belonged to them there is reſtored. But Sentences forfeiting may be diſtinguiſhed further, (as *Boſſius* obſerves, *tit. de remed. Juſtitiæ*) into ſuch, as tho' they were unjuſt, yet every private Perſon was not obliged to know the Injuſtice of Forfeiture: As if a Man had been forfeited in a Juſtice-court for Murder under Truſt, or a Landed-man for Theft; againſt which Sentences, tho' the Perſon forfeited were reſtored, yet it might ſeem hard, that ſuch as intrometted by virtue of Warrants or Aſſignations from the Eſtate, ſhould be forc'd to reſtore all they received. But others may be forfeited, as the Earl of *Forth* was, by virtue of Sentences, which were no ſooner pronounced than they became Treaſon, by an execrable Inverſion, not in the Pannel, but in the Pronouncers, and were not only Treaſon of their own Nature, but behoved to be acknowledged treaſonable by all ſuch as heard of them: And ſuch ſure was that Sentence pronounc'd againſt the Earl of *Forth*, which was againſt the fundamental Laws of this and all Nations, and which is declared by the Act of Parliament reſtoring him, to have been, at the Time it was pronounc'd, an Act of Rebellion, and an Invaſion upon His Majeſty's Royal Prerogative.

This being the State of this Reſtitution, it is (My Lords) anſwer'd to the Defence, That it is defective in the Application of all its Parts; for, that this Money was not *res fungibilis*, appears, becauſe the Law diſtinguiſhes all Eſtates *in mobilia* (*quæ ſunt fungibilia*) *immobilia, & nomina debitorum. Nomina debitorum* are Bonds due to the Creditor; which are of a middle Nature, betwixt Moveables and Immoveables; and theſe fall, certainly, under Reſtitution, by way of Juſtice, even according to the Defender's own Principles; for they bear the Name and *Impreſſa* of him to whom they belong; and ſo the Intrometter is warn'd to beware of them. And that this Money crav'd here to be repeted, was ſuch, is very clear; for it was due upon an heritable Bond to the Earl of *Forth*, by the Earl of *Errol* and his Cautioners, and came never in, nor was confounded with the public Treaſure; for E. C. got a Precept upon it, before the Public obtain'd a Sentence for it, and got a Warrant for that ſpecific Sum, owing by that Bond to the Earl of *Forth*, and got Payment of it from the Earl of *Forth*'s Debitors, as Debitors to him: So far did juſt Heaven allow this Haſte to be its own Puniſhment.

As to the Second Member of the Defence; which is founded upon his *bona fides* to intromet with the Sum, for Payment of a Debt due to him, (he having been General at that Time) from an Authority then in Being: 'Tis replied, That *bona fides* in the Intrometter doth not extinguiſh and take away the Right of the true Proprietar; *nam quod meum eſt, ſine facto meo a me auferri nequit*. And Lawyers determin, That to denude a Man of his Property, there muſt be ſome Fact of his, either *ſe obligando*, or *delinquendo*; neither of which can be alledged in this Caſe: And if the Earl of *Forth* was never denuded, then *Calendar* could have no Right; for, *duo non poſſunt eſſe domini in ſolidum unius & ejuſdem rei*: Which Maxim holds ſtill *in ſpecibus & nominibus debitorum*; for tho' ſometimes it may fall in numerate Money, the Dominion whereof is, for the Good of Commerce, ſometimes tranſmitted by ſimple Numeration; yet it never fails *in ſpecibus, ſeu corporibus*. And that Money due by Bond, is not of the Nature of *pecunia numerata*, is clear from *l. Si certus, ff. de legat.* 1. And if a Robber take away my Cloak, and give it to a Stranger; yet I would, *per rei vindicationem*, get it back, notwithſtanding of the Defender's *bona fides*: But here there was no *bona fides*, ſeeing E. C. was obliged to know, that the Earl of *Forth* was unjuſtly forfeited; and that the Act of Parliament, againſt which there is no diſputing, has declar'd it to have been Treaſon. And if E. C. were purſued for oppoſing His Majeſty at that Time, for concurring to the forfeiting of the Earl of *Forth*, he could not defend himſelf otherwiſe, than by the Act of Indemnity: *Ergo*, in the Caſe of Reſtitution of *Forth*'s Eſtate, which is excepted from the Act of Indemnity, that Warrant proceeding upon Forfeiture, cannot defend him: For how is it imaginable, that his *bona fides*, which could not defend him againſt the Loſs of his own Eſtate, ſhall be able to defend him againſt the reſtoring of *Forth*'s, to which he had, *aliunde*, no Right? There is no *bona fides*, but where it is founded upon a Title; *& ubi non ſubeſt titulus, ibi non eſt admittenda bona fides.* But ſo it is, that E. *C.* his Title, *viz. The Forfeture of the Earl of* Forth, is declar'd by Parliament, never to have been a Title: But E. *C.* who was a Member of that Parliament which forfeited the Earl of *Forth*, and General of that Army which defended them, is in the ſame Caſe, as if Two Robbers had taken a Bond from a free Liege, and had given it to one of their own Society, who was at leaſt a Spectator; in which, 'tis moſt certain, that the free Liege ſo robbed, would recover Payment from him who intrometted.

BY this unwarrantable Intromiſſion with the Earl of *Forth*'s Money. E. *C.* became his Debitor; and the ſupervenient Act of Indemnity could no more defend E. *C.* againſt this, than it could againſt his other Debts. Indemnities are deſign'd to ſecure againſt the Prince's Purſuits who gave them, but not to ruin Innocents; elſe were theſe Indemnities Acts of Injuſtice, not of Clemency. *Si criminaliter cæptum judicium interventu indulgentiæ ſcriptum eſt, habes tamen reſiduam indagationem, & potes de fide ſcripturæ civiliter quæri. l.* 9. *C. ad l.* Cornel. *de falſ.* Amneſties are but general Remiſſions, and ſo cannot be ſtronger as to all Crimes, than a particular Remiſſion is as to one: But ſo it is, that a particular Remiſſion can only diſpenſe with the Prince's Intereſt: Nor doth it cut off the Purſuits of private Perſons, as the former Law obſerves very well. And the Emperor, in another Law, tells us, *Nec in cujuſquam injuriam beneficia tribuere moris noſtri eſt*, l. 4. c. de emancip. libero.

FROM theſe Grounds your Lordſhips have an eaſy and juſt Proſpect of the Anſwers which may be made to the Inſtances adduced; for we are not in the Caſe of ſuch as obtain Gifts from the preſent Exchequer, nor Rights from Heirs once lawfully ſerv'd: For the Juriſdiction whereby theſe Rights are eſtabliſh'd, are not *funditus* taken away, nor were the ſingular Succeſſors obliged to know the Sentences, whereupon their Rights were founded, to have been null, as E. *C.* was in this Caſe; nor can this prejudge Commerce, except among ſuch as are obliged to know the Grounds of their Commerce to have been unwarrantable; and Rapines and Violence *ſunt extra Commercium*, which is ſo far from being an Abſurdity, that it is an Advantage; for this may help to ſtop all Commerce amongſt Rebels and Uſurpers, and to looſe theſe Cords by which they are tied: And from this, I beg Leave to repreſent to your Lordſhips, That by this Deciſion you will do more to hinder Rebellion, and to encourage Loyalty, than Armies can do: For ſince no Man will hazard Hanging and Damnation by Rebellion, without he be baited to it, by the certain Expectation of a Prey; ſo if Rebels find, that they can never be ſecure of any Prey ſo obtain'd, they will certainly neither be ſo eager to have ſuch as are loyal forfeited, nor ſo deſirous to ſettle upon themſelves Eſtates ſo robb'd.

AS to that Principle, *That whatever Defect was in the Title here, yet there was none in the Numeration of the Money; and Defects in the Nnmeration are only objected againſt ſingular Succeſſors*; It is anſwered, That *vis eſt vitium reale, & afficit rem ipſam licet transierit per mille manus.* And this original Sin infects the whole Iſſue; for the States could not tranſmit a better Right than they had themſelves, *nemo poteſt tribueri alteri plus juris, quam ipſe in ſe habet:* And *Plin. lib.* 3. *epiſt.* 9. informs us, that *Cæcilius Claſſicus* having robb'd the Province which he commanded, and having paid his Creditors with the Sums extorted, *pecuniæ quas creditoribus ſolverat, ſunt revocatæ.* But tho' this might be alledged where there remains ſtill ſome colourable Title in the Author, and where the ſingular Succeſſor was not obliged to know the Defect; yet in this Caſe it can never be pretended by E. *C.* whoſe Right is *funditus* taken away, and who was at the Time the Money was aſſign'd, or was numerate to him, obliged to know that Defect in his Right, which is now the Ground of this Reſtitution.

I ſhall not trouble your Lordſhips with anſwering thoſe Objections, founded upon the Earl of *Forth*'s ratifying and homologating his own Forfeiture, by giving in a Petition, 1647, when he was content to accept back his Heritage, without theſe Sums; for it is known, that Petition was not ſign'd by himſelf, nor did he ever appear before thoſe Uſurpers; and what was done by his Friends cannot bind him, eſpecially whilſt that Uſurpation continu'd, under which he firſt ſuffer'd; nor to the Act 1662, wherein ſome Intrometters are declared free, for that Act was only conditional, and upon Proviſion that His Majeſty ſhould pay the Earl of *Forth*'s Succeſſors 15000 Pounds *Sterling*, out of the Fines; which Condition was never purified; and I wiſh it had, for that was much better than what is here expected: Theſe Grounds are ſuch, upon which none, but ſuch as are ready to drown, would faſten. But (My Lords) if I needed to prepoſſeſs you with what the Parliament deſign'd in this Reſtitution, I might eaſily clear, that they deſign'd theſe Intrometters ſhould be liable; for when Duke *Hamilton* and the Earl of *Errol* were abſolv'd as the immediate Debitors, it is very well known, that they were abſolv'd upon expreſs Proviſion, that they ſhould deliver to the Earl of *Forth*'s Succeſſors ſuch Papers as might prove the Intromiſſion of theſe Defenders; which had been unneceſſary, if the Intrometters had not been liable; and the Reaſon why theſe Debitors were abſolved had been groundleſs, if Intrometters had not been liable. But to what purpoſe ſhould the Parliament have reſtored *Forth*, if they had not deſign'd the Intrometters ſhould be liable? For the Parliament knew, that there was nothing elſe which could have been reach'd by this Reſtitution, except theſe Moneys now purſued for, and ſo their Juſtice had proved an airy and empty *Fanfara*, bringing nothing with it but the Occaſion of certain Spending, upon an uncertain Expectation: To avoid all which Debate, the Parliament have expreſly ordain'd the firſt Debitors to produce theſe Papers, for proving againſt theſe Intrometters, who are hereby declared liable; which Words are ſo expreſs, that they preclude all Cavil, as well as Difficulty.

This being the Nature of our Purſuit, and theſe the Anſwers to any pretended Difficulties, it is humbly recommended to your Lordſhips, to give a Teſtimony of your Hatred againſt thoſe violent Courſes formerly practiſed, and to teach Poſterity what ſuch Invaſions may expect. I know well, that no Man has deſerv'd better of His Majeſty than E. C. hath of late; and I hope, that when you have decided againſt him, he will heartily acquieſce to your Sentence, as a further Proof of his ſincere Loyalty, *Nec tollitur peccatum, niſi reſtituatur oblatum.* I confeſs, that he did not yield to thoſe Impreſſions, till they had overcome the whole Nation, and that nothing but the Perſuaſion of his being then employed in the Service of his Conſcience and Country, could have withdrawn him from the Service of his Prince: But this can plead no further, than that his Prince ſhould pardon theſe Eſcapes, not that He ſhould reward them, eſpecially to the Prejndice of His faithful Friends.

*THE Lords ſuſtain'd the Purſuit, and repell'd the Defences.*

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## A

# Debate in favour of the Earl of *Forth*,

AGAINST

## E. *C*.

# The Ninth Pleading.

## *How far a Perſon unjuſtly forfeited and reſtored, may repete Annualrents from the Intrometters.*

IF I were not (My Lord *Chancellor*) very confident of the Juſtice of my own Cauſe, and of your Lordſhip's Learning, as well as Integrity; I ſhould be ſomewhat jealous, that the learn'd Diſcourſe you have heard, in favour of my L. *C.* might leave ſome Impreſſion. But (My Lord) I think it impoſſible that any, beſide thoſe unjuſt Judges who forfeited the Earl of *Forth* of his principal Sum, would again forfeit him of his Annualrents; nor do I imagine, that even thoſe would have done it, if they had not been diſtemper'd by their own feveriſh Zeal, and that national Fury: So that if your Lordſhips ſhould follow their Example, you ſhould ſhare their Guilt, but want their Excuſe.

IT is (My Lord) now alledged, “ That E. *C.* is not liable in Payment of Annualrent to
“ the Earl of *Forth*'s Succeſſors, becauſe Money is of its own Nature *res ſterilis*, and in Law
“ bears not naturally Annualrent; and therefore an Intrometter, tho' *predo*, tho' *malæ fidei*
“ *poſſeſſor*, is not liable for Annualrent; for no Man is obliged to improve another Man's
“ Money: And by the Civil Law, (which was more ready to give Annualrents than our's)
“ *In corporibus ex quibus fructus naturaliter proveniebant, malæ fidei poſſeſſor* was liable in
“ *fructus productos*, but *in corporibus quæ non producebant fructus de ſua natura, nec predo,*
“ *nec latro tenebatur in fructus*: And tho' a Perſon who impropriated public Money was pu-
“ niſhable, *ratione repetundarum vel ex reſiduis*, and ſo was there moſt unfavourable of all
“ Intrometters, yet he was not liable *in uſuras*; nor by our Law are Annualrents ever due
“ *ſed ex lege, vel ex pacto*, neither of which can be alledged in our Caſe; and the Act of
“ Indemnity hath made Intrometters with public Money liable in Repetition; and tho' their
“ Intromiſſion be moſt unwarrantable, yet are they not made liable by that Act in Annual-
“ rents. Likeas, tho' theſe Moneys due to the Earl of *Forth*, did at firſt bear Annualrent,
“ yet they being once uplifted, became a Sum lying in Caſh, which E. *C.* was not obliged
“ to re-employ upon Annualrents, and by the Act 1662, whereby His Majeſty was to
“ repay the Earl of *Forth*, he was only to be repaid of his principal Sum, but not of his
“ Annualrent.

TO which, (My Lord) it is anſwer'd for the Earl of *Forth*, That ſince your Lordſhips have found E. *C.* his Title to have been unjuſt, we muſt debate now againſt him *tanquam*, at leaſt, *male fidei poſſeſſorem*; for the Act of Parliament has declared this Forfeiture an Invaſion upon His Majeſty's Prerogative, and you have by your Sentence, found it not to be ſhelter'd under the Act of Indemnity.

LET us therefore, in the firſt Place, conſider that the Law never deſign'd to favour Oppreſſors, nor ſuffer the Innocent to be prejudged; it never deſign'd that Men ſhould enrich themſelves by their Guilt, and be rewarded for their Violence. And ſince the Fear of Puniſhment is ſcarcely able to reſtrain that Wickedneſs, to which we are naturally prone; it were abſurd to heighten our Viciouſneſs by Rewards: Whereas, if *malæ fidei poſſeſſores* ſhould not be liable to repay Annualrents, they ſhould be enrich'd by their Oppreſſion, and ſhould be baited to commit Violence, and to maintain themſelves in it; for they ſhould be ſure *lucrari* (at leaſt) *uſuras rei, per vim & injuſte ademptæ*. And therefore (My Lords) tho' the Law makes a Diſtinction *etiam in malæ fidei poſſeſſore, inter corpora, ex quibus fructus naturaliter proveniunt, & corpora ſterilia*: Yet, they do not this upon Deſign to favour vicious or violent Intrometters, but in order to the ſeveral Ways of taxing the Reſtoration of the Perſon injured; for, where the Bodies unjuſtly intrometted with bear Fruits, they ordain the Fruits to be reſtor'd; but where they bear not naturally Fruits, the Law doth not ordain the Intrometters to be free, but to be liable *in damnum & intereſſe, & in omnem cauſam*. This the Law defines to be all the Advantage could have ariſen out of the Thing intrometted with. This being an uncontroverted Principle, I humbly conceive, E. *C.* ſhould be liable to theſe Annualrents acclaimed, and that upon theſe Three Conſiderations.

FIRST, This Sum intrometted with by E. *C.* was a Sum bearing Annualrent; and therefore, *Forth* being reſtored by way of Juſtice, he ought to be put in the ſame Caſe he was in before the Forfeiture: And if the Money were now lying unuplifted, *Forth* would be preferred to E. *C. quoad* theſe Annualrents, which clears, that they were never due to E. *C.* and if they were not his, he ought to reſtore them. The Forfeiture is declared to be no Warrant; and ſo, tho' E. *C.* were in the ſame Condition as a Stranger is, who intromets with another Stranger's Money without a Warrant, yet ſure he would be liable in Annualrents, if he intrometted with a Sum bearing Annualrent: Much more then ought he to be liable, who hath intrometted with a Sum, which was unjuſtly and predoniouſly intrometted with. For here, E. *C.* is in the ſame Caſe, as if a Man had broke my Houſe, and had taken away my Bonds with blank Aſſignations lying beſide me, and had uplifted for many Years, the Annualrents of theſe Sums; or if a Man had, upon a falſe Token, taken up my Moneys which bear Annualrent: In which Caſe, it is moſt undeniable, that the vicious Intrometter, would be liable in repayment of the Annualrents. And to invert one of the Defender's own Inſtances, it is not imaginable, if any ſhould uplift a Sum belonging to a Perſon lately forfeited, and which did bear Annualrent, that the Exchequer would not exact Annualrent from the Intrometter. I might here urge likewiſe, That a Minor's Money intrometted with, bears Annualrent by the Civil Law and our's; and it is moſt clear, that *pinguius ſuccuritur reſtituto, per modum juſtitiæ, quam minori*, as *Boſſius* well obſerves, *tit. de remed. juſt. num.* 3. *& Jaſon. ad. l. Gallus ff. de liber. & poſtlim.* For as they are equal, in that Neither did conſent to the Intromiſſion; ſo he who is forfeited for his Country, deſerveth more Favour than a Minor doth; and many Things are in Law allow'd *ob bonum Reipublicæ*, but we are not here in the Caſe of *corpus ſterile*; for Money bearing Annualrent is not *corpus ex ſua natura ſterile*, but *habet fructus ex ſe facillime provenientes*; *uſura eſt* Τοκος *ſeu partus pecuniæ*, and ſhould rather be reſtor'd than *fructus prædiales* ought to be; for in theſe the Intrometter beſtow'd his Induſtry, but here Annualrent doth grow very eaſily: And that Annualrent is due, even where it was at firſt *ſterilis*, is clear from § *quid ſi l. item veniunt ff. de hæred. petit. Quid ſi poſt venditam hæreditatem hic ipſe res venient fructuſque earum, ſed ſi forte tales fuerunt, quæ vel ſteriles erant, vel tempore perituræ & hæ diſtractæ ſunt vero pretio, tunc poteſt petitor eligere ut ſibi pretia & uſura præſtentur.* Upon which Law the Doctors obſerve, that *malæ fidei poſſeſſor tenetur rem ipſam reſtituere, ſi extet, vel pretium & uſuras, ſi non extet*: But much more, where Money bearing Annualrent is intrometted with, for there the proper *damnum & intereſſe* is Annualrent, and our Law calls Annualrent *the Intereſt of Money*. So that tho' the Money had been *ſterilis*, yet the vicious Intrometter would have been liable *in damnum & intereſſe*, and the Damage and Intereſt of Money is Annualrent: Nor is this Money of the Nature of that Money, which the Law makes *ſterilis*, for here was an heritable Bond bearing Annualrent, *nomen debitoris*, and which in our Law is not accounted *inter mobilia*, and ſuch a Bond *pro feudo habetur*: Nor can it be ever ſaid, that this heritable Security was lawfully looſed, no Requiſition having ever been made.

ANOTHER Ground I go upon is, That *malæ fidei poſſeſſor, tenetur non ſolum in fructus perceptos, ſed in percipiendos*, l. ſed & partus ff. quod metus cauſa; where the Law determines, that when any Thing is *vi, vel metu* taken, *partus ancillarum & fetus pecorum, & fructus reſtitui, & omnem cauſam opportet*; *nec ſolum eos qui percepti ſunt, verum ſi plus ego percipere potui & per metum impeditus ſum hoc quoque præſtabit.* And when Lawyers conſider *fructus illos percipiendos qui ſunt reſtituendi a malæ fidei poſſeſſore*, which they call *fructus civiles*, they define them with *Bartolus, ad l. ex diverſo ff. de rei vindicat.* to be *vel quos petitor percepiſſet, ſi ei poſſidere licuiſſet, vel quos poſſeſſor quo alios diligentior non eſt, percipere potuiſſet.* According to which Characters (worthy of their wonderful Author) theſe Annualrents are to be reſtored upon both Accounts; for they might have been uplifted by the Earl of *Forth*, if this Forfeiture and Intromiſſion had not interven'd, and by E. *C.* had he continued theſe Sums for After-years, as in the Beginning, in the Cautioner's Hands; or if he had re-employ'd them in other Hands upon the firſt Terms: And if he, ſtudying either his own Gain or Conveniency, has inverted the primitive Uſe of *Forth*'s Money, ſhould either his Gain or Humour prejudge *Forth*? *Incuria ſua in rebus alienis nocere non debet.* And *Copus Pariſienſis* doth excellently obſerve, That *ſicut ille qui culpa deſit poſſidere pro poſſeſſore habetur, ita & ille qui fructus percipere potuit pro percipiente habetur, ſi culpa ſua deſiit non poſſidere.* What can be more ſolid or plain, tho' E. *C.* had not employed them upon Land, whereof he has reap'd the Fruits conſtantly, ſince they were ſo employed? If a Man be violently ejected out of a Mill which was grinding, a Coal-heugh, or Salt-pan which was going, he would certainly be reſtor'd, not only to his Coal-heughs or Salt-pan, but to all that they might have yielded: Much more then ought he to be reſtor'd to his Annualrent, which was a more ſure Product than theſe. And whereas it is pretended, "That an Intrometter, "tho' wanting a juſt Title, is not obliged to improve the Money ſo intrometted with by him, "and ſo cannot be liable to pay Annualrents for it. It is to this anſwered, That tho' he be not obliged to improve them, yet he ſhould be liable, if he alter'd the natural Improvement of them: This would not be allowable in *bonæ fidei poſſeſſore*, much leſs ought it to be indulged in *malæ fidei poſſeſſore*; and tho' the Intrometter *in crimine repetundarum*, be not liable *in uſuras*, yet he is liable *in quadruplum*, which much exceeds theſe, and would alſo be liable *in uſuras*, if he intrometted with public Money bearing Annualrent, which is our Caſe. And whereas it is pretended, That Annualrent is in our Law only due *ex lege, aut ex pacto*; it is anſwered, That Annualrent is here due *& ex lege, & ex pacto*: *Ex lege*, becauſe in Reſtitutions *ex juſtitia*, the Party ought to be reſtored *in integrum, cum omni cauſa*, in which Annualrent is included; *& ex pacto*, becauſe *C.* hath given his Bond to ſecure the Debitors, as to all Damage or Intereſt they could ſuſtain.

THE Third Principle I fix upon is, That E. *C.* gave his Bond to relieve the Earl of *Kinnoul* and *Errol*'s Cautioners, of all Damage and Intereſt they could ſuſtain by paying theſe Moneys to him; and therefore, ſeeing they are now abſolved by the Parliament, upon expreſs Proviſion, that they ſhould make out the Intromiſſion of ſuch to whom they paid the Money; it follows by an infallible Inference, that they are liable to the Earl of *Forth* for what Damage he ſuſtain'd, and he, by this Sentence, is ſurrogate in their Vice. And E. *C.* having given this Bond, ſhould have always look'd upon this Money, as that which he was more Ways than tied to improve, and ſhould have known, that this Talent was not to have been laid up.

I will not burden your Lordſhips, with ſatisfying the Clamours rais'd againſt the Rigidity of this Purſuit. It is not craved, that the King would beſtow E. *C*'s. Eſtate upon *Forth*, but that *Forth* ſhould be reſtored to his own: E. C's Life and Fortune being at His Majeſty's Diſpoſal, as excepted from the Act of Indemnity; the Ranſom craved, is only to reſtore the Earl of *Forth*'s Eſtate. We deſire not E. C. ſhould be made poor by his Crime, and it were unwarrantable to deſire that he ſhould be enriched by it, eſpecially when his being enrich'd will neceſſarily ſtarve them, who had never any Requital for their Loyalty, ſave this Act of Juſtice. *Forth*'s Lady and Family have been forced to borrow Money at dear Rates, (as all ſtarving People do) to ſupply their Want of theſe Annualrents; and if they be not reſtor'd to theſe, they are ſtill to be Beggars, for the Principal will not pay their Debts; and ſo they muſt wander the indigent Inſtances of their Prince's Unkindneſs, and Country's Injuſtice, whilſt their Oppreſſors do warmly poſſeſs their Eſtates, as the Reward of their Oppoſition to His Majeſty.

*NOT decided* in Jure.

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FOR

## *Bartholomew Parkman,*

AGAINST

## Captain *Allan.*

# The Tenth Pleading.

## *Whether Ships taken after they have carried Contraband Goods, can be declared Prize?*

MY Client is, I confeſs, (My Lords) taken as an Enemy to His Majeſty in this War; but it is by a Privateer, who makes all rich Ships ſo: His Ship is adjudg'd Prize; but it is by the Sentence of a Judge, who having the Tenth of all Ships as his Share, was too much intereſted to releaſe her when ſhe was taken. But our Law being jealous of that Court upon that Account, has allow'd a Remedy by your Juſtice, againſt what Injuſtice they could commit; and when we are concern'd with Strangers, and to let Foreigners know what Juſtice our Country diſpenſes, it was fit that they ſhould have entruſted the Deciſion to your illuſtrious Bench, whoſe Sentences may convince, if not ſatisfy, even ſuch as are Loſers by them.

THE Sentence adjudging that Ship Prize is, by the Admiral, founded upon theſe Two Grounds, "*Firſt*, That His Majeſty has, by His Declaration ordain'd, that all Ships which "were ſail'd by His Majeſty's Enemies the *Hollanders*, ſhould be ſeiz'd upon as Prizes; and "this Ship was ſail'd by *Hollanders*, at leaſt Three of them were of that Nation. The *Second* Ground was, "That he carried Contraband Goods for ſupplying His Majeſty's Ene-"mies, *viz.* Stock-fiſh, and Tar; and tho' he was not taken with theſe Contraband Goods, "yet he was taken with that Salt which was the Return of theſe, having loaded in Salt as the "Product of theſe Goods. My Client has rais'd a Reduction of this Decreet, as unjuſt, and reclaims againſt it upon theſe Reaſons.

AS to the Firſt Reaſon of Adjudication, bearing, "That the Ship was ſail'd with Three "*Hollanders*" he alledges, That the *Swede* being an Ally, was not oblig'd to take Notice of the King of *England*'s Proclamation of War, which is indeed *Lex belli quoad* his own Subjects, and may warrant them in what they do againſt the *Hollanders*, who are declar'd Enemies; but no Laws made by Him can tie Allies, further than is conſented to by expreſs Treaties amongſt them. And it were unjuſt, that becauſe the King of *Britain* deſigns to make War with *Holland*, that therefore it ſhould not be free for *Sweden* to uſe any *Hollanders* in their Service; eſpecially ſince without *Hollanders*, it is impoſſible to them to manage their Trade: And were it not unjuſt, that all the *Swedes*, *Spaniards* or others, who had employed the *Hollanders* before the War, to ſail their Ships, and had relied upon their Service, ſhould be forc'd immediately, upon declaring a War, to lay aſide all Trade? And if it were unjuſt for any in *Britain*, to take Priſoner a *Hollander*, who ſerv'd a *Swede* in *England*, much more unjuſt it is to take their Ship and themſelves as Prize, becauſe they were ſerv'd at Sea by *Hollanders*. Nor is it advantagious for the Intereſt of *England*, that this Gloſs ſhould be put upon the Proclamation; ſince it is *England*'s Intereſt, that the *Hollanders* ſhould all deſert their Country, and ſerve Abroad amongſt Strangers: Whereas by this Gloſs, they would be forc'd to ſtay at Home, ſince none elſe could employ them: And this will extremely gratify *Holland*, which commands, under ſevere Pains, by public Placaerts, That none of their Subjects, eſpecially Seamen, ſhould ſerve Abroad.

'Tis alſo humbly repreſented to your Lordſhips, That ſome of the Three who are *Hollanders*, are young Boys, who have no conſtant Domicile, but ſerve where they can have Imployment: And Servants are, by the Laws of *Oleroon* (which are now the *Lex Rhodia* of *Europe*) accounted Inhabitants of that Place where they ſerve; and we conſider not *domicilium originis in ſervis*; for they, in all Senſes, and amongſt all Nations, follow the Domicile of their Maſter, elſe the Power of Maſters would be much impair'd, and Commerce much entangled. Likeas it is fully proven, That theſe Men were not employed upon Deſign, by my Client, but were hir'd by him, upon the Death of ſuch as ſerved him when he was in *Denmark* and *Holland*; which Neceſſity is ſufficient to defend Subjects, and much more Allies. Nor is it imaginable, that a *Swede*, who is not concern'd in the War, ſhould, if his Men die in *Holland* or *Denmark*, lie idle there, loſs his Trade, and ſtay from his Country, becauſe he cannot employ His Majeſty's Enemies: Nor would *England* allow this, if they were Allies, and the *Swedes* only concern'd in the War: And tho' in a former Caſe, your Lordſhips adjudged a Ship, called *The Caſtle of* Riga, becauſe ſail'd by *Hollanders*; yet the greateſt Part of the Sailors were *Hollanders*, in that Caſe, who might, becauſe of their Number, have commanded the Ship, and taken her to *Holland*, or have with her, fought againſt His Majeſty's Ships, and have made them Prize, when they were ſecure. Nor doth it follow, that becauſe His Majeſty, in His Treaty with *Spain*, has allowed the *Flandrians* a Liberty to ſail with *Hollanders*, that therefore it muſt not be lawful to ſail with *Hollanders*: For the Deſign of that was not ſo much to allow the *Flandrians* to ſail with *Hollanders*, as to ſecure them againſt Seizures, upon the Preſumption of their ſpeaking *Dutch*, becauſe of the Vicinity of their Language, ſays the Treaty: And if this had not been granted to the *Flandrians*, all their Ships might have been brought in, upon Pretext that they were ſail'd with *Hollanders*.

The Second Reaſon of Reduction, upon which my Client craves to reſcind that pretended Adjudication, is, That tho' he had carried in Stock-fiſh and Tar to His Majeſty's Enemies; yet, except he had been taken when he was actually carrying theſe Contraband Goods, his being taken with the Return of theſe Goods, was no ſufficient Ground of Seizure; which I ſhall endeavour to evince by many Reaſons: Firſt, That by no Law, Stock-fiſh nor Tar can be called Contraband; ſeeing Contraband Goods are only ſuch as are determin'd to be ſuch by an expreſs Treaty, or by the general Cuſtom of Nations: Neither are Contraband Goods ſtill the ſame every where, but are by private Treaties with Allies, eſtabliſh'd to be ſuch, in reſpect of ſuch Terms as are agreed upon betwixt them; and generally theſe are only counted Contraband Goods *quoad* Allies, which have no Uſe in the Place to which they are carried, but for carrying on, and maintaining the War: And ſeeing the Reaſon why Contraband Goods are prohibited, is only, that Allies may not aſſiſt in the War againſt the Confederates; it is therefore very conſonant to Reaſon, that the Law ſhould only interpret thoſe Goods to be Contraband, which ſerve properly and immediately for maintaining the War; and Tar cannot be called ſuch, ſeeing it ſerves more for Peace, than War; and though an naval War cannot be carried on without Tar; yet Tar cannot be ſaid to be Contraband, no more than Cloth, Stuffs, Linen or ſuch Things, can be called Contraband, ſeeing War cannot be carried on without theſe. And if we look to the Treaty betwixt the Crowns of *Britain* and *Sweden*, we will find, that Tar is not enumerate in that Article; wherein it is declared, what Goods can be accounted Contraband: And in ſuch ſpecial Articles as theſe, *incluſio unius eſt excluſio alterius*; eſpecially where it appears to be deſign'd by both Parties, that theit Subjects ſhould be inform'd, what ſhould be look'd upon as Contraband; and it was very fit, that their Subjects ſhould have been inform'd expreſly, elſe that Treaty could but prove a Snare: And if we look narrowly into the Nature of the Particulars there enumerate, we will find, That there is nothing there expreſſed to be Contraband, but what is only and immediately uſeful for the War: And there is no General in all that Article, but only *Inſtrumenta bellica*; which cannot be extended to Tar, without an evident wreſting of the Word.

II. Tho' by an expreſs Article, the carrying in Victuals to Enemies be diſcharg'd as Contraband Goods, and that under the Word of *Comeatus*; yet Victual is only declar'd to be Contraband, in caſe it be carried to any of the Enemies Cities when they are beſieg'd; *Si civitas ſit obſeſſa*, (ſaith *Grotius*) which Reſtriction was very reaſonable; for then the carrying in that Victual, was the relieving and the maintaining of an Enemy's Town againſt the Faith of the League; for there, he who doth feed, doth defend: And tho' *Peſh.* relates, that the *Dantzickers* did confiſcate, in *Anno* 1458, 16 Sail of *Lubeckers* for carrying Victual to the Enemies, yet he forgets to tell whether the Enemies were beſieg'd, but he expreſly relates, that there the carrying in Victual was expreſly prohibited. I find, that by the *Roman* Law, *l.* 2. *C. quæ res export. non. deb.* it is declared unlawful to carry or ſell Arms to the Enemies of *Rome*; but tho' in Law, all that is not forbidden is allowed, and that there be there a full Enumeration of what ſhould not be carried into Enemies, yet Corn is not at all ſpecified. And by the Canon Law, all ſuch as ſupply *Turks*, and the other Enemies of Chriſtian Religion, with Guns, Swords, & *aliis metallorum generibus*, & *inſtrumentis bellicis*, are anathematiz'd; yet there is no Execration pronounced againſt ſuch as ſupply them with Victuals: And tho' to carry Wine or Oil to *Barbarians* was puniſhable by the *Roman* Law, *l.* 1. *C. eod. Ne quidem guſtus cauſa, aut uſus commerciorum*, leſt the Delicacies of the *Italian* Fruits ſhould have tempted thoſe to invade it; yet, that Law did not at all reach their Allies; nay, nor did it ſo much as prohibite even in Subjects, the ſending Corn to Enemies who were not *Barbarians*: So that whatever may be alledged againſt Allies, who buy Corns to carry into Enemies; yet it ſeems moſt unjuſt that the *Swedes*, who carry in only their own Product, either Corn, or Stock-fiſh, to ſell them, ſhould be proceeded againſt as Enemies upon that Account; and at this Rate, *Sweden* could no where ſell their Corn, nor other native Commodities, for they can only vent them either in *Holland*, *France*, *England*, or *Denmark*, and all thoſe being now engaged in this War, the poor *Swedes* behoved to loſe all their own Rents, and want all theſe Neceſſaries with which they can only be ſupplied from the Product of theſe. And here the *Swedes* cannot be ſo properly ſaid to ſupply the *Hollanders*, as to entertain themſelves, and His Majeſty would ſooner ſtarve thus His Allies, than His Enemies. And tho' Princes may impoſe theſe hard Terms upon their own Subjects, yet it were hard they could tie their Allies to the ſame Terms; which makes me believe, that the Deciſions related by *Boer. deciſ.* 178. and by *Chriſtinæus*, *deciſ.* 64. wherein they relate, that the Exportation of Corns in Time of War is a ſufficient Reaſon for confiſcating both Ship and Goods, *Frumenta, Vina & Olea, exiſtente prohibitione ad exteros, præſertim inimicos, exportare non licet. Chriſtin. ibid.* For Exportation being only prohibited, it can only extend to Subjects; for none can export properly but they: For Allies cannot be ſaid to export when they Trade, for to export is to carry out of the Place where the Prohibition was made.

I confeſs, that the carrying in Corns to *Holland* may ſeem a greater Supply to them, than it would be to any other Nation, becauſe their Country cannot ſupply them with its native Product; yet ſince they have the *Rhine*, the *Metz*, and other Rivers open to them, in which His Majeſty's Ships cannot ſtop their Commerce, they will be abundantly ſupplied with Corns, tho' *Sweden* could be bound up by this Treaty from ſupplying them: So that His Majeſty will prejudge thus His Allies the *Swedes*, in their Commerce, without wronging His Enemies, as to Corn or other Proviſion.

AND to clear, that the *Comeatus* here prohibited, is only Corn carried in to Cities beſieged, or to Armies of the Enemies, but that our Allies are not abſolutely prohibited to carry Corns to any who are in Enmity with us; your Lordſhips will be pleaſed to conſider, that *Comeatus* ſignifies properly, a Liberty granted to Soldiers to go and return *ſalvum conductum*, as is moſt clear by the whole Title, *C. de comeatu.* And tho' ſome have taken the Word thereafter in a tranſlatitious Senſe, *pro cibariis & alimoniis exercitus*, yet to extend that to all Corn carried in by way of Commerce to an Enemy's Country, ſeems very hard; eſpecially where it is not carried in *alimoniæ ſed commercii ergo*: And tho' Corn as the Staff of Life, be ſometimes ſpecially prohibited, yet that ſhould not be extended to Stock-fiſh and other leſs neceſſary Proviſions; and tho' it were extended to theſe, yet the carrying ſo ſmall a Quantity could no more be eſteemed a Contravention of the Treaty, than the carrying a little Money, (without which there can be no Trade) could be eſteem'd a Breach of that Part of the Treaty, whereby *Pecunia* or Money is ordain'd not to be carried: *Si quis ab initio ſui uſus cauſa exportaverit, poſtea vero, quia non indigeret, partem vendidit, legem non offendit*, Ludovic. *Concluſ.* 25. *circa modum uſus tunc præſumitur, cum modica quantitas vendita eſt*, Tuld. *Tit. C. Quæ res export. Num.* 6. From which I conclude, That the Prohibition

tion of carrying in Money or Victuals, can only reach thoſe who carry them in great Quantities, or to beſieg'd Cities, or Armies; or principally, for the Advantage of the Enemies, and for ſtrengthning them in War againſt His Majeſty: For ſince to reſtrain this, is the only Deſign of the Treaty, the Words of the Treaty ſhould be interpreted ſuitably to this Deſign: And thus this poor Ship can only be condemned for its original Sin, having carried Contraband in the former Voyage. Neither was there any ſuch conſiderable Quantity of theſe Stock-fiſh carried in here, as might ſhew any Deſign of aſſiſting the *Hollanders* by Victuals, ſeeing it was carried in a very ſmall Quantity, and might have been neceſſary for the Purſuer's own Company; and if they had deſign'd to have carried theſe as Commodities, they had carried them in greater Abundance: And Tar is the Product of *Sweden*, and ſo Commerce in it is neceſſary for them.

AND whereas it is contended, "That the Ship had formerly carried Enemies Goods, and "conſequently had tranſgreſs'd that Article of the Treaty, whereby *bona hoſtium tuto adve-* "*here non licet*. 'Tis anſwered, That if they had been taken carrying theſe Enemies Goods, the Goods could have been confiſcated, but not the Ship; it being very clear by the Law of all Nations, that it is lawful, even for Allies, to fraught their Ships to Strangers, in order to civil Commerce; and that to hinder this Liberty, is a Breach of the Law of Nations; as is very clear by the Conſtitutions of ſeveral Nations, printed lately at *Venice*; where amongſt other Articles, it is determin'd, *Si & navis & merces hoſtium ſint, fieri ea capientium*; *ſi vero navis ſit pacem colentium, merces autem hoſtium,* (which is our Caſe) *cogi poſſe ab his qui bellum gerant navem, ut merces eas in aliquem portum deferat, qui ſit ſuarum partium, ita tamen, ut vecturæ pretium nauta ſolvat.* Since then by the Law of Nations, the Skipper behov'd to have had this Fraught paid, tho' he had been taken carrying Enemies Goods; it were againſt all Senſe and Reaſon, that his Ship could have been confiſcated for carrying them. And *Camden*, in the Year 1597, tells us, That *Pole* did by their Ambaſſador complain, that the Law of Nations was violated, in that the *Engliſh* had, in their War with *Spain*, challenged their Natives for carrying their Goods to *Spain*. And *Serviens* relates a Deciſion, 12. *December*, 1592, wherein ſome *Hamburgers* were declar'd free, tho' they were taken carrying Corns and other Commodities to *Spain*, and becauſe they were Allies; for the Parliament of *Paris* thought, that Allies deſerved better than others.

IF we conſider the Treaty with *Sweden*, we will find, That Ships carrying Contraband Goods are only to be ſeiz'd on *ſi deprehendantur*; which (like all Words in Treaties amongſt Princes) muſt be taken *in auguſtiori ſenſu*; nor ſuits it with the Generoſity of Kings, to take little airy Advantages of one another, and to debate like pedantic Formuliſts, who enſnare one another in thin Cob-webs, as Spiders do Flees: But in no Senſe can theſe Words, *Si deprehendantur*, be extended to the Ships being taken in any former Voyage; for elſe they had been ſuperfluous and impertinent, ſince no Ship can be adjudg'd, except ſhe be taken in ſome Voyage. The genuin Interpretation of Words is, *interpretari ſecundum ſubjectam materiam*: And therefore, ſince theſe Words are inſert in a Treaty, wherein His Majeſty is to indulge Favours to the *Swedes*, they muſt be in Reaſon ſo interpret, as that they may be a Favour: And there is no Favour indulg'd here, if theſe Words be not taxative, and if they declare not any Ship free, which is not ſeiz'd carrying Contraband the time of the Seizure.

BY our Law it has been very wiſely provided, That we ſhould uſe Strangers in our Admiral-court, as they uſe us in their Country; Act 24. *Jam.* I. Par. 9. And it is offered to be proven, by the Law of *Sweden* Tar is not eſteem'd Contraband; nor can Ships be declared Prize for what they carried in a former Voyage: And ſince our Natives would complain of ſuch Uſage in *Sweden*, let them not meet with it in *Scotland*; which is very ſuitable to that excellent Title in the *Digeſts*, *Quod quiſq; juris in alterum ſtatuerit, ut ipſe eodem jure utatur.* By the Law alſo of *England*, (as Judge *Jenkins* reports, in a Return to your Lordſhips Commiſſion) no Ship is confiſcated upon this Ground.

BE pleaſed (My Lords) to conſider, what great Prejudices would ariſe to Trade, if Ships might be ſeiz'd, upon Pretext that they carried Contraband in a former Voyage; for by that Allowance, all Ships might be ſeiz'd upon, ſince this Pretext might lie againſt all; and every poor Merchant might be left a Prey to the ravenous Privateers, who might force them to ranſom themſelves from the very Hazard of a Seizure: In which Caſe, whatever were the Event of the Confiſcation, yet ſtill their Time and Expence would be loſt, and their Secrets and Papers would be made open; which is ſo great a Prejudice to Merchants, that by the *Rhodian* Law, *Secreta των ναυϛαθμων non licebat introſpicere, & introſpicientibus ultimum ſupplicium irrogabatur.*

IT was likewiſe very fit, that the *Swede*, and all Princes, ſhould tie the Privateers to a Probation that fell under Senſe, and ſuch is the having Contraband-goods preſently aboard, &

*ubi conſtare poteſt de corpore delicti*, and not lay poor Merchants open to the Hazard of the Teſtimonies of two Rogues, who being tempted by Malice or Avarice, might depone falſly, that the Ship carried Contraband Goods formerly: In which they might the freelier tranſgreſs because they could not be control'd; whereas no ſuch Falſhood is to be fear'd, if only actual carrying can confiſcate a Ship; ſince there, the Exiſtence of the Goods precludes all Poſſibility of Error or Falſhood. Were it not alſo very abſurd, to ſeize a Ship which poſſibly carried Contraband in a former Voyage, and thereby ruin a great many Merchants who were the preſent Fraughters of her, and who neither did, nor could know what ſhe had carried formerly? and yet, ſhe being ſeiz'd, their Voyage would be broke, and their Fortunes ruin'd. Or, if another Skipper or Owners had bought her from the firſt Offender, were it not unjuſt to ſeize the Ship? and yet the Ship were Prize, if this Opinion could take place. This were to puniſh Ignorance, and Commerce requires more Latitude, than ſuch Principles can allow.

It is, I perceive, urg'd for this Opinion, "That the Commiſſions granted now, and of old, bear expreſly a Power to take Ships which have carried Enemies Goods; and there is a Commiſſion produced in *Anno* 1628, of this Tenor, together with Two Deciſions of our Admirality to the ſame Effect." Neither of which are concluding; for Strangers and Allies are not obliged to take notice of private Commiſſions, which are not *leges belli promulgatæ*; theſe may warrant againſt Damage and Intereſt, but not againſt Reſtitution. And as to the Deciſions they are founded upon other Grounds alſo. It is alſo urged, "That the carrying Contraband being a Crime againſt the Prince or State who make the War, there is *jus quæſitum* to them, by the very Commiſſion of the Crime, tho' the Defender be not then actually deprehended; as we ſee in other Crimes, which are puniſhable, tho' the Offenders be not actually deprehended." But to this it is anſwered, That Princes may otherwiſe uſe their own Subjects than they ſhould be allow'd to uſe Strangers; the having offended is ſufficient in the one Caſe, but actually offending is neceſſary in the other; for elſe our King might at any Time, even after the War, ſeize upon one of theſe Ships, becauſe (forſooth) there was *jus* once *perfectè quæſitum* to him by the very Offence, which is too abſurd a Conſequence to be allow'd. And albeit all that was done in the Courſe of the War, be ordinarily caveated by the ſubſequent Treaties, as to the Nations who were engaged in the War; yet Allies being ſecured by no ſuch Treaties, their Subjects might ſtill be liable to Seizures and Hazards of this Nature, which were both unjuſt and inconvenient.

Consider that there is a Difference betwixt ſuch Allies, as are tied in a League Offenſive and Defenſive, and ſuch as only enter in a Treaty for their own Advantage, as *Sweden* has now done: The firſt are obliged to aſſiſt, and therefore, all Correſpondence in them were a Breach; but in the other it is not ſo, and in them that Maxim holds, that *cuilibet licet uti jure ſuo, modo hoc non fecerit principaliter in æmulationem alterius*. Tho' all this Traffique that is alledg'd were true, yet it clearly appears, that the great Deſign of my Client was not to ſerve the *Dutch*, but to maintain their own poor Families, in a Way which the ſevereſt Lawyers could juſtify. Remember how little *Sweden* is obliged to *Holland*, who kept them lately from conquering *Denmark*; ſo that it is improbable they would have ſerv'd them, upon Deſign to promote their War. Remember how much our Countrymen were honoured lately by their great King, who preferr'd Two of them to be Generals, and Thirty Two to be Colonels at once in his Armies: And I muſt likewiſe remember your Lordſhips, that the Probation in ſuch Caſes is very ſuſpicious; for there, a Man's whole Eſtate depends upon two mean Fellows, and ſuch Two, as are under the Impreſſions of their Enemies, and who may expect at leaſt their Liberty as a Bribe, and that their Depoſitions come to us by an Interpreter: So that tho' he did not miſtake them, (as he may) yet the Truſt reſolves at moſt in his ſingle Aſſertion, who is but one Man, and who, by being the ordinary Servant of that Court, is much to be ſuſpected; and therefore, your Lordſhips may call for the Witneſſes, declare their Perſons free, and thereafter examine them.

Let us not be more cruel than the Sea, and more mercileſs than Storms, and after that theſe poor Men have eſcaped thoſe, it were inhumane that they ſhould ſhipwrack upon our Laws, which were to them like hid Rocks, upon which there ſtood no known Beacon. Figure to yourſelves (My Lords) how theſe poor Men's longing Wives, ſend daily their languiſhing Looks into the Ocean, as they can, to find them; or how the Creditors, who advanced Neceſſaries for their Aliment, expect Payment from their Return; and how it muſt prevent the ſtarving of their poor Babes, whoſe craving Appetites and Cries, do probably now aſtoniſh their indigent Mothers; it is thoſe you puniſh, and not only our Appealers: And how would we uſe Enemies, who had murder'd our Countrymen, when we thus uſe our Allies? We alledge, that this is (My Lords) a Caſe wherein Juſtice will allow ſome Reſpect of Perſons; and ſince politic Advantages have given their firſt Form and Being to this Law and Proclamation, whereupon this Seizure is ſaid to be founded, conſider, I entreat you, how inconvenient it were to diſoblige, by a Deciſion, the King of *Sweden*, whom your

Royal Maſter, who underſtands beſt the Advantages of this Crown, has taken Pains to oblige by a Treaty; and how hard were it, if, upon your Deciſion, that Prince ſhould be forced to grant Letters of Marque, or lay an Arreſt upon all the Veſſels of our Nation trading there, by which the Innocent might be oppreſs'd for the Guilty, many might loſe for the Gain of few, and the preſent Unity of the Two Crowns might be diſſolved, by a Sentence of your Court.

*THE Lords jointly ſuſtain'd the Adjudication, notwithſtanding of this Debate.*

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FOR

# The Burghs of Regality,

AGAINST

# The Burghs-Royal.

## The Eleventh Pleading.

### *Whether it be free to all the Lieges to Trade with Foreigners; or if this Privilege be only competent to Burghs-Royal?*

*May it pleaſe your Grace,*

SINCE Freedom is one of the greateſt Bleſſings and Pleaſures of Mankind, thoſe Laws which deſign to abridge or leſſen it, muſt be very unſupportable and unfavourable; except they bring other Advantages, which in exchange of this Bondage, can either convince our Reaſon or gratify our Intereſt. But if we conſider the Laws here founded on, whereby it is pretended, That none but the Indwellers of Burghs-Royal can trade with Foreigners, we will find, that theſe Laws are ſo far from being advantagious, either to the Public, or to private Perſons, that they are a great Bondage on the one, and a great Impediment to the other. The Purſuers, who deſire to leſſen the Freedom of Trade, are the Sixth Part only of *Scotland*, who deſire to retrench the Privileges of the other Five Parts, and the Privilege wherein they deſire to retrench us, is our Freedom; the very Words of the Privilege they crave are, *That we ſhould be declared unfree Men*, and unfree Men imports Slaves, in all Languages; and in Reality, not to have Liberty to export our own Commodities, is to be Slaves to ſuch as may ſtop us; for in ſo far as they may ſtop us, they are our Maſters.

THAT they are deſtructive to every Man's Intereſt, appears from the Reſtraint they lay upon his Inclinations, and upon his Property: As to his Inclinations, they are very much reſtrained, in ſo far as tho' any of the Lieges did never ſo ardently deſire to trade, and tho' his Breeding, and the Situation of the Place where he lived, did favour extremely therein his Inclinations; yet except he live conſtantly in a Burgh-royal, he cannot trade. They lay likewiſe a Reſtraint upon his Property, becauſe tho' the Situation of his Eſtate be very advantagious for trading, and his Eſtate conſiſt in Money, yet can he not employ that Money in Trade, which is the natural Uſe of it; and thus in effect, theſe Acts tend to enſlave both our Inclinations and our Eſtates.

Nor do they leſs prejudge the public Intereſt, as will clearly appear by theſe Conſiderations. 1. By this Privilege, Five Parts of Six in the Kingdom are debarred from trading; whereas it is a known Maxim in all Nations, that the more Traders, The richer always is the Kingdom; and upon this Conſideration, the *Engliſh* and *French* have invited all their Gentry to trade, by declaring, that Merchandizing ſhall be no Derogation from their Nobility and Honour. 2. The more Money be employed upon Trade, and the leſs upon Annualrent, the Kingdom is always the richer; for tho' private Parties may gain by Annualrent, yet the public Stock of the Nation is not thereby improved, the one Half gains there from another, but neither from Foreigners; and if all except Burgeſſes be debarr'd from Trade, then the Money of Five Parts of the Nation muſt lie idle, or elſe muſt be lent to Merchants, which is not ordinary; and to force us to lend, were unjuſt. 3. By this, the Places in *Scotland* fitteſt for trading, are kept bound up from uſing the natural Advantages of their Situation, to the great Prejudice of the Nation; as we ſee in many Inſtances, and particularly in *Lews* and *Borrowſtounneſs*, to keep which from being Burghs, the Burghs have ſpent a great deal of Money. 4. This has ruin'd many little Towns, who becauſe they were debarr'd from all Privilege of trading, were forc'd to get themſelves erected in Burghs-royal, and after that they were erected, were forc'd to be at the Expences of keeping Priſons, being Magiſtrates, ſending Commiſſioners to Parliaments, making public Entertainments, and ſo did ruin themſelves without any Advantage to the Country: And by this, the Number of Burghs are ſo far encreaſed, that it is a Shame to ſee ſuch mean Creatures as ſome of them, ſent to our Conventions and Parliaments; who, notwithſtanding they want both Fortunes and Breeding, yet muſt ſit as the great Legiſlators of the Kingdom, and muſt have a deciſive Voice in what concerns the Lives, Fortunes, and Honour of the greateſt Peers in it. I deſign not by this to diſparage all Burrows, for moſt are repreſented by moſt qualified Perſons; but to tax theſe Laws which have forc'd many little Towns, either to ſend none, or to ſend ſuch as are unfit. 5. All the Counrry is ill ſerv'd; for in ſome Shires there are but very mean Burghs, and in theſe Burghs, Merchants yet meaner; and if theſe want Credit, to buy and carry out our native Commodities, they muſt lie upon the Owner's Hands; and the Country wanting neceſſary Returns, ſuch as Salt, Iron, and Timber, muſt buy from very remote Places. 6. If two or three Merchants in better Towns, conſpire not to buy or ſell, but at Rates agreed upon amongſt themſelves, then the poor Country muſt be at their Devotion: And this were to grant Monopolies, not only in one Place, but in every Shire; not only as to ſuperfluous Commodities, (as uſe is, when Monopolies are granted) but as to all, and even the moſt neceſſary Commodities: After this, no Man ſhall dare buy a Skin, Wine, or Suggar, but a Burgeſs; and which is yet harder, this will furniſh Pretext to Burghs, to oppreſs all ſuch as they envy, under the Notion of unfrer Traders. 7. His Majeſty's Cuſtoms will be thereby much impaired; for the fewer Traders be, the leſs will be both exported and imported, and whatever leſſens Export and Import, leſſens doubly His Majeſty's Cuſtoms, of the which thoſe are two Hands. 8. Other Nations, who underſtand Trade in its Perfection, ſuch as *Holland*, do allow all their Subjects to trade without Difference; and it is a Maxim amongſt them, *That many Hands and many Purſes, make a rich Trade.* And it imports not to ſay, that their Commonwealth differs from our's in its Conſtitutions, and that they have Vent for their Commodities all over *Europe*, whereas our Vent is no larger than our Conſumption; for whatever Difference be in our fundamental Conſtitutions, yet in the Matter of Trade, they are ſtill the univerſal Standard: And ſure, it is the Advantage of our Country, even in order to our Conſumption, to have the Privilege of Trade, in neceſſary Commodities extended to all; for the more Importers be, we will get our neceſſary Commodities at a lower Rate, and the more Exporters be, our Corns, Fiſhes, &c. will give the greater Rates, and thoſe are the Two great Advantages of a Kingdom.

I confeſs, (may it pleaſe your Grace) that the erecting of Societies, as to ſome Trades, and at ſometimes, is neceſſary; but the ordinary Rule extends there, no further, than that Trading to remote Nations, and in rich Commodities, ſhould at firſt have ſome Privlieges as to their Erections; for elſe, private Stocks would not be able to compaſs it: But even as to theſe, when the Trade is once ſecur'd, and becomes eaſy, and managable, then theſe Privileges ceaſe, with the Cauſe from which they had their Origin. And therefore it is, that albeit Trade with Foreigners ſeem'd at firſt, above the Reach of our firſt Traders, when to ſail to *Spain*, ſeem'd as hard as an Eaſt-*India* Voyage now doth, then Trade needed ſome Privileges; yet now, when Experience, and Increaſe of Money has leſſened thoſe Difficulties, I conceive the Privileges ſhould expire. It is known, that the Biſhop of *Glaſgow* gave only his Burgh then Liberty to trade into the Shire of *Argile*; and that the Burgh of *Edinburgh* had a ſpecial Privilege of old, to trade in the *Iſles*: But that now they need theſe, will not be debated even by themſelves.

I confeſs, that all Incorporations in a Commonwealth ought to have different Deſigns, and different Privileges, ſuitable to theſe Deſigns, as is pretended; but it can by no clear Inference be deduc'd from this, that the ſole Liberty of trading in all Commodities with Foreigners, ſhould belong to Burghs; but only that they ſhould have ſome Staple-goods, wherein they only may trade. And we are content to allow them the Exporting and Importing of what is ſuperfluous; ſuch as Wine, Silks, Spices, *&c.* Let all, even Countrymen, have the Export and Import of what is neceſſary for their own Station and Employments; let them export Corns, Cattle, *&c.* ſince the having theſe Commodities ſignifies nothing, without Power to ſell them; and the Liberty of Importing Timber, Iron, Salt, and theſe other Commodities, without which they cannot live in their own Station. And whereas 'tis pretended, “ That “ they are content we ſhould export the natural Product of our own Country, providing we “ bring home Money only for them: ” It is conceiv'd, That this Conceſſion deſtroys what is conceded: For if unfree Men can only bring home Money, then Free-men and Burgeſſes may eaſily underſel them; for few Abroad buy them with ready Money; and Money is the deareſt of all Returns: So that theſe who barter Commodities for what they export, may ſell much ſooner, and cheaper, if they bring home nothing in Return of what they export; for Export, by itſelf, without Import, occaſions great Loſs; and the Advantages of Merchandiſing is ordinarily in the Returns.

WHEREAS it is contended, “ That the leſs diffuſe Trade be, it proſpers ſo much the bet- “ ter; for it may be eaſier govern'd according to the juſt Rules. And our old Law appointed “ wiſely, That none but worſhipful Men, and Men of conſiderable Stocks ſhould trade Ab- “ road, that thereby poor People, by running over Seas, might not by their Neceſſity of ſel- “ ling, or Want of Skill, low the Prices of what they exported, and buy unſkilfully at high “ Rates what they imported: And that to defend Trade againſt this Diſhonour and Preju- “ dices, Guildries were appointed in Burghs, to ſuperviſe the Conduct of Merchants, and “ reſtrain Abuſes, which Burghs of Regality and Barony wanted, and ſo were liable to ma- “ ny Eſcapes.

TO this 'tis anſwered, That tho' at firſt theſe Rules were neceſſary; yet now when Trade is rais'd to ſome Conſiſtency, this Neceſſity fails with its Occaſions; for there are no where poorer Traders, than within Burghs; to which ordinarily, the meaneſt and pooreſt amongſt the People retire, when they cannot live elſewhere; and when they are once ſettled there, they, becauſe of the eaſy Conveniencies of Trading, do indiſcreetly run upon it: Whereas none who live either in Burgh of Regality, Barony, or in the Country, will be tempted to adventure upon Trade, except they have conſiderable Stocks, and be ſecure of a full Vent. And without debating what was the Deſign of our Legiſlators in erecting Guildries; yet we now find by Experience, (which is a much ſurer Guide than Project) that Guildries have conduc'd ſo little to advance Trade, that they tend rather to ſecure the Monopoly which they at firſt procured, and to eſtabliſh by mutual Compacts, thoſe exorbitant Prices for Commodities which are now exacted: And if Deaconries amongſt Malt-men and others, were diſcharged, to prevent Combinations, I ſee not why Guildries, which are but Deaconries amongſt Merchants, ſhould not be diſcharged for the ſame Reaſon.

BUT (May it pleaſe your Grace) the great Refuge againſt theſe convincing Reaſons is, That theſe might have been urged *in jure conſtituendo*, but not *in jure conſtituto*; for Reaſoning ends, where Law begins: *& omnium quæ fecerant majores noſtri non eſt reddenda ratio.* But this may, I humbly conceive, be eaſily anſwered, if we conſider, 1. That Laws are mortal, like their Makers; and they who would bind up their Reaſon to a conſtant adhering to what was once made a Statute, behov'd to renounce that Reaſon by which they ſhould be governed, and leave off to be reaſonable Men, that they might be Lawyers. And therefore it is, that becauſe Legiſlators might take an untrue Proſpect of future Events, Lawyers have determin'd, That where Laws never grew unto Obſervance, they did really never become Laws; the being once obſerved is one of the greateſt Eſſentials of a Law; *Statuta uſu non recepta, nec obſervata, pro non factis reputantur:* Voet. *de Statut. Cap.* 2. § 12. *Arg. l.* 1. § 9. *C. Cad. Toll. & alex. Conſil.* 6. *Vol.* 1. And if the not Obſervance of Laws for ten Years after they were made is, in the Opinion of Lawyers, ſufficient to repudiate them, much more ought they to be rejected, after they have for many Hundreds of Years, languiſhed in a conſtant Contempt; for elſe they are but like thoſe Idols, of which the Scripture tells us, That *they had Eyes, and ſaw not; Ears, and heard not; and Feet, but could not walk.* And if we conſider theſe Laws, we will find, that even Authority of Parliament, which can do all things in *Scotland*, has not been able to maintain them in thoſe; for theſe Statutes oft-times begin, *That foraſmuch as there had been divers Acts of Parliament, made in favours of the Royal Burghs, ordaining they ſhould have the only Benefit of ſailing Abroad,* &c. *yet theſe Laws have not been in Obſervance: Therefore,* &c. as is very clear by the Narrative of the 152 Act, 12 Parl.

*James* VI. And why ſhould the Act have been renew'd ſo oft, if the former had been obſerved? And if in ſpight of all theſe Acts, the Subjects could never be brought to Compliance with them, Why ſhould we offer ſo much Violence to our native Country, as to force upon them that from which they have ſo much Averſion? If Acts, which have been ſtrengthened by Obedience and Obſervation, may be repell'd by Deſuetude, and a contrary Cuſtom, how much more may Deſuetude overcome Acts which are not yet arrived at their due Strength and Perfection? 2. Though theſe Acts had been once in Obſervance, yet they are now antiquated by Deſuetude and Non-obſervance: That Deſuetude may antiquate and abrogate Laws, is very clear from reading our Acts of Parliament, of which the full Half are in Deſuetude, and are only conſidered now by us as Matters of Antiquity, as *Roman* Medals, or old Hiſtories: And particularly, can the Burghs-royal deny, but moſt of theſe Acts limiting their Trade and Government, are gone in Deſuetude? As that Officers within Burgh ſhould not be continued from Year to Year, *Ja.* III. Par. 5. Act 29. They ſhould not ſail in Winter, nor oftner than twice in the Year to *Flanders*, *Ja.* V. Parl. 4. Act 30. Nor ſhould they ſail, except they be worſhipful Men, and have at leaſt Three Serplaiths of Wool, or Half a Laſt of Goods, *Ja.* III. Parl. 2. Act. 13. *Ja.* II. Parl. 14. Act 168. *Fruſtra opem Legis implorant, qui in Legem peccant.* And it were unjuſt, that they ſhould oblige others to obey what they will not ſubmit to. And that the Acts whereupon the Privileges now craved are founded, are gone in deſuetude, appears very convincingly, from the conſtant Practice of all the Corners in the Nation; not by ſingle or clandeſtine Acts, but openly, upon all Occaſions, and in all Places and Ages, even under the Neighbouring Obſervation of whole Fleeces, and of all their ſucceeding Serieſes of Magiſtrates. Have not *Muſſelburgh*, and *Borrowſtounneſs* near *Edinburgh*, *Hamilton* near *Glaſgow*, the greateſt Burghs of this Kingdom, exerciſed this Freedom which is now controverted? And tho they made frequent Applications to your Lordſhips, yet till now was there never a Decreet *in foro* in their favours; and Decreets in Abſence, are rather founded upon the Omiſſions of the Defender, than the Juſtice of the Purſuit. So that it appears clearly, that the Magiſtrates have been aſhamed to crave, the Judges unwilling to allow, and the People ſtiffly refractory from ſubmitting to the Privileges here crav'd to be declared.

TO this it is replied for theſe Burghs-royal, " That Deſuetude cannot abrogate Laws under Monarchies, tho' it could under Commonwealths, *Nec poteſt tacitus populi conſenſus abrogare, quod expreſſus populi conſenſus non introduxit, l. 32. ff. de leg. Nam cum ipſæ Leges nulla ratione nos teneant quam quod judicio populi ſint receptæ, merito & ea quæ populus ſine ullo ſcripto probavit, tenebunt omnes.* 2. Tho' Deſuetude might abrogate ſuch Laws as reſpect only private Rights, yet the People, by breaking penal Statutes, cannot by repeated Tranſgreſſion, ſecure themſelves againſt Laws made for reſtraining their Inſolencies; elſe by frequent Uſury, or attending Conventicles, theſe Delicts might paſs in Deſuetude, and by the Acts founded upon, the Half of the Offender's Goods are declared to belong to His Majeſty, and theſe Laws are in effect penal Statutes. 3. Where Laws may run in deſuetude, it is required, that the Deſuetude or contrary Conſuetude, be founded upon clear and open Deeds, and not upon clandeſtine or precarious Acts; as in this Caſe, wherein all the Trade with Foreigners, to which theſe Burghs-royal or of Barony can pretend, was either carried on under the Name of Free Burgeſſes, or was tolerated by the neighbouring Burghs-royal. 4. It is requiſite, that the Conſuetude which is oppos'd to Law be *judicio contradictorio vallata*, which cannot be alledg'd in this Caſe, where not only no Decreet can be inſtanced, finding theſe Laws to be abrogated, but where there are Decreets produced conform thereto.

TO the Firſt of which it is anſwered, That tho' thoſe Laws ſeem to reſpect a Commonwealth, yet it is generally received now, that a contrary Deſuetude may abrogate even Laws introduced by Monarchs, and that the Taciturnity or Connivance of the Prince, is equivalent to a Conſent. Thus *Perez, tit. Quæ ſit long. conſuet. ſunt qui ſcientiam principis deſiderant, quia in illum omnis poteſtas condendi juris tranſlata, ego tamen exiſtimo ſufficere, ne Princeps contradicat.* And for this he cites, *C.* 1. *de conſtitut. de* 6. where a Conſuetude is ſuſtained to abrogate Law, tho' the Pope (who is a ſovereign Prince in his own Dominions) did not expreſly allow it, *dummodo ſit rationabilis, & legittime præſcripta*: And with us, do not our old Laws die out by Deſuetude? And do not new Conſuetudes daily ſpring up, without any other Warrant than mere Reaſon and Preſcription? But in our Caſe, His Majeſty has ſo far allow'd this Cuſtom, and has ſo far contributed with it to the Abrogation of theſe Laws, that He has, under His own Royal Hand, granted many Signatures in favours of Burghs of Regality and Barony, allowing them to trade with Foreigners, and extending their Privileges as far as thoſe of Burghs-royal; which Signatures are paſs'd in His Exchequer, and authorized with His Seal, which ſtates this Conſuetude in a very different Caſe from Conſuetudes which may abrogate penal Statutes, or ſuch public Laws as are made againſt Conventicles; the one His Majeſty oppoſes, in the other He concurs. And this likewiſe anſwers that other Objection, founded upon the Clandeſtineneſs of theſe Acts; for what Act can be more public, than theſe which paſs His Majeſty's Hand, the public Judicatures, and common Seals? And as to extrajudicial Acts contrary to the Laws, they have been too many and univerſal to be latent; but it is offered to be proven, that Burghs-royal and Burghs of Barony, have been in uſe openly and avowedly to drive on this Trade, which they endeavour to maintain. And whereas it is alledged, That *conſuetudinis non vilis eſt authoritas, verum non uſque adeo ſui valitura momento, ut aut legem vincat, aut rationem, L.* 2. *C. quæ ſit long. conſuet.* To this ſome Lawyers anſwer, That tho' it cannot over-power a Law, whilſt the Law ſtands, yet it can abrogate and make the Law fall, *Cont. ad dict. l.* And others interpret ſo this Law, as that they extend it only to a growing and unripe Conſuetude, which cannot indeed abrogate a Law that has not fully loſt its Vigour, as *Cujac.* and others affirm.

As to the Fourth Objection, it is anſwered, That a contrary Conſuetude can abrogate a Law, *ſine judicio contradictorio*; for, *judicium contradictorium* is not that which abrogates the Law, but only finds that the Law is thereby abrogate, and it doth not ſtrengthen, but declare the Conſuetude: And the Lords of Seſſion, by refuſing frequently to declare this Privilege, have therein done what was equivalent to a *judicium contradictorium*. And if this be not ſuſtain'd, then the Burghs-royal may crave, that all the Lieges may be debarr'd from tapping Wine, Spices, or other Things, abſolutely neceſſary for the Accommodation of Travellers; for the ſelling of thoſe is, as expreſly prohibited by the Laws founded on, as is the trading with Foreigners. Nor is the Conſuetude whereby theſe are abrogate, any otherwiſe *firmata judicio contradictorio* than this is; and tho' the Burghs-royal declare, that they inſiſt not at this Time to have their Privileges *quoad* theſe extended, yet certainly when they have prevail'd in the one, they will crave the other. And what an abſurd Thing were it, that all Travellers behoved either to ly in Burghs-royal, or to want that Accommodation which is neceſſary, or to buy it at exorbitant Rates; and that not ſo much as a Candle or Peny-point ſhould be ſold, for the Conveniency of the Country, outwith a Burgh-royal.

I may likewiſe repreſent to your Grace and Lordſhips, That His Majeſty is not only, becauſe the Author, therefore the abſolute Arbiter of this Privilege, and may diſpoſe upon what He hath given; but that likewiſe by the 26. Act of the 3. Seſſion of His Majeſty's firſt Parliament, it is declared, *That His Majeſty has the ſole Prerogative of ordering and diſpoſing Trade with Foreigners*; and therefore, ſince His Majeſty has granted to all Burghs of Regality, and many Burghs of Barony, as full Liberty in trading with Foreigners, as He hath granted to any Burghs-royal, I ſee not who in Law can diſpute this Privilege with them; at leaſt, how the Burghs-royal can in Gratitude debate the Extent of a Privilege with their Prince, who at firſt gave it. Nor can theſe Conceſſions, in favours of Burghs of Regality and Barony, be alledged to be ſubreptitious, as is pretended, ſince they are not only paſt in the ordinary Way, but are frequently paſt, & *actus geminatus facit actum cenſeri non eſſe ſubreptitium*; but likewiſe, after it hath been repreſented to His Majeſty from the Burghs-royal and their Agents in Court, that this Conceſſion was contrary to the Privileges granted to them by the Parliament; notwithſtanding of all this, His Majeſty's Predeceſſors and Himſelf have ſtill continued to grant theſe Conceſſions. And that the Burghs of Regality and Barony have enjoyed this Privilege of Traffique and Merchandizing, is very clear by the 29. Act, 11. Parl. *Ja.* VI. wherein it is declared, *That forſomuch as divers Burghs of Barony and Regality were in uſe to exerce the Trade and Traffique of Merchandice; therefore, that Privilege and Freedom ſhall be continued to them.*

It hath been oft inculcate, “ That this Privilege granted to the Burghs-royal of the ſole
“ Trade with Foreigners, is not the mere Effects of His Majeſty's Favour, and is not only
“ founded upon the Parliament's Conceſſion, but that it is granted to them upon the Ac-
“ count they pay the Sixth Part of all the public Impoſitions of this Kingdom; which makes
“ their Contributions within Burgh to riſe ſo high, that if they had not this Privilege to
“ balance that Inconvenience, they would not be able to eaſe the Country, by paying ſo
“ great a Proportion. And if Burgeſſes within Burgh had no ſpecial Privilege above others,
“ they would not live within Burgh; for, it were unreaſonable to imagine, that when they
“ might trade as well elſewhere as within Burgh, that yet they would continue to live there
“ under great Burdens, and without any Privileges.

To this it is anſwered, That the 111. Act of Parliament, *Ja.* VI. Parl. 11. whereby it is declared, That their Part of all general Taxations ſhall extend to the Sixth Part allenarly, bears no ſuch Quality; nor do the Acts of Parliament bear any ſuch onerous Cauſe: But the true Reaſon of their bearing the Sixth Part of the Kingdom's Burdens, is, becauſe they are intrinſically the Sixth Part of the Kingdom, if we look either to the Number or Riches of their Inhabitants: And if the Burghs-royal were accounted the Sixth Part of *Scotland*, under

Reign of King *James* I. how much more great a Proportion are they able to bear now, when the Burghs are ſix Times more numerous, and each particular Burgh ſix Times more rich and populous than they then were? Their Riches have increaſed with our Luxury, and the Luxury of our Age doth far exceed what it was in that King's Time: So that ſince now the Nobility and Gentry only toil to get Money, to buy from Burgeſſes what they import from foreign Countries, I conceive thoſe Burghs may eaſily bear a Sixth of our Burdens, ſince once a Year they get in all our Stock. And to any thinking Man it may eaſily appear, that all the Money in *Scotland* doth once a Year circulate and paſs thro' the Hands of Citizens: For Money ſerves only either to pay our Annualrents, or buy us Neceſſaries; and that which is paid for Annualrents is by the Receivers given out to others, to ſatisfy their preſent Neceſſities, and all is ultimately employ'd for Food or Rayment, and little Money is beſtow'd upon Food or Rayment in *Scotland*, except only within Burgh.

SINCE then this Privilege doth divide *Scotland* in Two Parts, ſince Equity in it, ſeems to oppoſe Law, and ſince both Parties pretend to national Advantages; I ſhall humbly move, that if this illuſtrious Senate be unwilling to interpoſe in ſo univerſal a Difference, that this Debate ſhould be tranſmitted by them to the Parliament, which is the full Repreſentative of all the Kingdom, and the natural Judge of Equity and Conveniency.

*THE Seſſion referr'd this Caſe to the Parliament, who extended this Privilege to all the Lieges.*

FOR

# The Earl of *Northeſk*,

AGAINST

# My Lord Treaſurer-Depute.

## The Twelfth Pleading.

### *Whether a* Novodamus *ſecures againſt preceding Caſualities?*

*My Lord Preſident,*

IT is one of the chief Advantages of our Nation in this Age, that we live under a Prince, who covets more the Hearts of his Subjects than their Eſtates; and who loves rather to ſee his Laws obey'd, than to have his Advocate prevail: What Meaſure then can his Fiſk expect, when in general, all Lawyers have even under Tyrants delivered, as their Opinion, *ſemper contra Fiſcum in dubio eſt reſpondendum?* And ſince Flattery or Fear may encline ſome, to favour the Prince's Intereſt too much, it is fit, that Judges ſhould be jealous of their own Spirits in ſuch Caſes, and ſhould bend them, rather to the other Side, that they may fix at laſt in a Straightneſs.

THE Caſe propos'd is, *Whether the* Novodamus, *not expreſſing the Caſuality of Marriage ſpecially, but all Caſualities in general, doth by our Law, defend againſt the Marriage?*

THAT it doth, I preſs for my Client, upon theſe Grounds; *Firſt*, a *Novodamus* is that which the Feudaliſts call *renovatio feudi*; and *renovatio feudi* doth import, *liberationem ab omni caducitate*; nay, the very Nature of a Diſpoſition or Alienation doth imply a Liberation from any Burden with which the Diſponer could affect it, elſe he ſhould alienate and yet retain, give and not give; and therefore, by the Civil Law, he who diſpon'd Land, was interpreted to have diſpon'd it *tanquam optimum maximum*, free from all the Diſponer could lay to its Charge.

IF any Perſon ſhould diſpone his Land to me, and ſhould thereafter crave a Ward or Marriage, as due out of theſe Lands, *tanquam debitum fundi*; certainly it would be an abſurd Purſuit; and I would be abſolv'd: Nay, if a Superior enter me to my Lands, *eo ipſo* I'm free from all preceding Caſualities: Nor did ever a Vaſſal take Diſcharges at his Entry, of any former Caſualities, but his Entry was always judg'd ſufficient; Why then ſhould not His Majeſty's Vaſſals be in the ſame Condition? For ſince this is clear in other Vaſſals *ex natura feudi*, there being no Statute in their favours, it muſt be due to all Vaſſals; for, *a quatenus ad omne valet conſequentia*; and that which is natural to Feus, muſt be inherent in all Feus. The Deſign of a *Novodamus* is, to ſecure the Receiver againſt Nullities: The Law thought to ſet this as a March-ſtone, and let not us remove it. The Stile of a *Novodamus*, in our Law which is equivalent to expreſs Law, is very exactly adapted to this Deſign, as may appear by all it's Clauſes; for when His Majeſty *de novo dat*, that Charter muſt be equivalent to an original Diſpoſition; and ſure, if theſe Lands had belong'd to His Majeſty, and if He had diſponed them, that original Right would ſecure the Receiver againſt all His Majeſty could crave out of theſe Lands; except in ſo far as he did expreſly reſerve at the making of the Diſpoſition: Nor do I ſee, why Reſervations of former Rights were neceſſary in Diſpoſitions, if theſe Rights were reſerv'd without them, and if they were not cut off by the Alienation itſelf.

BUT not only doth this *Novodamus* diſpone in favours of my Client, the Land out of which theſe Caſualities are ſought, but it diſpones them *cum omni jure, titulo, intereſſe, & jurisclameo, tam petitorio quam poſſeſſorio, quæ nos, aut predeceſſores, aut ſucceſſores noſtri, habuimus, habemus, vel quovis modo habere poſſumus, in, & ad dictas terras.* What can be more expreſs? For if His Majeſty had any Claim to, or Right in theſe Lands, any Manner of way, He here diſpones it, and transfers His Right in, and to my Client: If His Majeſty have any Right at all, it muſt be *vel jus, vel intereſſe, vel jurisclameum*; and if it be either of thoſe, it is diſponed. But leſt it might be pretended, that this Clauſe extended only to ſecure the Property (which is not its only Effect, as I ſhall clear hereafter) therefore the Stile of a *Novodamus* bears, *omne jus, non ſolum quoad aliquam ejus partem, ſed & ad omnes cenſus, firmas, & proficua ratione wardæ, purpreſturæ, foris facturæ, non introitus, eſchetæ,* &c. *vel quocunq; alio jure vel titulo.* From which general Clauſe, I draw theſe Inferences; Firſt, That this general Clauſe muſt ſeclude His Majeſty, ſince *tantum valet genus quoad omnia, quantum ſpecies quoad ſpecialia:* Bald. *Conſil.* 1. *Lib.* 3. *Gemin. conſil.* 65. *& L. Si duo, ff. de adminiſt, tut.* And therefore, ſince a ſpecial Gift of this Marriage would have ſecluded the King, or His Donator, a general Conceſſion muſt do the ſame; eſpecially ſince this General was deſigned to ſecure againſt all, in reſpect Particulars could not be remembred; even as we ſee in general Diſcharges, or Renunciations, which are as valid *quoad* all, as any particular Diſcharge can be, as to a ſpecial Debt or Deed: And ſince this general Diſcharge of all former Caſualities, is ſo oft repeted, and repreſented under ſo many various Terms, which can ſignify nothing, if they did not expreſs the exuberant Will and Inclination of the Prince, to denude Himſelf, and ſecure His Vaſſal againſt all former Caſualities, as well Marriage as others: And this Clauſe is equivalent to that Clauſe ſpoken of by the Doctors, *Quovis modo vacet*; which comprehends *omnem modum vacandi, & omnes formas excogitabiles renunciationis: Cap. Conſil.* 14. 2. General Clauſes ſubjoin'd to Specials enumerate, muſt be extended at leaſt to all ſuch Specialities as are of the Nature of the Specialities enumerate; for, the ſubjoining a General to Specials, is deſign'd to ſupply the not Enumeration of other Specialities which are homogeneous; *Clauſula generalis quæ ſequitur caſus ſpeciales enumeratos, extenditur ad ſimilia ſpecificatis:* Socin. *Conſil.* 316: But ſo it is, that the Caſuality of a Marriage is of the ſame Nature with many Caſualities here ſpecifically expreſs'd; ſuch as Ward, Non-entry, Eſcheat, *&c.* To which the Superior having Right in the ſame Way as he has to Marriages, it is preſum'd, he would diſcharge it in the ſame Way with them. 3. General Gifts muſt be extended to ſuch Particulars, as probably the Granter would have gifted if they had been expreſs'd: But ſo it is, that it is beyond all Doubt, but that His Majeſty, if He had been ask'd, Whether he was content to diſpone and gift the Marriage, He would have conſented very freely to gift the Marriage, as well as the other Caſualities: This Marriage muſt therefore paſs under the General: And how can it be thought, that he who granted all other Caſualities, would have refuſed this? Or what Speciality was there in this Caſuality, which might have occaſioned this Refuſal? *Nam generalis clauſula idem operatur quoad ſpeciales, ubi non ſubeſt ratio diverſitatis: Curt. Conſil.* 19. And upon this Ground it is ſtatute, That general Clauſes in Remiſſions ſhall be extended to all Crimes of leſs Gravity than the chief Crime which is expreſt: Act 62, *Jam* IV, Parl. 6. And if great Crimes can be taken away by general Clauſes, ſure it cannot be denied in civil Caſualities, which are of their own Nature, eaſier pardon'd, and of leſs Conſequence. And by that Act it is clear, that the general Clauſe was extended formerly to all, even greater Crimes than the Crime ſpecified: And if a Statute was neceſſary there, it is much more neceſſary here, elſe the general Clauſe cannot be reſtricted. Sure He He who granted the Property, would not ſtick at a Caſuality; He who granted the greater, would not ſtick at the leſſer; He who granted ſo many Caſualities, would not ſtick at one; He who granted all the others of that ſame Nature, would allow this to paſs with it's Fellows; and who granted Ward, which is the Cauſe of Marriage, would not have refuſ'd to grant the Marriage, which is but an Effect and Conſequent of that Ward. And this leads me into another Argument, upon which I lay very much Weight; His Majeſty has here gifted *omnia proficua, & devorias quæ contigerunt ratione wardæ:* But ſo it is, that Marrriage is a Caſuality *proficuum, & devoria*; which falls by Reaſon of Ward-holding, and ſo *contingit ratione wardæ*; for Ward here is taken not as a naked Caſuality, but as a Holding: And therefore it is, that when by the Stile of a *Novodamus*, all Caſualities are enumerated, Marriage only is not ſpecified in the old Signatures, becauſe that Caſuality was ſtill look'd upon, as comprehended under the General, *Omnia proficua ratione wardæ*. Not only do many general Terms of this *Novodamus* ſecure againſt this and all other Caſualities; but His Majeſty, in His Conceſſion, expreſſes all the Ways of Tranſmiſſion, whereby theſe Caſualities could be given by Him to His Vaſſal; *viz. renuntiando, tranſferendo, & extradonando eadem, cum omni actione & inſtantia:* And in Contemplation of this Right, His Majeſty has a conſiderable Compoſition in Exchequer; which makes this to be not only a Gift, but a Bargain; not only mere Law, but Equity.

To balance theſe Reaſons, it is repreſented for His Majeſty and His Donator, “That all His Majeſty's Conceſſions are gratuitous, and muſt not be too largely extended; for what Compoſitions are paid, are rather paid as Fees to His Majeſty's Officers and Attenders, than as a Price; and theſe are too low, and unproportionate to what is given, to deſerve that Name. 2. That His Majeſty cannot be prejudg'd by the Negligence of His Officers; and what He paſſes in favours of His Vaſſals deſerves a far other Conſtruction, than what is done by other Superiors: And tho' general Clauſes may carry away Caſualities from them, becauſe 'tis preſum'd that they have Leiſure to ponder every Word, in any Right they grant; yet His Majeſty being loaded with the weighty Affairs of the Nation, cannot vake to ſo exact Obſervations: And therefore it was thought fit, that the Negligence of His Officers, nor the Importunity of Parties, ſhould not prejudge Him. 3. That the Gift of a Ward *per ſe* would not carry the Caſuality of Marriage, if it were not expreſs'd: *Ergo*, Marriage could not be comprehended under the Caſuality of Ward which is here expreſt. 4. That general Clauſes are, in many Caſes, but *error Stili*, and are reſtricted by the Deciſions of all our Courts: Thus tho' the Stile of a Gift of Eſcheat doth diſpone all Moveables which the Rebel had, or ſhall acquire; yet theſe Gifts are reſtricted by our Deciſions, to what the Rebel had the time of his Rebellion, or ſhould acquire within a Year after the Rebellion; tho' Gifts of Ward and Marriage bear, Ay and till the Entry of the next lawful Heir: Yet theſe Gifts are reſtricted to the Three Term's Nonentries ſubſequent to the Ward: And tho' Gifts granted do bear *Relief*, yet they would not carry a Right to the *Relief*. 5. That the Deſign of a *Novodamus* is to ſecure the Property, but not to tranſmit a Right to any Caſualities not expreſt: And thus the King might, notwithſtanding of a *Novodamus*, crave bygone Feu-duties: Nor would it debar His Majeſty from craving Tax'd-wards or Marriages, as was decided in the Caſe betwixt His Majeſtie's Advocate, and *Pierſton*; where it was found by the Exchequer, That Marriage was not comprehended under the *Novodamus*, becauſe it was not expreſt.

I am not, (My Lords) willing to leſſen His Majeſty's Favours to His Subjects, who were not worthy of them, if they undervalu'd them; and therefore, I beg leave rather to magnify them ſo far as to think, that they ſhould not be interpret ſo narrowly, as to bear a Proportion to our Deſerts, (for the Favours of Princes cannot, like His whom they repreſent, be merited) but ſo auguſtly and opulently, as may bear a Proportion to the Greatneſs of Him who diſpenſes them, as *Clarus* and all the Feudaliſts obſerve; and if the Word can admit a large Interpretation, the Grants of Princes ought to have it: So, that ſince theſe general Clauſes would carry all Caſualities in Gifts granted by private Superiors, much more ought this to be allow'd *in auguſtioribus principum conceſſionibus*, eſpecially in Diſcharges granted by them of all former Incumberances, which being of the Nature of Indemnities, ought, like them, to be interpret all poſſible Ways to defend the poor Vaſſal. Nor do I deny, but the Negligence of His Majeſty's Officers ſhould not prejudge His Intereſt, yet, Gifts granted cannot

not be called Negligence; for the one is an Omiſſion, and the other a Commiſſion; the One is a Privation, and the other is a poſitive Act. The Deſign of that Statute was to defend His Majeſty againſt the Omiſſion of His Officers; ſuch as the ſuffering his Rights to preſcrive, or omitting to propone Defences for Him. And the Words of the Act 14. Parl. 16. *Ja.* VI. are, *That in the purſuing or defending any of His Actions or Cauſes, the Negligence of His Officers omitting any Exception, Reply,* &c. *ſhall not prejudge Him.* But God forbid that every Gift granted by His Majeſty, and paſt by His Exchequer, might be thereafter queſtioned, becauſe a ſufficient Compoſition was not paid, or that it was not founded upon a ſufficient Cauſe; for elſe, all our Signatures and Rights might be queſtioned: This were to unhinge all our Securities, and to endanger all His Majeſty's Officers. But how can what is paſt His Royal Hand, be thought to be paſt by the Negligence of His Officers? And how impertinent were it, for His Officers always to ſtop what His Majeſty commands?

I confeſs, that the Gift of a Ward *per ſe*, would not carry Marriage; but if His Majeſty did grant *omnia proficua ratione Wardæ contingentia*, tho' in a ſingle Gift, I think it would give Right to the Caſuality of Marriage; and yet, that Caſe would not be ſo ſtrong as our's: For in ſingle Gifts it is proper to expreſs Caſualities diſpon'd, but in a *Novodamus* it is otherwiſe; for the Deſign there, is by the Enumeration of all ſpecial Caſualities, and by ſubjoining a General to theſe, thereby to ſecure againſt all theſe Caſualities.

To what is founded upon the Errors that are in many of our Stiles, I need only anſwer, that *regulariter ſtilus æquipollet juri, & pro lege habetur, l. ſi quando C. de injur.* Bart. *in l. peritos ff. de excuſ. tut.* And therefore, tho' as Laws may be abrogated or reſtricted, ſo Stiles are ſubject to the ſame Frailty: Yet, unleſs it can be made appear, that theſe Stiles are reſtricted by the conſtant Current of Deciſions, or by ſome expreſs Laws, certainly Stile muſt rule us. Stiles are the Product of common Conſent, and are introduced after much Experience by ſuch as underſtand: They are to Lawyers what the Cart is to Geographers, or the Compaſs to Seamen; and this is ſo far from being convell'd, that it is eſtabliſhed by the Inſtances adduced, of Gifts of Eſcheat and Nonentries, which were reſtricted according to the latter, till they were reſtricted by expreſs Acts of Exchequer. And ſure theſe Acts had been needleſs, if the Stile had not been binding, before theſe Statutes drawn backwards; but having a future Obligation only, every Man knew how to compone or tranſact for them accordingly.

As to the Inſtance of Reliefs, bygone Feu-duties, tax'd Duties of Ward and Marriage, (which was *Pierſton*'s Caſe) it is clear, that the Reaſon why theſe paſs not under general Gifts is, becauſe they are liquid, and ſo cannot be compon'd for in Exchequer, as *Hope* well obſerves; for theſe are no Contingencies. And ſince the Law gives Right to any Thing in a Signature becauſe it is compounded for, therefore in Juſtice theſe Things cannot be comprehended in a Signature, which are not compounded for. We have likewiſe an expreſs Act of Parliament, appointing that Reliefs ſhould not be compounded for; which draws out theſe from the common Objection, and ſtates Reliefs in a Caſe far different from our's.

And tho' it be much urg'd, "That His Majeſty having tax'd the Caſuality of Ward and " Marriage in this Gift, it is moſt preſumable that He would have expreſs'd the Caſuality of " Marriage, if He had deſign'd to have tranſmitted it, ſince that Caſuality was then under " Conſideration:" Yet, this is but a remote Conjecture, and muſt cede to the ſtronger Preſumptions urg'd in the contrary; and ſince the Signature is not drawn by His Majeſty's Order, but by the Vaſſal, the Preſumption ceaſes: And it is more preſumable, that the Vaſſal would have expreſs'd this Caſuality, had he thought it neceſſary. And whatever might be urg'd, if this Caſuality of Marriage had been expreſs'd but had been delete; yet there can be little Difficulty where the Signature was preſented without it, and where the Vaſſal reſted upon the general Clauſe.

All the Lawyers of our Nation have adviſed, that this *Novodamus* did ſeclude Marriage, tho' not expreſs'd; all the People have eſteem'd ſo, and upon that Eſteem, they have bought and ſold accordingly Rights carrying ſuch a *Novodamus*: So that whatever may be done as to the Future, yet ſince ſo many have compon'd with His Majeſty for ſuch Gifts, in Contemplation they carried all Caſualities, and that ſo many have given conſiderable Sums to ſuch as had compon'd for them, upon that Conſideration: Since this Opinion was ſo old and univerſal, and ſince Ignorance in it (if it be an Error) was ſo invincible, being warranted by the Advice of the ableſt Lawyers; I cannot ſee how in Law *quoad preterita* it can be otherwiſe interpret, whatever Fate it may have for the Future.

*THE Lords found, That a Right granted by the King, with a* Novodamus, *did not only ſecure the Property, but ſecluded all Caſualities that were expreſs'd; but that it did not defend againſt Caſualities which were not expreſs'd.*

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FOR

## John Johnſton,

AGAINST

## James Hamilton.

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# The Thirteenth Pleading.

## *Whether a Contract entred into by a Minor, who averr'd himſelf to be Major, and ſwore never to reduce, be revocable?*

THE Law might ſeem a ſevere Maſter, if it only impos'd upon us what we were to obey, and exacted from us an intire Submiſſion to what it did command: But in Recompence of our Submiſſions, it returns us its Protection; it doth ſupply Want of Strength in the Weak, when they are engaged againſt the Strong; Want of Wit in the Simple, when they are engaged againſt the Subtle; and Want of Age in Minors, who would otherwiſe be very eaſily circumveened: It appoints its Judges to be their Tutors; and whilſt ſuch as rely upon their own Wit may be circumveened, they are by its Aſſiſtance plac'd beyond all Hazard.

AMONGST thoſe other Minors, who daily come to crave from you the Reduction of what they did in their Minority, none was ever more favourable than my Client, he being a Perſon, who becauſe of the Lowneſs of his Parts, and Meanneſs of his Breeding, is like to continue very long a Minor. And if Sharpneſs, & *malitia*, can in ſome Caſes foreſtall Majority, and almoſt meet it Halfway, certainly Want of Wit and ordinary Sagacity, ſhould extend the Privilege of Minority. The Perſon by whom he is leſ'd being his own Kinſman, and one in whom he confided very much, pleads likewiſe for a more liberal Reparation; and the ſame Principle which makes Murder under Truſt to be Treaſon, ſhould likewiſe make the Leſion here to be more eaſily reparable, and ſhould not only weaken the Defences, but ſhould likewiſe be a ſufficient Ground to repel ſuch as were of themſelves relevant. And the Leſion here is not one of theſe ſmall Injuries, but is a great and conſiderable Loſs, wherein the Minor has not only been induced to ſell his Land, tho' the Law appoints that a Minor's Land ſhould not be ſold but by the Authority of a Judge; but to ſell his Father's Heritage, tranſmitted to him by a long *Series* of Anceſtors, and to ſell it too without the Conſent of his Curators, who are the only Perſons who ſhould defend and ſupply his Infirmity.

AGAINST theſe Reaſons it is debated for the Defender, “That tho' Minors have great “Privileges allow'd them in Law, yet many Cauſes may occur, wherein it were unjuſt to “proportion exactly the Prices of what they ſell, with the ordinary Prices of what is ſold;

" and the ſame Equity whereupon their Privilege is founded, may make ſuch Exactneſs, not only to appear to be, but really to be Rigour. As if a Minor ſhould, to free him from the Gallies, oblige himſelf to ſell Land at an eaſy Purchaſe to one of his Countrymen, who were then in a foreign Country with him, and from whom he could only expect Money, and which Money being to be beſtow'd upon Merchandice in theſe Countries, might produce far greater Advantage to the Merchant than the Land could; which, and many other Inſtances, may clearly evince, That if Minors had not ſome Way whereby they might ſecure ſuch as would contract with them, the Law would ſecure them, but as it doth Priſoners, and which was deſigned to keep them free, would take their Freedom from them: And therefore, the Law has introduc'd, that Minors being in *confinio majoritatis*, may ſubjoin an Oath to their Contracts; which Oath is, becauſe of its Divine Character, and of the Reverence that's due to that Great God, who is called upon as Witneſs in it, by all Chriſtian Lawyers declared to be ſufficient to fix and corroborate the Contract to which it is ſubjoin'd. For, the Law of God obliging every Man to obſerve what he has ſworn, even tho' to his Prejudice, it were unfit that the Laws of Men ſhould be more binding than thoſe. Likeas, by the common Law, *l.* 1. *c. ſi adverſus venditionem*, an Oath confirming Vendition is declared binding, *Nullam te eſſe contraverſiam moturum, neque perjurii me auctorem tibi futurum ſperare debuiſti.* And *authent. Sacramenta puberum*, doth expreſly tell us, that *Sacramenta puberum ſponte facta, ſuper contradictibus rerum ſuarum non retractandis, inviolabiter cuſtodiantur.* Which is likewiſe obſerved by our Law, the laſt of *February* 1637, and by a late Deciſion, 10. *February* 1672, Mr. *George Wauch* contra *Bailie* of *Dunraggat.* But not only has this Minor obliged himſelf upon Oath not to revoke, but he hath likewiſe declar'd upon Oath, in the ſame Bond, that he was Major; and Majority being that which cannot be known by the Eye, and there being no liquid and preſent Proof of a Minor's Age, the Law ſhould have prejudg'd Commerce very much, if it had not allow'd that a Minor aſſerting himſelf to be a Major, ſhould notwithſtanding be reſtor'd againſt his own Declaration: For by this, not only ſhould Minors be diſabled from getting Money to do their neceſſary Affairs, but likewiſe Majors behov'd ſtill to wait till they ſhould get an exact Probation of their Age; which Probation is very difficult with us, where there are no certain Regiſters: And conſequently Majors might, becauſe the Probation of their Majority could not be preſently inſtructed, be very much prejudged, and ſometime the Probation of Age being that which cannot appear convincingly to the Sight. And that being a Caſe, wherein ſuch as contract with Minors might be cheated, it was very juſt, that ſince the Law deſign'd only to aſſiſt Minors that were cheated, that it ſhould not give the ſame Privilege to ſuch Minors as cheat others, by aſſerting themſelves to be Majors, *l.* 2. *Si min. ſe major. dixerit. Si is qui minorem nunc ſe eſſe adſeverat, fallaci majoris ætatis mendacio te deceperit, cum juxta ſtatuta juris, errantibus non etiam fallentibus minoribus publica jura ſubveniant, in integrum reſtituti non debet.* And ſince *Diocleſian,* who was not only no Chriſtian, but a Perſecutor of them, did bear ſuch Reſpect to an Oath, what Reſpect ought it to have from Chriſtian Judges, who if they ſuffer this Oath to have no Effect, are the Occaſion that the Name of God is taken in vain?

" Minors may be puniſh'd for Perjury, Falſhood, and Cheating, and therefore it follows neceſſarily, That they may much more be bound by Oaths; for it were unjuſt to puniſh them for Perjury, if they underſtand not perfectly the Strength and Efficacy of an Oath; and if they do underſtand that, there is no Reaſon to abſolve them from it. And if it can bind them to ſevere and corporal Puniſhments, it can bind them much more to the Performance of civil Contracts.

Nor can it be denied, but that our Law reſpects ſo much an Oath, and finds it ſo obligator, that Deeds done by Women in favours of Strangers, *ſtante matrimonio*, are null, tho' ratified by an Oath; as was decided 18 *February*, 1663 *Briſband* contra *Douglaſs*: At which Time, the Lords were of opinion, That all Obligations which are *ipſo jure* null; ſuch as Obligations made by Women *ſtante matrimonio*, and by Minors having Tutors and Curators, but without their Conſent, are ſtill null, tho' they be ratified by an Oath. And if this be true, as is acknowledged, they contend, " That there is no Reaſon, why all Contracts entred into by Minors ſhould not be valid; for the Obligation of an Oath lies in the Hazard of Perjury, and in the religious Reſpect which Lawyers have to Oaths: And in Point of Conſcience, What Difference is there betwixt Contracts *ipſo jure* null, or ſuch as are not ſo? God takes no Notice of ſuch ſubtile Differences; and ſince the Oath is the ſame in both; Why ſhould it not produce the ſame Effect? 'Tis the Oath which in this Caſe obliges; And therefore, tho' the Contract were null, yet the Oath ſtill binds, and ſubſiſts, tho' annex'd to a null Contract, even as a null Contract may be ratified, or homologated. And that Contracts upon Oath do bind Minors, tho' they have Curators, and tho' they ſubſcribe without their Conſent, is maintain'd by moſt famous Lawyers; as *Andreolus*, *Con-*

“ *troverſ. 202. Eſt enim hæc opinio (inquit ille) fundata in religione juramenti, quæ ſemper militat, ſive minor habeat Curatorem, ſive non; & conſequenter, cum religio juramenti, & odium perjurii in utroq; militat caſu, in utroq; etiam debet manere effectus.* Other Lawyers aſſure us, That *Juramentum minorum repreſentat Majorem.* And therefore, ſince Majors are bound, and Minors ſwearing are Majors, in the Conſtruction and Interpretation of Law, Minors ſwearing ſhould be alſo tied by theſe Contracts: Nay ſome have ſaid, That *Juramentum fingit minorem non habere curatorem:* Bald. & Corn. *ad auth. ſacramenta pub.* And according to the Canon Law, (which *Craig* ſays, we follow in what concerns our Conſciences) *Juramentum ſemper eſt ſervandum, quotiſecunq; poteſt ſervari ſine diſpendio ſalutis æternæ.*

It is likewiſe alledged for him, “ That *Minoribus deceptis, non decipientibus eſt ſuccurrendum:* Becauſe there, the Want of Wit, which is the Ground of Reſtitution, ceaſes. And it were alſo unjuſt, that this Remedy ſhould be abus'd againſt the Deſign of the Legiſlator; nor ſhould the Minor have the Protection of that Law which he has offended: But ſo it is, that it is offered to be proven here, That the Minor was a Perſon trafficquing upon his own account; and ſuch cannot be reſtor'd, *Fortia de reſtit. min. Part. Quæſt.* 23. How dangerous were it, if ſuch as were Merchants, and common Traders, ſhould be reponed? For then, Who ſhould contract with them? Or how could innocent People be ſecured? That ſame Neceſſity, and public Intereſt, which introduc'd the Privileges of Minority, has likewiſe introduc'd many other Privileges in favour of Commerce: And ſince it were diſadvantagious to debar Minors from trading, it were unreaſonable to ſtate them in a Condition, in which their Trade would be ineffectual: For who would bargain with them, or beſtow Truſt upon them, if their Tranſactions could be reſcinded upon the Pretext of Minority? It is, *ſay they,* to be preſumed, That Experience and Art (learn'd by them whilſt they were Practiſers) doth ſupply the Imbecillity of their greener Years: And ſince by Learning and Art, ſuch as are very young do outſtrip very far ſuch as are of riper Years, and attain to very much Exactneſs in the ſubtileſt Sciences; Why may not Application refine them alſo to a ſufficient Conſiſtency in Merchandizing, in which there are no ſuch myſterious Points? Upon which account, even our Law has introduc'd, that Advocates, Nottars, and others in public Offices, cannot revoke what they do in their Minority; as was decided, 19 *July,* 1636.

“ If, *ſay they,* the Minor was forc'd to ſell his Heritage, it was to redeem his Perſon from Priſon; and Freedom is preferable to Heritage, becauſe Liberty can pleaſe without Heritage, but Heritage ſignifies nothing to one who wants Liberty: And for this Heritage my Client gave out his Money, by which he had rais'd himſelf to a conſiderable Fortune; and being forc'd by Want of this Money to quit his Trade, he did loſe Hope of gaining a greater Eſtate, than that which the other ſold: But this he did, to prefer his Friend to his Hopes: And ſo this Friendſhip and Relation, which the Purſuer would make the Foundation of a Cheat, was indeed the Foundation of this Favour; and the Law preſumes, that this Couſen would not have cheated him.

Notwithstanding of all which plauſible Repreſentations, I humbly conceive, That the Minor my Client, ought not to be tied by this Oath: And that what I debate in his favours may be the better underſtood, your Lordſhips will be pleas'd to conſider, That all civil poliſh'd Nations have, in effect, reſigned ſo far their Liberty to their Legiſlators, that theſe in their Contracts, are to be ruled by thoſe in their Statutes: And God Almighty is more concerned in the Oeconomy and Government of the World, than in the Obſervations of private Oaths: And therefore we muſt conſider more the Force of a Law, than of an Oath: And if private Oaths among Parties could derogate from public Laws, then the public Laws ſhould be abſolutely evacuate, and remain as the empty Shadows of what they ought to have been. And from this I infer, That ſince the Law has thought fit to declare all Deeds done without the Conſent of Tutors and Curators to be null, that no Deed done by any Minor having Curators, can bind him, except he be authoriz'd by their Conſent.

And from the ſame Principle I likewiſe infer, That the former Diſtinction made in Law, betwixt ſuch Deeds as are *ipſo jure* null, and ſuch as are not *ipſo jure* null, but are only reducible, is ſo far reaſonable, in relation to this Controverſy, that tho' Deeds that are *ipſo jure* null, be not reducible, if they be not confirmed by an Oath; yet Deeds that are *ipſo jure* null are reducible, tho' ſworn; for incaſe the Deed be *ipſo jure* null, it is reprobated by Law, and ſo is no Deed in the Conſtruction of Law: And if it be no Deed, it cannot be confirmed by an Oath; for a Confirmation preſuppoſes a pre-exiſting Deed; *ſed non entis nullæ ſunt qualitates nec accidentia;* and ſo this Oath wants here a Baſis upon which it can be fix'd. 2. It were unfit, that what the Law has expreſly condemned, it ſhould allow others to evite; for it ſhould thus cheat itſelf out of it's own Authority, by ſuch indirect Courſes; *& quod dire-*

*cte fieri non licet, nec per ambages fieri licet.* In vain were Laws to be made, if every private Man might enervate it's Force, and evite it's Sanction by ſuch Subterfuges: This were to invite Men to break and ſcorn Laws; to allow them to tear off their own Yoke; and to place every private Man above the Legiſlator: For as Oaths exacted by Magiſtrates oblige not, when they are contrary to the Laws of God; ſo the Oaths of private Perſons oblige not, when they are expreſly contrary to the Laws of our Rulers, who are Gods upon Earth. And as Vows are declared null by God Himſelf, if given by a Maid without the Conſent of her Father; ſo ſhould Oaths, for the ſame Reaſon, not oblige ſuch as have Curators; for theſe are the Parents in Law. 3. No Oath can be *vinculum iniquitatis*, the Tie of Injuſtice: But ſo it is, That where a Deed is declared null by the Law, that Deed is in ſo far unjuſt: And to allow a Deed that is unjuſt, becauſe it is ſworn, were to eſtabliſh Unjuſtice by an Oath, and to put it in the Power of every private Perſon, to alter the Nature of Things, and to make that juſt which is unjuſt. 4. This would diſappoint the Care and Pains of the Civil Magiſtrate; for His Deſign being to ſecure our Poſterity, becauſe of the Imbecillity of their Judgment, that would be abſolutely eluded, and poor Minors would by that ſame Want of Judgment and Sagacity, for which their Deeds are reducible, be induc'd to ſwear; and ſo the Remedy will become effectual, *nam eadem facilitate jurant qua contrahunt.* And ſince Minors cannot be obliged in their Minority, becauſe of their Imbecillity, Oaths ſhould not bind them, except it could ſupply that: And ſince the Law has given them Curators, it is juſt the Deeds done by theſe Minors ſhould not be reſpected in Law, ſince the Forms preſcribed by Law are not obſerved, nor the Reaſon ſatisfied whereon it is founded. 5. This would open a Door to Perjury; for ſuch as could not cheat Minors becauſe of their leſs Age, would cheat them by their Oaths: And thus, Oaths which ſhould not be given but upon ſolemn and extraordinary Occaſions, would become cheap, and would be taken in every Ale-houſe, adminiſtrate by every Nottar or his Servant; and the beſt of Ties would oft-times be us'd in the moſt ſinful Occaſions: And how can ſuch Oaths as theſe oblige, ſince they want all the Three Qualities of an Oath, and for which Oaths are declared in Scripture, to be obligatory? And theſe are, *That they ſhould be in Truth, in Judgment, and in Righteouſneſs.* I know that every Man may renounce what is his own Intereſt; but this Maxim holds only where Men underſtand their own Intereſt, but not in Minors, who want that Ripeneſs of Judgment by which their Renunciations are ſuſtain'd. And that the Oath is obligatory, tho' not the Contract, is but a mere Quible; for there is no Action ariſing in common Law, from an Oath *qua tale. Bart. ad L. Si quis. C. de Fidejuſſ. Imol. ad C. Cum contingat de jure-jur.* Such an Oath obliges in Conſcience, but not in Law; and tho' it be the Subſtance in the one, it is but an Accident in the other.

I need not debate here, that the *authentic Sacramenta puberum*, aſcribes only this Cogency to Oaths which are given *tactis ſacroſanctis evangeliis*; which tho' it may ſeem but a Solemnity, yet has great Force with it, in my Opinion: For Solemnities do raiſe up the Attention, and oblige more the Swearer to advert to what he is promiſing. And if Witneſſes and others come to Age, need theſe Advertiſements, much more do Minors need them, ſince they are oft overtaken by Inadvertency. And as this Caution ſeems not to have been unneceſſarily adjected by that excellent Law; ſo *Seraphinus* and others have required neceſſarily that Solemnity in ſuch Oaths as theſe, *antiqui quo major eſſet jurisjurandi religio, pleraſque adinvenerunt ceremonias, quæ jurantibus terrorem ac formidinem incuterent, Ann. Robert. Pag.* 188. And ſwearing by touching ſomewhat that was ſacred, was very old:

> *Tango aras medioſque ignes & numina teſtor.*
> Virgil.

*Juſtin.* alſo, *l.* 22. relates, that *Agathocles* ſwore Confederacy with the *Carthaginians, expoſitis tactiſque ignibus cereis.* And by all our old Evidents it is clear, that ſwearing upon the Bible or Altar, was uſed in all extraordinary Caſes. And for the ſame Reaſon, Oaths in Writ have been oft-times little reſpected by Lawyers, becauſe the Writ is oft-times not read nor conſidered, and paſſeth by too tranſiently to have all the Force which a ſolemn and judicial Oath deſerves, *vid. Bart.* and *l. qui juraſſe, ff. de jure-jur. & fachin. contrav. lib.* 3. *cap.* 8. So that we ſhould either not ſeek the Benefit of theſe Laws, elſe we ſhould make uſe of the Forms and Ceremonies which they preſcribe.

As to the aſſertory Oath, by which the Minor ſwore that he was Major, it is anſwered, That ſuch Oaths ought not to be reſpected further than as the above-cited Laws declare; which is, that theſe Oaths ought to be believ'd, except the contrary can be proven by Writ; and that the Truth and Strength of this Probation cannot be taken off, and enervat by Witneſſes: For a Writ is a more binding and concluding Probation than Witneſſes, who may be miſtaken, or may be corrupted. *Si tamen in inſtrumento per ſacramenti religionem majorem te eſſe adſeveraſti, non ignorare debes, excluſum tibi eſſe in integrum reſtrictionis beneficium, niſi* *palam, & evidenter ex inſtrumentorum probatione, per non teſtium depoſitiones te fuiſſe minorem oſtenderis.* But here it is offer'd to be proven, by the Regiſter of the Church-Seſſion where my Client was baptized, that he was Minor the Time of the Tranſaction; and by this your Lordſhips may ſee, how dangerous it were to make ſuch Oaths as theſe binding, and how eaſily Minors may be induced, not only to bind, but to damn themſelves; and how little this Perſon deſerves, who was the Occaſion and Solicitor of the Perjury. Were not this to baffle that ſacred Tye, by which Princes bind their Subjects to a ſecure Obedience; by which Judges oblige Men to reveal the Truth; and by which every private Man is ſecure, when he referreth to his Adverſary's Oath the Truth of what is controverted amongſt them. Nor can the Defender maintain this Contract, as entred into by my Client, who was a Merchant by his Profeſſion; ſince tho' that may defend ſuch as contract with him, in Things relating naturally to his Commerce, yet that ſhould not be extended to ſuch Contracts as theſe, wherein my Client is bound to ſell his Heritage at too low a Rate: *Et quæ ex neceſſitate, per modum privilegii introducuntur, ultra caſus neceſſarios non extenduntur.* Lands are not the Subject-matter of that Traffique which the Law doth privilege: But on the contrary, Lands are not allow'd to be ſold, without the Conſent and Sentence of a Judge; nay, and even theſe *qui veniam ætatis a principe obtinuerunt*, will be reſtored againſt the Prejudice ſuſtain'd by them in ſelling their Heritage: *L. 3. C. de his qui veniam ætat.* albeit no Man could *impetrare veniam ætatis*, till he was paſt Eighteen, and was proven to be prudent and frugal: *L. 2. C. eod.* which is all that can be alledged againſt this Minor. Nor ſhould our Law reſpect much *confinium majoritatis*, ſince they have ſhortned too much the Years of Minority, it making it end at Twenty One; whereas, the *Romans* and others who were ſooner ripe, and more ſagacious than we, extended Minority to Twenty Five: And ſince our Times are more cheating than their's, it was fit that our Minority ſhould have been longer than their's. But however, both of us agree, that *minorennitas computanda eſt de momento in momentum.*

To conclude then (My Lords) ſure that Opinion in all Controverſies ſhould be follow'd, which may do Good, and can do no Harm; and that is to be reprobated, which can do Harm, and is not neceſſary towards the doing what is juſt. But ſo it is, that not to reſtore a Minor in ſuch Caſes as theſe, may, and will neceſſarily deſtroy all Minors, who may be over-reached, and cannot be repon'd, becauſe of ſuch Oaths; whereas, ſuch as contract with them, can ſuffer nothing by ſuch Reductions: For, either the Minors with whom they contract are leſ'd, and then they will not be reſtor'd, and therefore, ſuch as contract with them cannot be prejudg'd: But if they can make it appear that they are prejudged, it will neceſſarily follow that the Minor is not leſ'd, and ſo the Contract will not be liable to Reduction, And thus theſe Oaths will infallibly prove to be either unneceſſary or unjuſt.

*THIS Cauſe came not to a Debate.*

## AGAINST

# Forfeitures in Abſence.

## The Fourteenth Pleading.

*My Lord Chancellor,*

WE have ſubjected to our Conſideration an Overture, which ought to be ſeconded by very convincing Arguments before we paſs it into a Law, ſeeing it innovates a Cuſtom, which is as old as our Kingdom, and older than our poſitive Laws. And Cuſtoms, like Men, may be thought to have had excellent Conſtitutions, when they laſt long; and this Act, if paſt, ſeems to infer the greateſt Hazard upon the Two higheſt of our Concerns; for ſuch are our Lives and Fortunes.

THE old inviolable Cuſtom of *Scotland* was, That no Probation could be led againſt Abſents, either in Treaſon, or any other Crime, in any Court, ſave the Parliament; but the only Certification in all Criminal Letters, was the being denounced Fugitives, (or out-law'd, as the *Engliſh* ſpeak) which Cuſtom hath maintain'd itſelf for many Hundreds of Years, by its own Reaſonableneſs, without the Neceſſity of being fenced with any other Authority. And albeit the Parliament did reſerve to themſelves a Liberty to proceed againſt Traitors, in caſe of Abſence, yet they never granted that to any other Court; whereby it clearly appears, That our Predeceſſors have thought that Power incommunicable to all ſuch as were not Legiſlators; that Procedure being rather a privileged Tranſgreſſion, than an Execution of the Law. But it is now craved by this Act, that incaſe of Perduellion, and riſing in Arms againſt the Prince, it ſhall be lawful to the Juſtices to lead Probation againſt Abſents, and forfeit them accordingly; which ſeems to me moſt inconvenient, for theſe Reaſons. 1. Becauſe the Stiles in all Courts are equivalent to Fundamentals; and by an expreſs Act of Parliament with us, Stiles are not to be altered: But ſo it is, There is no Stile in the Juſtice-Court, bearing any other Certification againſt Abſents, but the being denunced Fugitives. 2. There was never any Inſtances of it ſince the Foundation of the Juſtice-Gout; and a negative Practique being ſo old and uniform as this, is moſt binding; eſpecially where all the Conveniencies, Reaſons, and Advantages which are now preſs'd, were then obvious: Our Predeceſſors were ſure, as loyal as we, and let not us be more cruel than they were. 3. The old Cuſtom was founded upon moſt convincing Reaſons: For when Perſons are proceeded againſt in Abſence, they want the Benefit of *Exculpation*, for proving thoſe juſt Defences which are of ſo great Conſequence to them, and their Poſterity; ſuch as are, That tho' they were preſent upon the Place, yet they were taken Priſoners, and carried there, and were only going looſe upon Parole, or fell accidentally amongſt thoſe Rebels, who had gathered themſelves together, or went there by a Command from ſome of His Majeſty's Officers, for reclaming thoſe who were in Arms; with many other Defences, which (the Party being abſent) none can know, and tho' known, none dare propone; it being a Maxim in our Law, That none dare propone any Thing to defend one, who being purſued for Treaſon, is abſent. Another great Diſadvantage, under which theſe will fall who are purſued in Abſence, will be, That ſuch Witneſſes may be receiv'd againſt them, as are liable to juſt Exceptions, and whom they would decline if they were preſent: Which Objections likewiſe none know, nor dare propone; And it is likewiſe very well known, that there are many Witneſſes, who will depone upon Suggeſtion, very many Things which they durſt not aſſert, if they were confronted with the Party againſt whom they were to depone; being ſometimes overaw'd, and ſometimes thro' Pity driven to ſpeak only Truth, when they look upon his Countenance who is to live, or die, by their Depoſitions. Upon which account, Confrontation of Witneſſes and Parties hath, in the Civil Law, been uſed as a ſucceſsful Remedy; and in our's, the Witneſſes are ordain'd to look upon the Pannel's Face when they depone. And albeit it may ſeem, that there is little Hazard of a Probation, where the Caſe is ſo notour, as that of riſing in Arms; yet the Miſtake lies in this, That tho' the riſing in Arms be notour, it may be it is not notour who were preſent; and the Perſons may be doubtful, tho' not the Thing itſelf. A Third great Inconvenience is, That whereas thoſe who are preſent may by Interrogators, reſtrict, or explain what ſeem'd diſadvantagious in the Depoſition of ſuch as depone againſt them, they will by this Innovation, forfeit this Advantage amongſt other Loſſes. 4. No other Nation receives concluding Probation againſt Abſents; many Inſtances whereof might be given; but I ſhall ſatisfy myſelf with that of *Frieſland*, cited by *Sand. Lib.* 5. *Def.* 2. *Praxis noſtra habet, ut criminoſus ſi fuga ſe ſubtraxerit, ad inſtantiam procuratoris generalis citetur; & ſi præfixa die non comparet, fiducialiter. bona in contumaciæ pœnam annotantur;* which is exactly our Cuſtom: And by the Civil Law, *Tantum annotabantur bona rei non comparentis, ita ut ſi poſt annum venerit, & ſatis dederit de ſtando juri, ea recuperat; ſi non, bona perdit: non tamen de delicto habetur pro confeſſo: L. 1. & Gloſſ. L. Pœn. & Fin. ff. de requiren. reis:* Which Title begins thus, *Divi fratres reſcripſerunt ne quis abſens puniatur; & hoc jure utimur, ne abſentes damnentur.* And *Hottoman* tells us, That *Majeſtatis crimen in foro apud ſuum prætorem; perduellio vero a populo* Romano, *comitiis centuriatis in campo martis judicabatur.* Which was much more reaſonable than our preſent Overture, ſeeing the greater the Crime is, it ſhould be the more ſolemnly, and ſlowly judg'd. From which Procedure of the *Romans* in Perduellion, it ſeems our old Practique of judging only Abſents in the Matter of Treaſon by a Parliament, hath taken its Origine; for *Comitiæ centuriæ* was to them what a Parliament is to us. I might here likewiſe alledge the Authority of *Mathæus*, the learnedſt Civilian who ever wrote upon that Subject: *Tit.* 2. *Num.* 6. whoſe Words are, *Deniq; cum leges vetant abſentem damnari, crimen perduellionis non excipiunt: erit igitur & hic obſervandum, quod in aliis criminibus, ut abſens requirendus adnotetur, & bona obſignentur, publicentur denique, ſi intra annum non reſponderit. L. Abſentem,* 5 *C. de pœnis. L. Abſentem,* 6. *C. de Accuſat. L. ult. D. de requer. vel abſ. dam. Nam quanquam perduellio graviſſimum* *crimen eſt, videndum tamen ne in occaſionem ſevitiæ atq; calumniæ habeatur: & Pag.* 371, *dicit* Math. *Falſum eſſe abſentem in hoc crimine poſſe damnari, nec ullo juris loco excipi crimen Majeſtatis: Dicitque, ſupradictam extravagantem conſtitutionem nullam authoritatem obtinere apud interpretes juris civilis.* 5. By the 90 Act, Parl. 11. *Jam.* VI. it is moſt juſtly ſtatute, That all the Probation ſhould be led in Preſence of the Pannel, and the Aſſize: Which ſhows clearly, that our Law hath been always jealous of Probation led in Abſence; and that Probation is only to be led in Preſence.

THIS Innovation is recommended to us upon theſe Reaſons: 1. "That theſe who are contumacious, and fly from Juſtice, ſhould be in no better Condition than thoſe who appear; and they cannot complain of any of the foreſaid Diſadvantages, ſeeing theſe are occaſioned by their own Abſence and Fault." To which it is anſwered, That a Perſon who is purſued for Treaſon may be abſent, not upon the account of any Guilt, but becauſe the Citation never came to his Knowledge; as if he be at the time Abroad in foreign Countries, where Citations at the Mercat-croſs of *Edinburgh*, and Pier and Shore of *Leith* (which is all our Law allows) ſeldom reach: And ſometimes the Perſons ſummoned may be either ſick, or in Priſon, and not be able to appear; or being liable to other Accuſations, or fearing rather the preſent Influence of ſome Enemies, than their own Guilt, dare not: For tho' Treaſon, as the moſt comprehenſive of all other Crimes to us, be of all others moſt abominated, when proven; yet of all other Crimes, moſt Innocents are, by either Malice or Deſign, ofteſt enſnared, upon Pretext rather, than by the Guilt of Treaſon: For as *Lipſius* obſerves of the Times wherein *Tacitus* wrote, *Fræquentatæ tunc temporis accuſationes Majeſtatis, unicum crimen eorum qui crimine vacabant. Tertullian* in his Apol. ſays, *Non licere indefenſos omnino damnari. Et a* Carolo Magno *inſtitutum eſt, Lib.* 7. *Cap.* 145. *ne quis abſens in cauſa capitali damnetur. Plutarch* in *Alcibiades*'s Life, makes *Alcibiades* to have given this prudent Anſwer, to one who challenged him for not appearing to defend himſelf: *Cetera (inquit) omnia libenter, ſed de capite meo, ne matri quidem, ne forte is pro albo atrum calculum imprudenter injiciat. Notat &* Liberius *Pontifex* Romanus Conſtantio *Imperatori, judicem non poſſe, abſente reo, de crimine ejus judicare, niſi aut iniquus judex ſit, aut privato odio ſævit: Hiſt. tripart. L.* 5. *Cap.* 16. *Seneca* ſaith, *L.* 6. *de Beneficiis, Cap.* 38. *Quantum exiſtimes tormentum, etiamſi ſervatus fuero trepidaſſe, etiamſi abſolutus fuero cauſam dixiſſe.* And as *Cicero* very well obſerves, Theſe who are accus'd before any Judge, for Life, conſider oftner what that Judge may do, than what in Juſtice he ought to do, *oratione pro* Quintio. And thus we find, that *Athanaſius* and *Chryſoſtom* would not appear at Councils to which they were cited, albeit they feared their Judges more than their Guilt: *Niceph. L.* 8. *C.* 49. It were therefore very hard in any of theſe Caſes, to forfeit an Abſent of his Property, ſeeing in theſe, Innocence and Abſence are very compatible. Nor doth His Majeſty ſuffer great Loſs by this, as is urged: For if he who is purſued for Treaſon compear not, he is denounced Fugitive; and by that Denunciation His Majeſty poſſeſſes his whole Eſtate, till he die, or compear; and after Death he may be forfeit.

THE Second Argument is, "By the 69. Act, Parl. 6. *Ja.* V. Traitors may be forfeit after their Death; in which Caſe they are abſent, and want all the Advantages above-related." But to this the Anſwer is, That the Law is ſo juſt and merciful, that after a Perſon is denounced Fugitive in the Caſe of Treaſon, it allows him all the Days of his Life to purge his Contumacy, by appearing to reclaim his Innocence; and it never deſpairs of the one, till the other be elapſed. And when it proceeds againſt any Man to Forfeiture after his Death, it ordains the neareſt of Kin to be called to exculpate him, by proponing Defences or Objections againſt the Witneſſes, and for doing every Thing elſe which is uſual in ſuch Caſes, or which might have been done by the Defunct himſelf; whereas he who is purſued in his own Lifetime, cannot defend after that manner, as ſaid is. After Death likewiſe, Death itſelf, which is the greateſt Half of the Puniſhment, is over, and there is not ſo great Hazard as there is in his Caſe who is forfeit during Life, who is by that Sentence (without any Poſſibility of Hearing) execute immediately upon his being apprehended. After Death alſo, Malice and Deſign ordinarily ceaſes; ſo that the Errors or Prejudices of either Purſuer or Witneſs are not ſo much to be feared.

THE Third Argument is, "That Probation may periſh in the mean Time, if it cannot be received till after Death." To which it is anſwered, 1. That this Argument, *aut nihil, aut nimium probat*; for, upon this Account, Purſuits ſhould be ſuſtain'd for all other Abſents, this Prejudice being common to all. But, 2. It is ſafer, that a juſt Probation ſhould periſh, than that a ſuſpected one ſhould be received; and this one Inconveniency ſhould not weigh down the many, which are laid in the Balance of the other Side. Parliaments are ordinary, and neceſſary after public Rebellions, wherein that horrid Crime may receive its legal, as well as its juſt Puniſhment: Or if they meet not, this may be otherwiſe remedied; for, Probation may be led *ad futuram rei memoriam*, tho' the Party be abſent, reſerving to him all his other Defences, by which the King's Right may be preſerved, and the Lieges Rights not prejudged; and of all Probations, that can leaſt periſh, which is to be led in the Caſe of public riſing in Arms.

The Fourth Argument is, "That the Civil Law admits Forfeiture in Abſence in the Caſe of Perduellion, (for ſo the common Law names that kind of Treaſon which is committed againſt the Prince or State) and our Criminal Law being founded upon the Civil Law, ought in this, as in moſt other Caſes, to be ſquared by it." To which my Anſwer is, That there is no Warrant for that Aſſertion from the Law of the *Romans*; for, by that Law, *bona tantum annotabantur*, as hath been ſaid, in place whereof, *banna hodie locum obtinent*, which is equivalent to our Denunciations. But becauſe Citations of the Civil Law would reſemble Pedantry too much, I ſhall recommend to ſuch as doubt this, the 16. Verſe, 25. Chap. of the Acts, where *Feſtus*, a great *Roman* Lawyer, ſure, (as all their Preſidents of the Provinces were) tells us, *That it is not the manner of the* Romans *to deliver any Man to die, before he who is the Accuſed, have the Accuſer Face to Face, and be heard to defend himſelf concerning the Crime laid againſt him.* I confeſs, that Forfeiture in Abſence is allow'd *per extravag.* Henrici *Septimi*, (and it is well called an extravagant Conſtitution;) but that is accounted no Part of the Civil Law, and if we follow its Model, we ought to allow Forfeiture in Abſence in all Points of Treaſon, as this doth. And even that Conſtitution acknowledges, that this was not allow'd by the *Romans*; and if it had, this Conſtitution had been unneceſſary, as it is now unreaſonable. And I remember, that *App. Alex.* in his Third Book of the Civil Wars, relates an eloquent Harangue made by *Lucius Piſo*, in favour of *Antonius*, maintaining, That no Perſon who is abſent could be condemned, tho' upon Probation; which was accordingly found by the *Roman* Senate. And tho' our Parliaments uſe to proceed againſt Abſents, in caſe of Treaſon; yet, that is ſo ſeldom and ſolemnly done, that there is little Hazard to the Pannels, and every Man hath ſtill ſome Friends in ſo great a Number, who may defend him. Nor is it probable that the Parliament, who are the great Curators of the Commonwealth, and who are ſo much entruſted by us, as to have repoſed upon them the Legiſlative Power, will prejudge any private Party; remembring it may be their Caſe one Day, which is now the Pannel's; and that being a Supreme Court, is not ſtinted to follow a Probation which is ſuſpected, tho' private Aſſizers might, for fear of an Aſſize of Error; which makes a vaſt Difference and Diſparity of Reaſon.

Let us then (My Lord) conſult the Intereſt of our Poſterity, which is a generous kind of Self-defence: For the *Italian* Proverb obſerves well, *That it is better to live in Countries which are barren, than in Countries where there are rigid Laws.* Let us guard againſt what is cruel, as we wiſh what is juſt; and let us lawfully be careful now of theſe our Lives and Fortunes, of which we have been too often unneceſſarily anxious. God Himſelf would not condemn *Adam*, till He heard him; and tho' He knew the Sins of *Sodom* and *Gomorrah*, He would not pronounce Sentence againſt them, till He went down and ſaw their Abominations. Let us not then make Snares in place of Laws, and whilſt we ſtudy only to puniſh ſuch as are Traitors, let us not hazard the Innocence of ſuch as are loyal Subjects.

*THE learned Reaſons adduc'd for this Overture, and the Opinion of the Seſſion, prevail'd againſt this Diſcourſe; and the Parliament did ordain, that Abſents might be proceeded againſt in the Juſtice-Court, for public riſing in Arms.*

## FOR

# The late Marquis of *Argyle*, immediately before his Caſe was adviſed.

# The Fifteenth Pleading.

## *Whether paſſive Compliance in public Rebellions, be puniſhable as Treaſon?*

*My Lord Chancellor,*

I Wiſh it may be the laſt Misfortune of my Noble Client, that he ſhould be now abandoned to the Patronage of ſo weak a Pleader as I am, whoſe Unripeneſs, both in Years and Experience, may, and will take from me that Confidence, and from your Lordſhips that Reſpect, which were requiſite in an Affair of this Import. In our former Debate, which is now cloſed, we contended from the Principles of ſtrict and municipal Law: But here I ſhall endeavour to perſuade your Lordſhips, from the Principles of Equity, Reaſon, Conveniency and the Cuſtom of Nations; which is the more proper Way of Debate before a Parliament, who make Laws, but are not tied by them; and who in making Laws, conſider what is fit and equitable, and then ordain what ſhall be Law and Juſtice. And if your Lordſhips conſider ſtrict Law in this Caſe, it were in vain for the loyaleſt Subjects, who liv'd in theſe Three Kingdoms during thoſe late Confuſions and Rebellions, to defend his own Actions by that Rule: For, ſince Intercommuning with Traitors, concealing of Treaſon, and acknowledging their Authority, are by ſtrict Law, in regular Times, undeniable Acts of Treaſon; I am no more to debate abſtractly my Client's Innocence as to theſe; for who amongſt us did not ſhare in that Guilt? All did pay Ceſs, all did raiſe Summons in the Protector's Name, we were all forc'd to be the idle Witneſſes of their Treaſons; and therefore I ſhall only contend, that in ſuch irregular Times as theſe were, wherein Law itſelf was baniſh'd with our Prince, mere Compliance can amount to no Crime in him; and that as to this he lies under no ſingular Guilt; eſpecially ſeeing His Majeſty has, by a Letter under His Royal Hand, declar'd, That He will not have His Advocate inſiſt againſt him for what was done by him, or any elſe, preceeding the Year 1651; (in which Time he was only an eminent Actor) having retired himſelf from all public Employments under *Cromwel's* Uſurpation; being known for nothing all that Time but a Sufferer, and being forc'd by Self-preſervation to do thoſe Things for which he is now accuſed. Which being undeniably acknowledged by all the Nation, cannot but recommend theſe few Particulars which I am now to offer for him.

COMPLIANCE (as the very Word imports) is only a paſſive Connivance, *Et præſupponit crimen in ſuo eſſe hactenus conſtitutum*; and in Law, when a Multitude offend (as in our Caſe) the Contrivers, and ſuch as were moſt active, are, and ſhould only be puniſhed, *detrahendum eſt ſeveritati ubi multorum hominum ſtrages jacet*: And therefore, this Noble Perſon being acknowledged to be none of the firſt Plotters, nor having been ſingular amongſt that vaſt Multitude of Compliers, cannot be brought in amongſt ſuch as ought to be puniſhed. For, albeit where many may commit a Crime, there the Multitude of Offenders ſhould heighten the Puniſhment; yet, where the Crime is already committed collectively by a Multitude, there the Number of Offenders takes off the Guilt. And in ſuch Caſes, none ſhould be puniſhed (ſaith *Aflictus*) but *in flagranti & recenti crimine* (or with Red-hand, as our Law terms it) *dum durat crimen, nec ſine quorundam nece extingui poteſt ſeditio*, or where the renewing of the Crime is juſtly to be feared: For Puniſhments being of their own Nature inflicted, not for what is paſt (ſeeing that cannot be remedied) but for Example in the Future, certainly where the Rebellion is extinguiſhed, and needs no more be feared, as in our Caſe, (God be praiſed) it were Cruelty to puniſh ordinary Compliers. It is remarkable, that in the 13, 14, 15, Acts of the 5th. Parliament of Queen *Mary*, ſuch *Scotſmen* as did ride with *Engliſhmen*, even where Her Majeſty's Authority ſtood in its Integrity, are ordain'd only to be liable for what Skaith they did to *Scotſmen* who ſerved the Country; and that they being charged to leave Aſſurance with *Engliſhmen*, and diſobeying, ſhould have no Action againſt true *Scotſmen* for any Wrong done to them.

If then ſuch Lenity was us'd, and ſuch Commiſeration extended to ſuch as were involv'd in a public Oppoſition to lawful and ſtanding Authority, and in a Compliance with the *Engliſh*, who were at that Time, born and ſworn Enemies both to this Crown and Country; What may ſuch expect as complied only when no viſible Authority was able to protect ſuch who were forc'd to comply, not out of any Deſign to defend Uſurpation, but rather out of a Deſign to preſerve themſelves for doing His Majeſty further Service? And as in the Body-natural, the ordinary Rules of Phyſic take no Place, when there is a violent and univerſal Conflagration of Humours; ſo the ordinary Rules of Law ſhould have as little Place in the Body-politic, when the whole Nation have thrown themſelves headlong into a common Diſtraction. To which Purpoſe I cannot but repreſent to your Lordſhip that excellent Law, made in the Reign of *Henry* VII. of *England*, and with Conſent of that excellent Prince; wherein it was enacted, That no Subject ſhould be guilty of Treaſon, for obeying One who was called King, tho' known to be an Uſurper; becauſe the People do there not rebel, but ſubmit.

*NECESSITY* may likewiſe be adduc'd for extenuating this Compliance; which is therefore ſaid to have no Law, becauſe it is puniſhed by none: Without complying at that Time, no Man could entertain his dear Wife, or ſweet Children; this only kept Men from ſtarving; by it only Men could preſerve their ancient Eſtates, and ſatisfy their Debts, which in Honour and Conſcience they were bound to pay; and without it, ſo eminent a Perſon as the Marquis of *Argile*, and ſo much ey'd by theſe Rebels, could not otherwiſe ſecure his Life againſt the Snares were daily laid for it: And ſo this Compliance did in Effect reſolve in a Self-defence; which *inculpata tutela*, ſeeing it can exempt a Man from Murder, and theſe other Crimes that are contrary to the Law of Nature, it ſhould much more defend againſt the Crime of Treaſon, which is only puniſhed, becauſe it is deſtructive to the Government of our Superiors, and Statutes of our Country: And ſince Crimes are only puniſhable, becauſe they deſtroy Society and Commerce; How can this Compliance be puniſhed which was neceſſary for both theſe?

Man's Will is naturally ſo frail, and Man becauſe of that Frailty ſo miſerable a Creature, that to puniſh even where his Will is ſtreight, were to add Affliction to the Afflicted: The Want of this, will defend Mad-men againſt Paricide; and the Degrees of this diſtinguiſh Slaughter from Murder: And in the Acts of Parliament whereupon the Libel as to Compliance is founded, it is requiſite, that the Compliance be voluntary; thus in the 37 Act, 2 Parl. *Jam.* I. it is ſtatute, That no Man wilfully receipt Rebels: And by the 205 Act, 14 Parl. *Ja.* VI. theſe who apprehend not ſuch as miſrepreſent the King, are as guilty as the Leaſing-makers; *if it be in their Power to apprehend them*; as the Act very well adds. Likeas by the 144 Act, 12 Parl. *Jam.* VI. the Lieges are only prohibited to intercommune with ſuch Traitors as they might curb: For that Act, as it forbids all Commerce with Rebels; ſo it commands all the Subjects to advertiſe His Majeſty of their Reſidence, and to apprehend them: Whereby it is clear, that this laſt Act is only to have Vigour when the Authority of the Sovereign ſtands in Force; & *per argumentum a contrario ſenſu*, ſeems to excuſe ſuch as ſubmit to Traitors, when there is either nothing to be advertiſed, or when Advertiſements of that Nature are either impreſtable, or at leaſt unprofitable; as in our late Troubles, at which Time the Reſidence of theſe Rebels was notour, and all Correſpondence betwixt the King and His People was daily betrayed and intercepted. Conſonant to which is that excellent Law, *L.* 2. *ff. de receptatoribus*, where it is ſaid, That *ideo puniuntur receptatores, quia cum apprehendere potuerunt dimiſerunt*. And *Bald. ad L. Delictis. ff. de Noxal. act.* is moſt expreſs, that *receptans rebelles non voluntarie, ſed coacte, quia ſunt plures rebelles ſimul, & eos expellere non poteſt ſine ſuo periculo, non punitur aliqua pœna*. Thus likewiſe in the Statutes of King *William*, *Cap.* 7. § 2. it is ſaid, *Pro poſſe ſuo malefactores ad juſtitiam adducent, & pro poſſe ſuo juſtitiarios terræ manu tenebunt*: And § 5. it is ordained, *Quod Magiſtratus pro poſſe ſuo auxiliantes erunt domino Regi ad inquirendum malefactores, & ad vindictam de illis capiendam*. By all which it is clear, that not only ſhould Compliance be voluntary before it be criminal; but that likewiſe it muſt be a Compliance againſt lawful Authority, able to protect ſuch as revolt from it. I remember, *in Anno* 1635, *James Gordon* being challenged for correſponding with *Alexander Leith* and *Nathaniel Gordon*, declar'd Traitors for burning the Houſe of *Frendraught*, they were aſſoilied, becauſe the Intercommuning challenged was not libelled to have been voluntary; and thereafter the Aſſize who aſſoilied them, having been purſu'd for wilful Error, for abſolving, as ſaid is, they were likewiſe abſolved from that Proceſs of Error: In the which Proceſs, that ſame Argument was urged, but not ſo ſtrong in point of Fact, as in our Caſe:

And becauſe the Deſign is that which differences the Actions of Men; (*Propoſitum crimina diſtinguit*) and ſeeing Deſigns, being the hid Acts of the Mind, are only gueſſed at by the concomitant and exterior Circumſtances; I ſhall only intreat your Lordſhip to conſider theſe few Preſumptions; which being join'd, may, in my Apprehenſion, vindicate this noble Perſon from the Deſign of voluntary Compliance. 1. He is deſcended from a Stock of Predeceſſors, whoſe Blood hath preſcribed by an immemorial Poſſeſſion, the Title of eminent Loyalty; and that ſame Law which preſumes that the Blood and Poſterity of Traitors is infected with a Deſire to revenge the juſt Death of their Predeceſſors, and an Inclination to propagate their Crimes, doth likewiſe preſume Loyalty, and a Deſire to be thankful, in the Children of ſuch as have received great Favours, and performed great Services, to ſuch as have been the Benefactors. 2. Theſe with whom he is ſaid to comply, were known and avow'd Enemies to Nobility, had quite exterminated in *England*, and begun to exterminate in *Scotland*, all Memory of Nobility, and Badges of Honour; ſo that in this Compliance, he muſt be thought to have plotted againſt his own Intereſt: Nor can I ſee what Advantage he could expect from a Commonwealth, which valued nor preferred none but Soldiers; a Trade which ſuited neither with his Breeding nor Years. 3. They were Enemies to Presbyterian Government, of which he has always ſhewed himſelf ſo tenacious; and of all Governments they did moſt abominate that one for which he had expos'd himſelf to ſo many Hazards. 4. That Uſurper had never obliged him, neither by Reward nor Compliment. 5. He was ſworn their Enemy both in Parliament and Council; and Charity as well as Law preſumes againſt Perjury. 6. He was purſued by them moſt unjuſtly, both at Council of War, and elſewhere; and was known to have been hated extremely by their Commander in chief, for Compliance with whom he is now challenged. By all which 'tis moſt improbable, that His Lordſhip would have linked himſelf with that abominable Crew of Miſcreants, by whom he might loſs much, but gain nothing.

HIS Majeſty hath recommended this Caſe to be judged by your Lordſhips, whom He knew the Iniquity of theſe Times did (tho' without any cordial Aſſent) involve in the ſame Guilt; and albeit it were a Guilt, there will be hardly any found to caſt the firſt Stone at him: And His Majeſty hath not delivered him up, to be proceeded againſt, till by His Act of Indemnity (granted even to ſuch as were eminently engaged in the Contrivance and Execution of the moſt horrid Plots that were perpetrate againſt him) He had firſt caſt a Copy to your Lordſhips of that meek Procedure which He allows; and not till He had (even notwithſtanding of their Compliance) preferred ſome to be Councellors, ſome to Titles of Honour, and many to Employments of great Truſt. And were it not unjuſt, that he ſhould ſuffer for Acts of Frailty, when the Ringleaders, and malicious Plotters paſs unpuniſhed? And were it not Unkindneſs to our Country, to have it thought, that we had Subjects who deſerved worſe than *Lambert*, *Lintil*, and others? I ſhall to all this add, That the Guilt charged upon this noble Perſon is ſuch, as was thought Prudence in thoſe who were moſt loyal; and this Compliance was ſo cuſtomary, and ſo univerſal, that it was thought no more a Crime, than the living in *Scotland* was criminal: Whereas in Law, *Qui ſequitur communem errorem, non delinquit*; *& conſuetudo facit actum de ſua natura punibilem, impunibilem, & excuſat a pœna ordinaria & extraordinaria*: Farin. *Quæſt*. 85. *de pœn. temperandis*. Cuſtom is a Second Nature, and Example a Second Law; and he who obeys them, obeys *quaſi legem naturæ & patriæ*. And in all Civil Wars, and Uproars, eſpecially where ſuch have laſted for a conſiderable Time; as in *Portugal*, *France*, *Germany*, *&c.* none have been puniſhed for mingling with the Multitude, if they did not pervert them. And if we conſult the Ancients, when Juſtice and Equity were not yet oppreſt by Intereſt and Deſign, we will find, That *Julian* the Emperor having only puniſhed the chief Rebels, *reſidui omnes abierunt innoxii, quos in certaminum rabiem neceſſitas ægerat, non voluntas*. And *Themiſtius* praiſes *Valens* the Emperor, becauſe *non pœna dignos exiſtimavit, qui bellum non ſuaſerunt, ſed qui abrepti ſunt a morum impetu, & qui ſuccubuerunt ei qui jam rerum potiri videbatur*. And *Joſeph. L.* 5. tells us, That in ſuch univerſal Rebellions, *Titus* uſed only to puniſh the Ringleaders; *unum criminis ducem puniebat reipſa; multitudinem vero, ſola verborum increpatione, ſeditionum concitatores, & duces factionum dicuntur, L.* 16. *ff. Quando appell.*

IT is likewiſe univerſally received by the Law of Nations, That ſuch as ſubmit after univerſal Rebellions, either upon Conditions, or who put themſelves in the Mercy of their Magiſtrates, (as *Grotius* doth moſt wiſely obſerve, *Lib.* 3. *Cap.* 11.) are ſtill ſecure, and therefore, ſince the Marquis did, immediately upon His Majeſty's Return, go to Court, to attend His Majeſty amongſt His other loyal Subjects, judging from the Dictates of his own Conſcience, that he was in the ſame Caſe with your Lordſhips his preſent Judges, it were ſtrange that he ſhould fall, when others are in great Multitudes pardoned, who fled out of a Conſciouſneſs to their own Guilt; eſpecially ſince he offered to prove, that he teſtified to many Hundreds during His Majeſty's Abſence, a deep Senſe of that Misfortune, and an abſolute Averſion from that preſent Uſurpation; and that he aſſiſted His Majeſty's Friends, both with Money and Advice. And who would think, that in Equity he ought to die, by theſe whom he wiſh'd reſtor'd, and for which Reſtoration he pray'd daily in his Family; and die for complying with thoſe, whoſe Ruin he beg'd daily upon his Knees? And tho' he did not join with ſome who were Commiſſionated by His Majeſty, yet that proceeded not in him more than in others, from any Unkindneſs to the Cauſe which he always allow'd, as can be proved both by themſelves and others; but from a Perſuaſion he had, that ſuch Courſes as they took would ruin the Deſign which was propoſed: And any Thing he did in Oppoſition to them, was to defend himſelf and his poor Country, againſt Injuries which were deſigned againſt him upon private Quarrels, as he ſtill offer'd to prove. If we conſider that ſame Intereſt of Nations for which Treaſon is puniſhable, we will find it unfit to puniſh ordinary Compliers after a Tumult is quieted; for if every Man that were involv'd in the Guilt, did think that he were puniſhable, all would be forc'd pertinaciouſly to continue the Rebellion they had begun, and to expect from Succeſs only, that Impunity which the Law deny'd; And thus your Lordſhips ſhould make all future Rebellions to be both cruel and perpetual.

I come now to the Probation adduced by His Majeſty's Advocate, for proving this Compliance; and in order thereto, I ſhall lay before your Lordſhips theſe following Conſiderations. 1. That the weaker the Relevancy is, the Probation ſhould be proportionably the ſtronger, *gravatus in uno, levandus in alio.* 2. That in Criminals, Probation ſhould be very convincing. 3. The more illuſtrious the Pannel is, the Proof ſhould be ſo much the more pungent; becauſe the Law preſumes Noble Perſons leſs inclin'd to commit Crimes than others. 4. Where there is no Penury of Witneſſes, Probation ſhould be ſo much the clearer, becauſe the Law preſumes that all is known which can be known: But ſo it is in this Caſe, Sixty Witneſſes have been led, (albeit our Law allows only Twenty Five in Criminals) and a long Time hath been taken, and many Invitations given to all Perſons, in all Corners, to come and depone; and it is believed by moſt of theſe ſilly Perſons, that it will be moſt acceptable to His Majeſty, and may procure a Reward to themſelves, that they depone againſt his Lordſhip: Which remembers me of theſe Slaves in *Juvenal*, who at *Sejanus* Fall, invited one another to offer Indignities to his dead Body, *Dum jacet in ripa calcemus Cæſaris hoſtem.* 5. The Law requires in theſe attrocious Crimes, Witneſſes *omni exceptioni majores*, and theſe are in Law expon'd to be ſuch as the Jealouſy of the greateſt Enemy needs not ſuſpect; whereas moſt of all the Witneſſes adduced, are either the Servants of ſuch as have been debarred themſelves from Witneſſing, for fear of Partiality, or the Uſurper's Soldiers, who have ſo oft foreſworn ſolemnly their Allegiance to their Prince, that no Judge can rely upon their Depoſitions: For it is preſumable, that *ſemel perjurus*, will be *ſemper perjurus*. And albeit His Majeſty, by His Indemnity, hath vail'd their Crimes, yet He hath not taken them away, as is clear, *per L. ff. C. de generali abolitione*; the excellent Words run thus, *Indulgentia (Patres conſcripti) quos liberat, notat, nec infamiam criminis tollit, ſed pœnæ gratiam facit.* Whence I argue, that infamous Perſons cannot be Witneſſes; but ſo it is, that perjured Perſons (*non abſtante amneſtia & remiſſione*) are infamous by the foreſaid Law. The Criminal Regiſters likewiſe tells us, that one who had been condemned for forging of falſe Writs, was refuſed to be receiv'd as a Witneſs in *Frendraught*'s Proceſs, albeit he had obtained a Remiſſion. And certainly, Perjury in the Crime of Treaſon, (whereof theſe Soldiers are guilty) is a more odious Crime, than that of forging of falſe Writs. 6. I hope your Lordſhips will conſider, that moſt of what theſe Witneſſes have deponed, are Speeches, which the beſt of Men may have forgot, after ſo long a Time, and in a Time when both Men and Manners have been much confounded, by the Strangeneſs and Number of intervening Accidents. Moſt of theſe Witneſſes have deponed upon that which fell under Senſe, and ſo have acted rather the Parts of Judges, than Witneſſes. Thus ſome depones, That the Marquis's Boats did bring the *Engliſh* up *Lochfine*, and that they could not have got up without his Aſſiſtance; which laſt Part, as it is negative, ſo is an Act of the Judgment, and not the Object of any exterior Senſe: And they preſume they had an Order from the Marquis, becauſe elſe they durſt not have gone. And is not this to imagin, and not to depone? 7. Moſt of them are Perſons, whom the Dittay acknowledged to have been wrong'd by the Marquis: Moſt of theſe poor Perſons who have deponed, were, to my certain Knowledge, ſo confounded by appearing before a Parliament, and by Interrogators, that they ſcarce knew what to anſwer. 8. Not any Two of theſe numerous Witneſſes concur in their Depoſitions; all vary, and moſt do claſh, and are either *Vacillantes*, or *Singulares*. Neither can the Depoſition of one Witneſs, as to one particular Circumſtance of a Crime, and the Depoſition of another as to another, be join'd for making up a clear Probation; for there the Judge is certified of neither of theſe Circumſtances, ſeeing one Witneſs is none; whereas proving Witneſſes ſhould be *conteſtes*. And if a Pannel were accuſed of more Crimes in one Libel, the Depoſition of one Witneſs to prove one, and of another to prove another of theſe Crimes, would not prove the Libel; ſo neither can the ſingular Depoſition of Two Witneſſes upon different Points, prove one Crime. Such Spelling is not lawful in Probation, and this is that which the Doctors call *ſingularitas diverſificativa*, which in Law hinders

Conjunction *in probationibus*, as well as *ſingularitas obſtitativa, Alexand. conſil.* 13. *Hippol. in ſua praxi,* § *diligenter num.* 149. *Farin. tract. de oppoſ. contradicta. teſtium.* 9. The Law makes a Difference, as to the Probation betwixt Perduellion, or open Treaſon, in which they require moſt convincing Probation; and in Conſpiracies or occult Crimes, in which the Rigour of Probation is remitted, becauſe the Poſſibility of Proving is much reſtricted, in reſpect of the Clandeſtineneſs wherewith ſuch Conſpirations are managed; and therefore, ſeeing in this Caſe the Acts to be prov'd were committed publicly, ſuch as joining in open Hoſtility with the Uſurpers, aſſiſting at their Proclamations, levying Forces againſt His Majeſty's Generals; certainly the Probation ſhould be moſt illative of what is alledged, and the Provers ſhould be *omni exceptione majores.* I muſt tell you (My Lords) that ſome have been ſo unjuſt to you, as to fear, that tho' the Probation be not concluding, that yet ye will believe, to the great Diſadvantage of my Noble Client, the unſure Depoſition of that as foul, as wide-mouth'd Witneſs, *publick Bruit and common Fame*; which as it is more unſtable than Water, ſo like Water it repreſents the ſtraighteſt Objects as crooked to our Senſe; and that others of you retain ſtill ſome of the old Prejudices, which our civil and inteſtine Diſcords did raiſe in you againſt him during theſe late Troubles: But I hope, Generoſity and Conſcience will eaſily reſtrain ſuch unwarrantable Principles in Perſons, who are by Birth, or Election, worthy to be Supreme Judges of the Kingdom of *Scotland*. It is unmanly to deſtroy your Enemy unarmed, but unchriſtian when you repreſent God as Judges; for then you endeavour to make him a Murderer; and in my Judgment, he revenges himſelf but meanly, who, to ruin his Enemy, deſtroys his own Soul, and taſhes his Honour.

My Lords, as Law obliges you to abſolve this noble Perſon, ſo your Intereſt ſhould perſuade you to it. What is now intented againſt him, may be intented againſt you; and your Sentence will make that a Crime in all Compliers, which was before but an Error and a Frailty. Your Royal Maſter may, with our Saviour, then ſay to you, *Thou cruel Servant, I will condemn thee out of thine own Mouth:* Or, if your Lordſhips be pardon'd, He may ſay to you as His Maſter ſaid to the other, *Sure I did pardon thee, why waſt thou ſo cruel to thy Fellow-ſervant?* But, not only may this prove a Snare to your Lordſhips, but to your Poſterity. Who in this Kingdom can ſleep ſecurely this Night, if this Noble Perſon be condemned for a Compliance, ſince the Act of Indemnity is not yet paſt? And albeit His Majeſty's Clemency be unparallel'd, yet it is hard to have our Lives hung at a *May-be*, and whilſt we have a Sentence-condemnator ſtanding againſt us. *Phalaris* was burnt in his own Bull: And it is remarkable, that he who firſt brought in the *Maiden*, did himſelf ſuffer by it.

I do therefore humbly beg, That ſince this Proceſs was intented upon Informations given to His Majeſty, of the Marquiſs's being very extraordinarily active for the Uſurpers, that your Lordſhips would tranſmit the Proceſs as it now ſtands to His Majeſty, that thereby he may have a fair Occaſion to give a generous Teſtimony of His Clemency; that the People may be ſecured againſt all Jealouſies and Fears, and that your Lordſhips may be reſcued from ſo invidious a Trial.

## FOR

# *Mævia*, accuſed of Witchcraft.

## The Sixteenth Pleading.

I Am not of their Opinion, who deny that there are Witches, tho' I think them not numerous; and tho' I believe that ſome are ſuffer'd by Providence, to the End that the Being of Spirits may not be deny'd: Yet I cannot think, that our Saviour, who came to diſpoſſeſs the Devil, who wrought more Miracles in His own Time, upon poſſeſs'd Perſons, than upon any elſe, at whoſe firſt Appearances the Oracles grew dumb, and all the Devils forſook their Temples; and who promiſed, *John* 12. *That the Princes of this World was now to be caſt out,* would yet ſuffer him to reign like a Sovereign, as our fabulous Repreſentations would now perſuade us.

This Perſon for whom I appear, ſtands indicted as a Witch, upon ſeveral Articles; the Firſt whereof is, “ That ſhe did lay on a Diſeaſe upon *A. B.* by uſing a Charm. 2. That “ ſhe took it off by another. 3. That it is deponed by Two penitent Witches, that ſhe and “ they did fly as Doves to the Meeting-place of Witches.

As to the impoſing or taking off Diſeaſes by Charms, I conceive it is undeniable, that there are many Diſeaſes, whereof the Cures, as well as the Cauſes, are unknown to us; Nature is very ſubtle in its Operations, and we very ignorant in our Enquiries: From the Conjunction of which Two, ariſes the many Errors and Miſtakes we commit in our Reflections upon the Productions of Nature. To differ then from one another, becauſe of theſe Errors, is ſufferable, tho' to be regretted; but to kill one another, becauſe we cannot comprehend the Reaſon of what each other do, is the Effect of a terrible Diſtraction. And if this were allow'd, the moſt Learned ſhould ſtill be in greateſt Danger, becauſe they do oft-times find Myſteries which aſtoniſh the Ignorant. And this ſhould give Occaſion to the Learned to forbear deep Searches into natural Myſteries, leſt they ſhould loſe their Life in gaining Knowledge, and to perſecute one another; for every Phyſician or Mathematician, who is emulous of another, but cannot comprehend what his Rival doth, would immediately make him paſs for a Wizard: It is natural for Men to think that to be above the Reach of Nature, which is above their's. If this Principle had taken Place amongſt our Predeceſſors, who durſt have uſ'd the Adamant? For certainly, nothing looks liker a Charm, or Spell, than to ſee a Stone draw Iron; and Men are become now ſo wiſe, as to laugh at theſe who burnt a Biſhop, for alledging the World was round; ſo blind and cruel a Thing is Ignorance. And if this Principle, of believing nothing whereof we do not ſee a Cauſe, were admitted, we may come to doubt, whether the curing of the *King's Evil* by the Touch of a Monarch, may not be likewiſe called Charming. This then being generally premiſed, to curb the Over-forwardneſs of Mankind,

It is alledged, That the Libel is not relevant, in ſo far as it is founded upon my Client's having threatned to do her Neighbour an evil Turn, that ſhe went into her Houſe, and whiſpered ſomething into her Ear, whereupon ſhe immediately diſtracted: For, tho' Threatning, when Miſchief follows, hath been too much laid Weight upon by us; yet the Law hath required, that many Particulars ſhould concur e're this be ſuſtained; as that the Perſon who threatned did ordinarily uſe to threaten, and that Miſchief conſtantly follow'd her Threatnings, *minæ ejus quæ ſolita eſt minas exequi*; that theſe Threatnings appeared rather to be the Product of a ſettled Revenge, than of a boiling and airy Choler, which doth oft-times, eſpecially in Women, occaſion very inconſiderate Extravagancies. 2. It is required, that the Threatnings were ſpecific, as if ſhe had promiſed that ſhe ſhould cauſe her diſtract, and the Diſtraction accordingly follow'd. But it were too lax, to aſcribe every Accident to a general Threatning, as is clear by *Dalrio, L.* 5. § 3. Lawyers likewiſe conſider, if the Occaſion of the Quarrel was ſo great, as might have provok'd to ſo cruel a Revenge as that which was taken; whereas here the Occaſion was very mean, not exceeding Two Pence. And tho' all theſe do concur, yet *Farin. Quæſt.* 5. *Num.* 37. acknowledges, that theſe are not ſufficient to infer the Crime of Witchcraft, but only to load the Perſon accuſed with a ſevere Preſumption, or to infer an arbitrary Puniſhment. And in the Proceſs againſt *Katharine Oſwald,* the 11. of *November* 1629. thoſe Threatnings, tho' the Effect follow'd, were not found ſufficient to infer Witchcraft, but only to be puniſhable *tanquam crimen in ſuo genere*; that is to ſay, as an unallowable and ſcandalous Kind of Railing.

The Second Defence againſt this Article is, That it is not relevant to libel, that the Malefice was occaſion'd by my Client, except it were condeſcended by what Means it was occaſioned; for in Law, when I'm ſaid to have produced any Effect, there muſt be a neceſſary Contingency ſhew'd betwixt what I did, and what followed; for elſe, the very looking upon her might have been ſaid to have been a Cauſe: And when Sickneſſes are alledged to have been occaſioned by Witches, the ordinary Signs are, That the Diſeaſe be in itſelf ſuch as cannot be occaſioned by Nature; as the vomiting up of Nails, Glaſſes, and other extraordinary Things: That the Perſon maleficiate do go in an Inſtant, from one Extremity to another; as from being extremely weak, to be immediately extremely ſtrong; or uſe extraordinary Motions which cannot be occaſioned by Nature, as D. *Autum* in his Diſcourſe of Witchcraft doth moſt learnedly obſerve: But ſo it is, that neither of thoſe can be obſerved here; for Diſtraction is a very natural Diſeaſe, and has oft-times fallen upon a Man in an Inſtant, eſpecially upon an Exceſs of Fear: And who knows but this Woman, who by her Sex and Humour, is known to be very fearful, might have been ſo ſurpriz'd at my Client's coming in to her, after the Threatning, that this Exceſs of Fear might have thrown her into that Diſtraction

ction under which ſhe now labours; and yet my Client might have had no Influence upon her as the Cauſe, but as the Occaſion only of this her Diſtemper?

All Concluſions in criminal Caſes ſhould be very clearly inferred, ſince the Crime is ſo improbable, and the Concluſion ſo ſevere: And therefore Lawyers are of opinion, That if the Inferences be not demonſtrative, and undeniable, *concluſio ſemper debet ſequi debiliorem partem.* That which but may be, may not be: And Lawyers do conſtantly conclude, That we muſt only conclude that in Crimes to have been done, which could not but have been done. And who can ſay, that neceſſarily this was done by her here, which could not but occaſion this Diſtraction? And therefore *Perkins, Cap.* 6. does aſſert, That no Maleſice can be a ſufficient Ground to condemn a Witch, except ſhe either confeſs, or that it be proven by Two famous Witneſſes, that ſhe us'd Means that might have produc'd that Effect. And tho' where Charms and other Means expreſly diſcharg'd, are uſed, theſe unlawful Means are by the Judge repute, as if theſe Means might have been effectual, *in odium illiciti,* and that the Uſers have only themſelves to blame in that Caſe, who would uſe theſe Charms, Spells, and Incantations, of which the Law is jealous; yet where none of theſe are us'd, but a ſimple Whiſper, the Effect, in that Caſe, cannot be ſaid to have flow'd from it; nor does any ſevere Preſumption lie againſt a Thing that is ordinary. And *Bodin. L.* 4. concludes, That *in capitali judicio, ex præſumptionibus veneficas non eſſe condemnandas; ut ſi ſagæ deprehendantur egredientes ex ovili, cum oſſibus, bufonibus, vel aliis inſtrumentis magicis inſtructæ, licet oves ſtatim moriantur.* All Concluſions muſt be neceſſary, or preſumptive: But ſo it is, that this Concluſion is not neceſſary, ſince all theſe Remedies might have been us'd, and yet the Uſer might have been innocent: For a neceſſary Concluſion is, *a qua veritas abeſſe non poteſt:* And if this Inference be only preſumptive, it is as undeniable that Witchcraft cannot be inferr'd from ſuch a preſumptive Concluſion; as is clear by *Farin. Quæſt.* 36. *Num.* 11. *Perkins, Bodin.* and others above-cited. And if it were otherwiſe, Judges might condemn upon Gueſſing, or Malice; and ſo more would be in Danger to die by Injuſtice, than by Witchcraft: And may you not as well puniſh ſuch as ſtay Bleeding by applying a Stone, or who prevent Abortions, by girding the Woman with a Belt, now much in Faſhion? And therefore it is very remarkable, That by the 73. Act, 9. Parl. Queen *Mary*, Witchcraft, Sorcery, Necromancy, and ſicklike Arts for abuſing the People, are only forbidden. Nor can it be ſubſum'd, that any Art, or exterior Thing, whereby People uſe to be abuſed, were here uſed: And therefore this Article cannot be ſaid to fall under the Prohibition of the Act of Parliament.

The Second Article is, “ That my Client did cure the ſaid Perſon whom ſhe had former-
“ ly diſtracted, by applying a Plantain-Leaf to the left Side of her Head, and binding a Pa-
“ per to her Wreſt, upon which was writ the Name of *Jeſus*: Which being done by her
“ who was an ignorant Perſon; being done to the Perſon who formerly diſtracted upon her
“ Whiſper; and the Cure being perfected in leſs Time than Nature uſes to take for compo-
“ ſing ſuch general and horrid Diſtempers, might neceſſarily infer, That this Cure was per-
“ formed by Witchcraft.

Against which Article 'tis alledged, That the Concluſion here ſhould demonſtrate, that neceſſarily this Cure was performed by no natural Cauſe: Whereas the Mean here us'd, *viz.* The applying of a Plantain-Leaf, is a natural Thing, and may cure in a natural Way; it being known, that there is nothing ſo cold as a Plantain-Leaf; and ſo it might have been very fit for curing a Diſtraction, which is the moſt malignant and burning of all feveriſh Diſtempers. Or who knows, but that this Diſtraction, having been occaſioned by the exceſſive Fear ſhe had of my Client's Revenge, but that how ſoon ſhe was reconcil'd to her, and that ſhe had, by the ſame Strength of Fancy which made her ſick, conceiv'd that ſhe would likewiſe reſtore her againſt that Sickneſs, her Diſtraction might have abated with her Fear? 2. The Law-givers having puniſh'd Crimes, becauſe theſe Crimes are deſtructive to their Subjects, and Commonwealth, have for the ſame Reaſon only puniſhed ſuch indifferent Enchantments, as did either kill Men, or enſnare them to unlawful Luſts; but not thoſe Arts, where the Health of Man, and the Fruits of the Ground were ſecured againſt Diſeaſes and Tempeſts; as is clear *per L.* 4. *Cod. de Malef. & Math. Eorum eſt ſcientia punienda, & ſeveriſſimis merito legibus vindicanda, qui magicis accincti artibus, aut contra hominum moliti ſalutem, aut pudicos ad libidinem delexiſſe animos detegentur; nullis vero criminationibus implicanda ſunt remedia, humanis quæſita corporibus, aut aggreſtibus locis, ne maturis vindemiis metuerentur imbres, aut ventis grandiniſq; lapidatione quaterentur; innocenter adhibita ſuffragia, quibus uniuſ cujuſq; ſalus, aut exiſtimatio lederetur; ſed quorum proficerent actus, ne divina munera, & labores hominum ſternerentur.* Which Law being a Statute made by *Conſtantine,* who was a Chriſtian Emperor, being conceiv'd in ſo devout Terms, and inſert by *Juſtinian,* who was a moſt Chriſtian Prince, amongſt his own Laws, cannot but be a Law very fit to be obſerved in a Chriſtian Commonwealth. And tho' it be alledged, that this Conſtitution was abrogate by *Leo, Nov. 65.* yet it is very remarkable, That this Conſtitution made by *Leo* is not inſert in the *Baſilics*; ſo that it ſeems it has been thereafter abrogated.

'Tis not probable, that the Devil, who is a conſtant Enemy to Mankind, would employ himſelf for their Advantage; and the Name of *Jeſus* being us'd, ſo much Reſpect ought to be had to it, that the Uſer ſhould not be puniſhed with Death, except it could be clearly prov'd otherwiſe, that ſhe had receiv'd this Charm from the Devil: In which Caſe, the Author, and not the Thing, occaſions the Puniſhment: Or elſe, if ſhe had been diſcharged by the Church, or any Judicatory, to uſe that Cure, as that which was in itſelf dangerous: But to burn a poor ignorant Woman, who knew not that to be evil which ſhe uſed, were to make Ignorance become Witchcraft, and ourſelves more criminal than the Perſon we would condemn. And all theſe Laws and Citations which can be brought to prove, that Magical Incantations are puniſhable by Death, tho' employed for the Welfare of Mankind, muſt be interpret ſo, as to relate only to ſome of theſe unlawful Caſes above-related. And I admire, that thoſe who inveigh ſo much againſt this Conſtitution of *Conſtantine*, have never taken Notice, that theſe Charms are only allow'd, even for the Welfare of Man and Beaſt, *ubi ſunt innocenter adhibita ſuffragia*, where Devotion was uſed, tho' erroniouſly, as in this Caſe. And we know, that a whole Family in *Spain* pretend to be able to cure Diſeaſes by the Touch, as being deſcended from St. *Katherine*, and are therefore called *Saludadores*; and that another Family in *France*, who alledge they are deſcended from St. *Hubert*, do cure ſuch as are bitten by mad Dogs; and yet neither of theſe are puniſh'd by any Law, ſince they aſcribe their Cures to Devotion. And there are but few Men who have travell'd any where, but uſe ſome Charm or other, out of Innocence or Railery: And to burn theſe, or the common People, who think they may follow their Example, were an Act of great Cruelty. And ſince the Croſs is allow'd by the Canoniſts to be applied to any Part of the Body, *per C. Non licet, 26 Quæſt.* I ſee not why the Name of *Jeſus* may not be applied in the ſame way. Nor can I think that the Devil would allow the uſing of that ſacred Name, at which he is forc'd to tremble, and by the very naming whereof, all the Eccleſiaſtic Hiſtories tell us, that the Devil has been diſpoſſeſs'd: And therefore *Ghirland. de Sortil. Num* 43. gives it as a general Rule, That *ubi alia nomina ignota ultra Dei nomina inveniuntur, tunc ſuperſtitioſa dici poſſunt, & ita puniri. Caſſiodorus* relates, that *multis efficax remedium fuit trina recitatio verſiculi*, Pſal. 115. *dirupiſti vincula mea, &c.* And *Bartholinus* in his Anatomy defends, that theſe Verſes repeated with a loud Voice in the Ear of one affected with the Epilepſy, will cure him:

> Gaſpar *fert myrrham, thus* Melchior, Balthaſar *aurum:*
> *Hæc tria qui ſecum portabit nomina Regum,*
> *Solvitur a morbo,* Chriſti *pietate, caduco.*

And tho' ſome have diſallow'd even pious Sentences, or Names, when join'd to ſuperſtitious Circumſtances; as when they are only to be writ upon Parchment, and cut too in ſuch a Figure, or bound by ſo many Threads only; yet to condemn the Uſers as Witches, when they are us'd ſimply, as here, ſeems to be the other Extreme.

In Things that are abſtruſe and dubious, the Law ſhould ſtill favour that which tends to the Good of the Commonwealth; yea and tho' it ſometimes may puniſh Charms, when us'd to the Diſadvantage of Men, tho' it know them not certainly to be unlawful; yet it doth not follow, that it ſhould puniſh that which may tend to their Advantage, except they know it to be certainly unlawful. And tho' our Act of Parliament puniſhes ſuch as ſeek Help by unlawful Means of Sorcerers, or Necromancers, yet they muſt firſt be prov'd to be Sorcerers, or Necromancers, who make a Trade of abuſing the People, as that Statute ſays; which cannot be drawn at all to a dubious Cure us'd in one Caſe, and by the Application of natural Means: And therefore tho' *Drummond* was burnt as a Witch, albeit he had never committed any Malefice, but had only cur'd ſuch as were diſeas'd; yet having in a long Habit and Tract of Time abus'd the People, and us'd Spells and Incantations, which had no Relation at all to Devotion; and having continued that Trade, albeit he was expreſly diſcharg'd, his Caſe was very far different from this, and deſerved a far more ſevere Puniſhment. The ſame may be likewiſe anſwered to the condemnatory Sentence pronounc'd againſt *John Burgh*, who was convicted of Witchcraft, *in Anno* 1643. for pretending to cure all Diſeaſes, by throwing into Water an unequal Number of Pieces of Money, and ſprinkling the Patients with the Water: So that it may be juſtly ſaid, That theſe died rather for being public Cheats, *& falſarii*, than for being Witches, *& venifici*. Upon which Account, *Ars Pauliana* alſo is puniſhable; by which ſome Cheats pretend to cure Diſeaſes by Spells, and pious Characters, revealed (as they pretend) to St. *Paul*, when he was carried up to the Third Heavens; for here the Foundation makes the Cures known to be Cheats.

I might likewiſe alledge here, That it is againſt the confeſt Principles of all Criminaliſts, that *una venifica non poteſt eſſe ligans & ſolvens in eodem morbo*, cannot both put on, and take off a Diſeaſe; for it ſeems that the Devil thinks, that it were too much to beſtow ſuch Favours upon one of his Favourites; ſo that he is juſter than thoſe who affect Plurality of Benefices: Or elſe he thinks it would leſſen too much the Eſteem of thoſe Faculties, if one could exerce both; or elſe it is not probable, that ſhe who had the Malice to lay on the Diſeaſe, would condeſcend to ſerve in taking it off. But however, I find much Weight hath been laid upon this Principle, by thoſe who did debate *Margaret Hutchiſon*'s Proceſs; and ſo let it have its Weight.

THE Third Article of my Client's Indictment is, " That it is deponed by Two dying and " penitent Witches, That ſhe flew like a Dove with them to their Meeting-places.

THIS Article ſeems to me very ridiculous; for I might debate, that the Devil cannot carry Witches bodily, as *Luther, Melanchton, Alciat, Vairus*, and others aſſert; becauſe it is not probable, that God would allow him the Permiſſion conſtantly to work this Miracle, in carrying Perſons to a public Place, where they join in blaſpheming His Name, and ſcorning His Church. Nor is it proper either to the Nature of heavy Bodies to fly in the Air; nor to Devils, who are Spirits, and have no Arms, nor other Means of carrying their Bodies: But I may confidently aſſert, that he cannot transform a Woman into the Shape of a Dove, that being impoſſible: For how can the Soul of Woman inform and actuate the Body of a Dove, theſe requiring diverſe Organs and Adminiſtrations? And to believe ſuch Tranſmutations, is expreſly declar'd Hereſy by the Canon Law, and to deſerve Excommunication: *Cap. Epiſcopi*, 26. *Quæſt*. 5. And is condemned by St. *Auguſtin, Lib*. 18. *de Civit. Dei, Delrio, Lib*. 2. *Quæſt*. 18. *Girland*. § 7. And tho' the Scripture tells us, that *Nebuchadnezzar* was transform'd from a Man to a Beaſt, by God; yet it follows not that the Devil hath that Power: Or as ſome Divines aſſert, he did but walk, feed, and cry like a Beaſt, and had brutiſh Thoughts.

WE muſt then conclude, That theſe Confeſſions of Witches, who affirm that they have been transform'd into Beaſts, is but an Illuſion of the Fancy, wrought by the Devil upon their melancholy Brains, whilſt they ſleep: And this we may the rather believe, becauſe it hath been often ſeen, that ſome of theſe Confeſſors were ſeen to be lying ſtill in the Room when they awak'd, and told where, and in what Shapes they had travelled many Miles. Nor is this Illuſion impoſſible to be effectuated by the Devil, who can imitate Nature, and corrupt the Humours, ſince Melancholly doth ordinarily perſuade Men that they are Wolves, (*Licanthropi*) Dogs, and other Beaſts.

SINCE then theſe Confeſſions are but the Effects of Melancholy, it follows neceſſarily, That the Depoſitions of theſe Two Witches amount to no more, but that they dreamed that my Client was there: And were it not a horrid Thing, to condemn innocent Perſons upon mere Dreams, as is concluded by *Franſ. Ponzan. tract. de lamiis. cap*. 1. *num*. 52. *Sunt illuſæ, ergo non eſt ſtandum ipſorum confeſſionibus: confeſſio enim hæc deficit in ſuis principiis, & eſt contra naturam, & ita impoſſibilis*. I confeſs, that ſuch Confeſſions may be a Ground to condemn the Confeſſors; becauſe tho' they were not actually where they dream'd at theſe Meetings, yet it infers that they had a Deſire to be there, and conſented to the Worſhip, and believed that Transformation to have been in the Devil's Power: But all theſe are but perſonal Guilts in the Confeſſors, and cannot reach others. And beſides this, it is very clear, that the Depoſitions even of confeſſing and penitent Witches, are no concluding Probation; for they are *ſociæ criminis*, and ſuch are not to be believed; they are infamous Perſons, and ſuch ought not to be believed; and they can give no ſufficient *cauſa ſcientiæ* and Reaſon of their Knowledge, the Want of which doth in Law enervate the Depoſition of a Witneſs: And with us, the Depoſitions of dying Witches were repell'd, in the Caſe of *Aliſon Jolly, pen. Oct*. 1596.

DIVINES, whoſe Puniſhments reach no further than Eccleſiaſtic Cenſure, may puniſh not only certain Guilt, but Scandal; yet Lawyers, being to inflict ſo ſevere a Puniſhment as Burning, and loſs of all their moveable Eſtate, ſhould not puniſh but what they know infallibly to be a real Guilt, nor ſhould they puniſh that Guilt, till it be convincingly prov'd. For, tho' this Woman were guilty, yet if ſhe be ſo, ſhe will ſuffer by the Sting of her Conſcience here, and will be reſerv'd for a greater Fire hereafter than you can ordain for her; whereas if ſhe be innocent, your Sentence cannot be reformed. And why ſhould you take Pains to augment the Number of the Devil's Servants in the Eyes of the World?

Nor doth the Civil Law puniſh always what Divines condemn; for thus, tho' it be Murder by the Divine Law to kill a Wife taken in the Act of Adultery, yet the Civil Law allows it: And tho' it be unlawful by that Law to cheat our Neighbour in buying or ſelling, yet the Civil Law allows all ſuch Bargains, except the Cheat amount to the Value of the Half. Thus, the One of the Laws reſpecting mainly the Good of Souls, and the Other the Good of Commerce, as they have different Ends, ſo they take different Meaſures; and therefore it is, that politic Laws have allow'd Cures even by ſuſpected Means. Which Principle is alſo allow'd by *Bartol. Salicet. Azo*, and others, *ad dict. l.* 4. And even according to the Principles laid down by Divines, except there were a Paction prov'd, or, confeſs'd, all Remedies ſhould rather be aſcribed to Nature, than to Witchcraft.

Consider how much Fancy does influence ordinary Judges in the Trial of this Crime; for none now labour under any extraordinary Diſeaſe, but it is inſtantly ſaid to come by Witchcraft, and then the next old deform'd or envied Woman is preſently charg'd with it: From this ariſeth a confuſed Noiſe of her Guilt, called *Diffamatio* by Lawyers, who make it a Ground for Seizure; upon which ſhe being apprehended, is impriſoned, ſtarved, kept from Sleep, and oft-times tortured. To free themſelves from which, they muſt confeſs; and having confeſt, imagin they dare not thereafter retreat. And then Judges allow themſelves too much Liberty, in condemning ſuch as are accuſed of this Crime, becauſe they conclude they cannot be ſevere enough to the Enemies of God; and Aſſiſers are afraid to ſuffer ſuch to eſcape as are remitted to them, leſt they let looſe an enraged Wizard in their Neighbourhood. And thus poor Innocents die in Multitudes by an unworthy Martyrdom, and Burning comes in Faſhion. Upon which Account I cannot but recommend to your Lordſhips ſerious Conſideration, that excellent Paſſage of a Learned Lawyer, *Baldwinus, ad* § *Item lex* Cornelia *Inſtit. de publ. jud. Sed quo gravius, & ab hominis ingenio magis alienum eſt hoc malum, eo major adhibenda eſt cautio, ne quis ejus prætextu ab adverſariis temere obruatur, facile enim hic quid vis confingere poteſt ingenioſa ſimultas, ut & multitudinem credulam ſtatim emoviat, & judices irritet adverſus eum quem cum demonibus rem habere mentietur. Ante annos ſexaginta, ſenſit infælix noſtra patria, magno ſuo malo, hujuſce generis calumniis, magna erat* Waldentium *mentio, quos adverſarii jactabant neſcio quid commertii habere cum innumeris ſpiritibus, hujus criminis prætextu optimi quique ſtatim opprimebantur, ſed tandem ſenatus* Pariſienſis, *cauſa cognita, vidit meras eſſe ſycophantias & infælices reos liberavit.*

FOR

## *Titius*, accuſed before the Secret Council for beating his Wife.

## The Seventeenth Pleading.

As nothing but the laſt Degree of Paſſion could have provok'd my Client to correct this unfortunate Woman; ſo no Creature which doth not feel his Grief, can expreſs the Reaſons which forced him to it. Nor could the Fear of Puniſhment, if it were not joined with the Senſe of Honour, move him to lay open before your Lordſhips, the ſad Story of theſe Perſecutions he has for Seven Years ſuffered, and the diſhonourable Secrets of his own Family, which, during all that Time, he has laboured to conceal.

Nor can I (My Lords) but regret, that I ſhould be forc'd to lead your Reflections into my Client's Houſe, and to ſhew you there a Woman burning, not with Flames of Love, but Revenge; embracing her Husband, not out of Kindneſs, but to throw him into the Fire; watching him in his Sleep, but that ſhe might even diſturb him in his Reſt; inviting his Friends to her Houſe, but that ſhe might heighten his Infamy, in letting them hear her rail againſt him: And all this done, not for a Day, or under the Excuſes of Paſſion, but for Seven whole Years; nor done ſo paſſingly, as that he could entertain any Hopes of her Reconciliation to allay his Grief; but ſhe begun to torment him the next Day after the Marriage, beating him with her Slipper, ſo that only his Marriage wanted its Honey-month; and ſo malicious was her Humour, that ſhe could not bridle it for one Day. And theſe Affronts were daily continued moſt deliberately, and own'd after all the Remonſtrances her Friends could make for reclaiming her; at which Occaſions ſhe us'd to ſpeak kindly of nothing to him or them, but her Paſſions; juſtifying her lying of him, as Wit; her railing againſt him, as Eloquence; her Revenge, as Juſtice; and her Obdureneſs, as Conſtancy.

THIS being the Perſon againſt whom I am to plead; I am oblig'd to give your Lordſhips ſome Character of him for whom I appear, who was not only born a Gentleman, but by being a Soldier, has made himſelf ſo; and by both theſe Qualities, has ſo ſtrong an Averſion againſt beating any Woman, that the great Reſpect he had for that lovely Sex, made this Purſuer, after Ten Years intimate Acquaintance, chooſe him for her Husband: And for Seven Years, he hath not only ſuffered, but conceal'd his Wrongs, to that Depth, that his Hair has by Grief changed its Colour twice; the Strength of Nature, and Grief, overcoming each other by their ſeveral Turns. Nor doth he think himſelf concern'd to anſwer his Wife's calumnious reproaching him, as having been her Husband's Servant; for 'tis moſt true, that after he loſt his Eſtate in His Majeſty's Service, her Firſt Husband choos'd him for his Friend, and after his Death, ſhe choos'd him for a Husband: Which ſhews, that he had ſome worthy Qualities about him, which were able to ſupply that great Want, the Want of Riches: And is it not clear, that when Women begin to complain of ſo ſacred a Relation, they will make Faults where they cannot find them? And theſe Wives who would divulge what is true, would invent what is falſe.

I confeſs (My Lords) that there is very much due to that excellent Sex, when they are what they ought to be; but our Love to Wine, muſt not hinder us to call it Vinegar when it corrupts; nor ſhould we flatter Tyrants, becauſe we love Monarchies. But Judges muſt look more to Juſtice, than Compliment: And therefore I muſt beg Pardon to alledge for my Client, that he cannot be puniſhed for beating his Wife; becauſe, the Wife is by Law, under the Power and Authority of her Husband; which Subjection is not only the Puniſhment of her Sin, nor will all this Power repair to Man, the Loſs he had, by the Injury done him when he got this Power; but this Power is put in the Husband's Hands, for the Good, not only of the Commonwealth, but of the Women themſelves: As to the Commonwealth, it was fit, that in every Family the Husband ſhould be empowered to correct the Extravagancies of his Wife, and not to bring them before the Judge, and in public; this would have divided Families, rais'd public Scandals; and many will be content to receive Correction in private, who would never be reconcil'd after a public Correction. And as to the Women themſelves, it was fit that ſhe, being the weaker Veſſel, a Creature naturally paſſionate, and wanting Experience, ſhould therefore be governed by, and ſubject to her Husband: And as the Head may reſolve to chaſtiſe or mortify any Part of the Body, when it thinks that Diſcipline will tend to the general Advantage of the Body; ſo may the Husband, whom the Scripture calls, *The Head of the Wife*, correct the Wife, when that Correction may tend to the Advantage of the Family.

LET us but look back upon the firſt Ages of the World, and we will find, that the Husbands had generally Power of Life and Death over their Wives, even amongſt the beſt of Men, the *Romans*: And thus *Plin. Lib.* 14. *Cap.* 12. reports, that *Egnatius Mecennius* killed his Wife, for having drunk too much Wine; and that her Death was never enquir'd into, as that which the Law then allowed. And *Cæſar* tells us, that the *Germans, in uxores, ſicut in liberos, vitæ neciſq; poteſtatem habebant.* And till this Day, the Southern Nations (whoſe Wits ripen more than ours, as nearer the Sun) have ſtill the ſame Power continued to them; by which the Women loſs little, for it keeps them from adventuring upon theſe Extravagancies, for which our complimenting Nations hate their Wives, which to a kind Wife, ſhould be worſe than Death. But if theſe Laws think this Power of Life and Death fit for the Husband, it ſhould at leaſt teach us to beſtow upon him the Power of Correction, for which I only plead: Which Power of Correction, is by *Bonaventure* ſaid to be allow'd them by the Law of Nations: 4. *Sentent. diſtinct.* 37. *Maſuer. Tit. de Poſſeſ.* § *Item maritus.* By the Canon Law, the Wife is declared to be more in the Power of the Husband, than of her Father: *Can. Sicut alterius*, 7. *Quæſt.* 1. and that the Husband may impriſon her, or keep her in the Stocks: *Can. Placuit*, 33. *Quæſt.* 2. And if we conſider our Law, we will find, that Husbands have the ſame Power over their Wives, that a Father hath over his Child: C. 131. *Leg. Burg.* which Law ſaith, *That he ſhould correct her, as not knowand what ſhe ſhould do, and as a Bairn within Age, ſeeing ſhe is not at her own Liberty.* And as the Council would not hear a Child complaining that his Father had beat him; ſo neither ſhould they hear a Wife. We have alſo an expreſs Statute, 2. *Dav.* Chap. 16. wherein it is appointed, That no Accuſation ſhall be receiv'd againſt a Man, for having occaſioned the Death of his Wife, except it be notoriouſly known, that he gave her Wounds whereof ſhe died: By which it is neceſſarily implied, that he is not puniſhable, nor cannot be accus'd for any Wounds given which were not mortal: Where likewiſe there is a Deciſion of the ſaid King *David*, related in theſe Terms:

*IN the Time of King* David, *a Caſe happen'd in this Manner: An Man of good Fame gave to his Wife, deſcended of great Blood, an Blow with his Hand, of good Zeal and Intention to correct her: And ſhe being angry with her Husband after that Day, would not for no Man's Requeſt, eat nor drink till ſhe deceaſed, and entred in the Way of all Fleſh. The Friends of the Woman accuſed the Husband for the Slaughter of his Wife: And becauſe it was notour and manifeſt, that he did not ſlay her, nor gave her no Wound of the whilk ſhe died, but gave her an Blow with his Hand, to teach and correct her, and alſo until the Time of her Death loved her, and intreated her as a Husband well affectionate to his Wife; the King pronounced him clean and quit, and thereanent made this Law.*

But I find, it is anſwered by the Wife's Advocates, (who can better maintain, than they could ſuffer what ſhe has done) « That tho' the Laws of other Ages and Nations did, and do allow this Power to the Husband; yet our preſent Cuſtoms, as well as our Inclinations, hate that ſtretched and ungentle Power: And tho' our Law did allow ſome Power to the Husband for correcting his Wife; yet that Power could not be extended to defend ſuch violent Courſes as were here us'd; where the Husband did hold her Head to the Fire, till her Face was burnt, and did thereafter beat her with a Slipper. Nor do any Law or Lawyers allow more than *modica coercitio* for her Correction: But ſuch an Exceſs as this, would be puniſhable in a Father towards his Child, or in a Maſter towards his Servant.

To which Anſwer the poor Husband acquieſces as much as they; and by his Patience and continued Kindneſs, in ſpight of all theſe Diſgraces and Affronts, he has teſtified more Reſpect than the Law could have commanded. But ſince it is acknowledged upon all Hands, that the Husband might have corrected his Wife; and that he is only puniſhable for having exceeded the juſt Meaſures which the Law allows, I ſhall firſt relate the Matter of Fact, and ſhall then examine, if he did not proportion the Puniſhment to the Injury.

After my Client's Wife had ſwore ſhe would ſtarve herſelf, if he would not renounce all her Eſtate, he (good Man) condeſcended to her extravagant Deſire; but not ſatisfied with this, ſhe ſwore ſhe would kill him if he did not leave the Country: And finding that he came in at Night, ſhe beat him with her Slipper; but finding he only ſmiled at this, ſhe came running up to him with a Knife in her Hand, whereupon he threatned to hold her Head to the Fire, if ſhe would not calm, and ſo took the Knife from her. Notwithſtanding of all which, both Kindneſs and Threats, ſhe did a Third Time flee in his Face; but at laſt, fearing his Patience might not only prejudge himſelf, but her, he did take her and hold her Face a little to the Fire, but without any Deſign, ſave of terrifying her; but ſhe being ſtrong, and Malice ſupplying what Strength her Sex denied her, wreſtled out of his Hands, and in wreſtling, threw herſelf upon the Fire, and burnt a little her own Face. All which ſhall be proved by Witneſſes, who ſaw the whole Tract of that unhappy Buſtle; for it was an Aggravation of her Guilt that ſhe uſed him thus publicly.

This being the State of the Caſe, I hear ſuch as ſtand behind me ſwear, had ſhe been mine I had drowned her, or ſtarved her; and I conjure your Lordſhips to reflect what any Man would have done in that Caſe; but I ſhall only debate, that this Guilt deſerved a more ſevere Puniſhment than what he inflicted. For 1. In proportioning the Puniſhment to the Guilt, your Lordſhips will be pleaſed to conſider, that the Husband never having puniſhed her former Extravagancies, was here to puniſh at once all that ſhe had formerly done; and if every Offence deſerved Correction, Ten Thouſand Offences deſerved one that was very great. And if the Law, after it hath puniſhed the firſt Two ſmall Thefts, puniſhes the Third with Death; and after it hath puniſh'd breaking Yeards with ſmall pecunial Mulcts, maketh the Third capital; may not the Hundredth Offence in beating a Husband, and laying Snares for his Life, deſerve all was done, where the former Faults were alſo to be puniſhed? And ſince no Judge could have refuſed to have burnt her in the Cheek for Three ſuch Riots, ſure the Husband cannot be puniſhed for puniſhing a Hundred at the ſame Rate. And I hope your Lordſhips will imagin, that a Husband, who ſuffer'd ſo many Affronts, would not have been too violent in puniſhing the laſt; and that ſhe hath herſelf to blame, having contemned the Warning given her by her Husband; and in giving of which Warning it clearly appears, that he was Maſter of his Paſſion, and proceeded both kindly and judiciouſly. Or tho' he did deſerve a Puniſhment, yet bypaſt Sufferings, Torments and Affronts, may do more than ſatiſfy her for that one Injury, of which ſhe can only complain. And as in balancing Accompts, ſo in balancing mutual Crimes, we muſt not look to the Debt and Credit of one Day; but conſidering all that either Party can lay to one another's Charge, we muſt at the Balance only determine who owes moſt. And if that Method be follow'd, then ſure your Lordſhips will find, that as Injuries may be compenſed amongſt the Parties themſelves, in ſo far as concerns their private Intereſt; ſo here, my Client's Wife having been more guilty towards him a Thouſand Times than he can be ſaid to have been towards her, tho' this Riot were acknowledged, her Intereſt ceaſes, and her Complaint doth become thereby moſt unjuſt.

THO' the Law deſigns to reſtrain our Vices, yet becauſe it cannot root out our Paſſions, it pities them; it employs its Juſtice againſt our Crimes, but its Clemency againſt our Paſſions. And ſo high did this Clemency run in the *Roman* Law, that he who in Paſſion kill'd his Wife, being taken with her Adulterer, was not puniſhed as a Murderer, *qui impetu tractus doloris interfecerit:* And the Reaſon the Law gives for remitting the Crime is, *cum difficillimum ſit juſtum dolorem temperare, l. 38. ff. ad l. jul. de adult.* And if any Paſſion deſerves Pardon, it muſt in him who has beſtow'd Pardons for Seven Years; or if it may plead againſt any, it muſt be againſt her who raiſed unjuſtly, the Paſſion of which ſhe complains. Injuries from a Wife are Crimes; and if Injuries can juſtify Paſſion amongſt Strangers, much more can they do it in a Husband.

I hope your Lordſhips will likewiſe conſider, that Self-Defence is not only a Privilege introduced by Law, but a Duty impoſed upon us by Nature; and without this, this World were nothing but a Scaffold, and every Man with whom we converſed, might prove an Executioner. Nor doth this Self-defence only ſecure us when we kill ſuch as would attack our Life, but it ſecures us likewiſe when we chaſtiſe ſuch as would ſtain our Honour; for Life without Honour, is but as a dead Carcaſe when the Soul is fled, or a King when he is dethroned. And ſince the Law has parallel'd Life and Honour in every Thing, it is moſt juſt, that ſeeing we may kill ſuch as invade the one, we may at leaſt chaſtiſe ſuch as invade the other; eſpecially ſeeing theſe who are here puniſhed, have only themſelves to blame, as the Authors and Occaſions of all thoſe Accidents of which they complain. And therefore, My Lords, I ſhall entreat you to Figure to yourſelves, what a Man could do, if his Wife ſhould conſtantly reſolve to ſpit in his Face when he were amongſt Strangers, or conſtantly awake him when he reſolved to reſt: Were it not ridiculous to put the Husband always to complain to a Judge in thoſe Caſes? And yet to ſuffer ſuch Injuries to be unpuniſhed, were not only to make a Man miſerable, but to force him to an impertinent Clemency, which might breed up his Wife to an inſufferable Inſolence. And if mean People, (who wanting Generoſity and Virtue, are curbed by nothing but Awe and Fear) ſhould come to know that the Council allow'd ſuch an Indulgence to Women, and that there were no Place for the juſteſt Complaints of injur'd Husbands, what Ruptures would this occaſion in private Families? What innumerable Suits before your Lordſhips? And, How many Separations betwixt Husband and Wife?

DO then, My Lords, by this Deciſion, let the People ſee, that as virtuous and deſerving Women may expect the higheſt and pureſt Reſpects imaginable; ſo ſuch as ſhew themſelves unworthy of theſe Favours, may expect Puniſhment anſwerable to their Crimes. Nor is it a ſmall Aggravation of their Guilt, that they endeavour as far as in them lies, to draw Contempt and Diſgrace upon that amiable and deſerving Sex. Thus good Women will be complemented, when they find they owe not the Reſpect they get to the Law only, but to their own Merit; and unworthy Women will find, they may expect a happier Life by taming their own Inſolencies, and by living in Concord with their Husbands, than they can from their inſolent and outragious abuſing of them.

*THE Council impriſoned the Husband for one Night.*

### FOR

## *Charles Robertſon* and his Two Sons.

# The Eighteenth Pleading.

## *How far Minors may be puniſhed for Crimes?* 2. *Whether Complices may be purſued before the principal Party be found guilty?* 3. *Whether* Socius criminis *may be received in Riots and leſſer Crimes?*

THE Crime for which my Clients are accuſed, is, "That in *January* 1660, "the ſaid *Charles Robertſon's* Brother and Two Sons did convocate the Lieges, "and throw down a Houſe belonging to *Elizabeth Rutherford*; which they "did at their Father's Deſire, or at leaſt, that their Father did ratihabit the "ſame.

Against this Indictment it is alledged, That the Two Sons, the one being of the Age of Fourteen, and the other of Fifteen, cannot go to the Knowledge of an Inqueſt for throwing down this Houſe; ſince they offer to prove, that they were informed by their Uncle, that this Houſe belonged to their Father, and that it was their Father's Deſire they ſhould go along with him to throw it down; for tho' Minors may be puniſhed for attrocious Crimes committed againſt the Law of Nature, ſuch as Murder, Inceſt, *&c.* and to abſtain from which, the youngeſt Conſcience doth adviſe: Yet, ſuch Acts as cannot be known to be criminal, but by ſuch as underſtand poſitive Law, are not puniſhed as criminal, but in ſuch as are obliged to underſtand that Law. None will controvert, that the throwing down ſuch a little Houſe, not exceeding Six Pound *Scots* of Value, and to which, they and all the Country had heard their Father pretend Right, cannot be called a Crime againſt the Law of Nature; and it is only a Crime in poſitive or municipal Law, when it is done by ſuch, as are obliged at the Time to underſtand they are doing an Injury, and that the Houſe belongs not to him, at whoſe Command they are throwing it down. And theſe Children were not obliged to know this; for ſince they are not in Law obliged to underſtand their own Rights till they be Majors, much leſs are they obliged to underſtand the Rights of other Men. And in this Caſe the Underſtanding the Matter of Rights, is that only which infers the Crime; for if the Father had Right, this had been no Crime in him nor them.

I am ſure, there is a great Diſtinction betwixt Acts which are of their own Nature indifferent, ſuch as throwing down of Houſes, taking Men Priſoners, *&c.* and theſe which are of their own Nature vicious and criminal, and need no extrinſic Thing to clear that they are ſo, ſuch as Murder, and Robbery; the Firſt doth require the Knowledge of ſomething that is extrinſic to the Act which is done: Nor is the Guilt inferr'd but by Reaſoning and Judgment; and therefore that Guilt ſhould not fall upon Minors except they are *doloſi*, and are preſumed to have done it intentionally and upon Deſign. And how can Deſign be preſumed in theſe Minors, ſince the committing this Act did not take its Riſe from them, but from their Uncle and Father, and they were to gain nothing to themſelves immediately by it? Nor can it be imagined why the Law will, for want of Underſtanding, leſſen the Puniſhment in the moſt attrocious Crimes, ſuch as Witchcraft, Murder, *&c.* in ſuch as are Thirteen Years of Age, if it will not remit abſolutely the Guilt in ſuch Caſes as theſe, where the Guilt was neither palpable, nor the Prejudice great. And if Minors be to be reſtored *adverſus delictum* in any Caſe, as is clear they are, they ought to be reſtored againſt this, where the Guilt doth conſiſt in a *Punctilio* or *Nicety* of Law; ſuch as, That tho' the Father had Right to the Houſe, yet he could not have thrown it down by his own Authority: A Principle which few Countrymen underſtand, when they have reached Twenty One Years, *ſi* *delictum fuerit commiſſum ſine dolo, poteſt minor juvari ope reſtitutionis in integrum, etiam ad hoc ut a tota pœna excuſetur*, Clar. *Queſt.* 60. & Anan. *in Cap.* 1. *Num.* 8. *de delict. puer.* Nor can I ſee a Reaſon why Crimes, by the unanimous Opinion of Lawyers, are ſaid not to be puniſhable in Minors when they are perpetrate *non committendo, ſed omittendo*, if it be not becauſe Omiſſions are *juris*, and fall not under Senſe, and proceed from a Weakneſs of the Judgment; but yet I think the former Diſtinction more juſt, ſince Omiſſions of what Nature requires ſhould bind them, but nothing ſhould bind them which proceeds from a Weakneſs in Judgment, ſince Law allows Minors to have no Judgment.

But whatever be alledged againſt other Minors, yet theſe having obey'd their Father, in an Act which was of its own Nature indifferent, they cannot be puniſhed for the Guilt, tho' he may; for that were to make poor Children unhappy, in ſubjecting them to double Puniſhments: For if they obey'd not their Father, they could not eſcape their Father's Anger, or if they did obey, they fall under the Law's Revenge. And it were very unjuſt, that the Law which has ſubjected them to the Power of their Father, ſhould not ſecure them when they obey that Power to which it has ſubjected them. And upon the other Hand, it would leſſen much that Power which the Law hath taken ſo much Pains to eſtabliſh in the Perſons of Fathers, and Maſters, over their Children and Servants, if it gave them Occaſion to debate their Commands. And tho' a Son, or a Servant, are not obliged to obey their Father or Maſter, in Things palpably attrocious and wicked; yet, where the Thing commanded is not unneceſſarily and intrinſically unjuſt, they ſhould either obey there, or no where. And what a great Prejudice were it to the Commonwealth, if a Son or Servant ſhould refuſe to aſſiſt, in bringing back Cattle which others were driving away, to labour Land, or aſſiſt Poindings, or even throw down Houſes at their Father or Maſter's Deſire, becauſe they might pretend his Right were not ſufficient? And ſo the Father and Maſter ſhould be ſtill obliged to give an Account to his Son or Servant, of his Right and Title upon all Occaſions; and his Commands, which require oft-times a ſpeedy Execution, ſhould be delayed in the *interim*. To prevent all which, the Law hath, for the Good of the Commonwealth, allow'd Sons, nor Servants, no Will of their own, making them in Effect but the Tools and Inſtruments of their Father's and Maſter's Will: *Non creditur velle qui obſequitur imperio Patris, vel Domini, l.* 4. *ff. de reg. jur.* And if the Law allows them to have no Will of their own, it cannot puniſh them when they obey their Maſter; for all Guilt is only puniſhed, becauſe it is an Effect of the Will: And therefore, *John Rae* was not put to the Knowledge of an Inqueſt, as Art and Part of Theft, becauſe he went only along with his Father, when he was about Twelve Years of Age, 1. *January* 1662. And by the 19. *Cap. Num.* 9. *ſtat. Will.* the Servant is only declared puniſhable, if he do not detect his Maſter, or deſert his Service. And *per l. homo. ff. ad l. aquil.* it is expreſly decided, That *ſi juſſu alterius manu injuriam dedit, actio legis aquiliæ cum eo eſt qui juſſit, ſi modo jus imperandi habuit, quod ſi non habuit, cum eo agendum eſt qui fecit.*

Tho' Minors may be puniſhed for a Guilt; yet they ought not to be indicted, till they attain to the Years of Majority; becauſe if they were to be tried in their leſs Age, they might by Want of Wit and Experience, omit their own juſt Defences, and miſmanage the Debate in which they were engaged; as to which our old Law appears to be very clear, *R. M. Lib.* 3. *C.* 32. *Lib.* 2. *Cap.* 41. *quia dicere vel tacere poteſt calore juvenili, quod ei nocere poteſt.* Suitable to which, *Skeen* doth in his Annotations obſerve a Deciſion, betwixt His Majeſty and the Abbot of *Parbroth, Anno* 1312. & *L. pen. Cod. de Autor. tut.* & *L.* 1. § *Occiſorum ad S. C. Sillan.* & *Cap.* 2. *de delictis puerorum extrav.* Since a Minor may be reſtor'd againſt ſuch Omiſſions, or againſt a Confeſſion emitted by him, *quando non poteſt aliter contra eum probari crimen*, or may omit to object againſt Witneſſes; it is more juſt and convenient, that he ſhould not be tried till he be Major: For if he be tried, he muſt be once puniſhed, and then his being reſtor'd is both impoſſible and unprofitable. And it were very inconſequential for our Law, to have ſo far privileged Minors, as that they are not obliged to debate *ſuper hæreditate paterna*, and that too upon theſe ſame Reaſons I here alledge; and that it ſhould not much more ſecure them againſt criminal Trials, in the ſame Minority, where the Hazard is greater; eſpecially where the Commonwealth is not concerned (as here) to have the Guilt immediately brought to open Puniſhment, and where the Crime is not attrocious, reaching no further than private Revenge, and a pecuniary Puniſhment. Nor is the Public in this Caſe diſappointed of a juſt Revenge; for it can reach the Father or Uncle, who are alledged to be the principal Actors.

For the Father, I alledge that he cannot be purſued, as he who was acceſſory to the committing of the Crime, in commanding, or ratihabiting it, except it were condeſcended, from what particular Acts his Ratihabition can be inferred, whether by Words, Deeds, Concealing, or otherwiſe: And it is not ſufficient to libel in the general, that he did ratihabite, no more than a Libel would be relevant, bearing, that my Client were guilty of Treaſon, without

out condeſcending how; as is clear by the Opinion of Lawyers, who require, that Libels ſhould be ſpecial; which is required by them, to the end that the Relevancy of the Libel may be debated and determined by the Judges, before it go to a Trial; which ſhould be rather done amongſt us, than any other Nation, becauſe the Probation is, in this Kingdom, tried only by an Aſſize; and theſe are ordinarily Men who underſtand not the Intricacies of Law: Whereas if the particular Way and Manner of Ratihabition be not condeſcended on, and diſcuſt by the Judges, it muſt come to be debated after the Probation, before the Inqueſt; and thus not only Relevancy, and Probation, Matter of Law, and Matter of Fact, but even the diſtinct Offices of Juſtices, and Aſſizers, will be here confounded: As for Inſtance, If the Purſuer ſhould prove, that the Father ſaid that all was well done; we would be forc'd to debate before the Aſſize, That ſuch paſſing Words as theſe cannot infer a Crime; for elſe many Thouſands in a Nation might be found guilty of Crimes to which they had no Acceſſion. Or if it were only alledged, that he received his Sons into his Houſe, it would be likewiſe debated, That the receiving of a Man's own Sons into his Houſe, cannot infer a Crime *in delictis levioribus*, tho' it may be debated to be criminal in Treaſon, and more attrocious Crimes: Upon which, and many other Points, the Doctors have writ very learnedly; and to debate ſuch Points before ignorant Aſſizes, were very dangerous.

'Tis likewiſe alledged for the Father, That he being only purſued as acceſſory to this Crime committed by his Brother, in ſo far as he did either command or ratihabite: 'tis therefore neceſſary, that the Brother be firſt purſued and diſcuſs'd; it being a Rule in all Law, That the Principal ſhould be pleaded and diſcuſt, before him who commanded the ſame to be done, or before the Receipter; as is clear by *R. M. Lib.* 4. *Cap.* 26. entitled, *The Order for accuſing Malefactors for Crimes:* Which agrees likewiſe with the Opinion of the Civilians; and particularly *Clar. Quæſt.* 20. *Num.* 6. whoſe Words are, *Scias etiam quod quandoq; proceditur contra aliquem, tanquam quod præſtiterit auxilium delicto; debet primo in proceſſu conſtare principalem deliquiſſe. Mars. Quæſt.* 26. gives an Example of it juſt in our Caſe; A Father is purſued as acceſſory to his Son's Guilt, in which Caſe he alledges the Father could not be tried, till the Son was firſt diſcuſs'd. *Et* Alexand. *Conſilio* 15. *Vol.* 1. *dicit, Quod niſi prius conſtet de mandatario, procedi non poteſt contra mandantem*; with which the *Engliſh* Law agrees fully; by which the Principal ought to be attainted by Verdict, Confeſſion, or by Outlawry, before any Judgment can be given againſt Acceſſories: *Bolton, Cap.* 24. *Num.* 38. And therefore, except the Uncle, who was the principal Actor here, were firſt found guilty by an Aſſize, my Client, as Commander and Ratihabiter, cannot be puniſhed.

To this it is anſwered, " That the foreſaid Law of the *Majeſty* holds only in Theft, but not
" in other Crimes; and that as to all Crimes it is abrogate by the 90 Act, 11 Parl. *Jam.* VI.
" by which it is appointed, That all criminal Libels ſhall be relevant, bearing Art and Part,
" without making any Diſtinction betwixt Principal and Acceſſories; and the Father is call'd
" here as a Principal, having given a Warrant, as ſaid is; for elſe the giving Warrant for do-
" ing treaſonable Deeds, or to commit Murders, could not be puniſhable, tho' nothing fol-
" lowed: Whereas in all Law, ſuch Deeds are criminal in themſelves, and the Mandant might
" be immediately puniſhed.

To which it is replied, That this Maxim holds not only in Theft, but in all other Crimes; for as there can be no Reaſon of Diſparity given, to difference Theft from other Crimes, as to this Point; ſo the Rubric of the former Chapter 4. is general, and in the fourth Verſe of that Chapter, it is ſaid generally, *That it is manifeſt, that the Commander or Receipter ſhall not be charg'd to anſwer, till the principal Defender be firſt convicted by an Aſſize.* Which is likewiſe *quoad* all Crimes, ordained indefinitely by the 29 Act, Stat. *Dav.* II. Nor can it with Juſtice be pretended, that theſe Laws are abrogated by the foreſaid Statute of King *Jam.* VI. for theſe Reaſons; 1. That Act does not expreſly bear an Abrogation of the former Laws; and ſtanding Laws cannot be abrogate by Conſequences: Nor can it be, but if the Parliament had deſigned to abrogate ſo old and fundamental Laws and Cuſtoms, they would have expreſs'd their Deſign; eſpecially ſince in criminal Caſes, all Lawyers endeavour to make their Laws clear and perſpicuous. 2. No Laws are interpret to abrogate one another, except they be inconſiſtent; ſo unfavourable is Abrogation of Laws: And it is generally receiv'd, that *Leges in materia diverſa ſeſe non tollunt, nec abrogant*: But ſo it is, that theſe Laws here founded on, are moſt conſiſtent with the Act of King *James* VI. and theſe two are *materiæ diverſæ*; for it is very conſiſtent, that a Libel bearing Art and Part ſhould be relevant, and yet that the Principal ſhould be firſt diſcuſs'd; for tho' the Principal be firſt to be diſcuſs'd, yet when the Acceſſories are to be accus'd, it is ſufficient that it be generally libelled againſt them, that they were Art and Part; the one of theſe regulates only the Way of Procedure, & *ordinem cognitionis*; the other regulates the Relevancy, and ſhows what Libel ſhall be ſufficient. Nor was there any Thing more deſigned by that Act *Jam.* VI. but that Libels in criminal Caſes ſhould not be caſt as irrelevant, as is clear by the Narrative of the Act. And by the Civil

Law, *ordo cognitionis, & accuſatio eorum qui opem auxilium præſtiterunt*, are always accounted different Titles, and are differently treated; ſo that theſe two Laws are very different, and very inconſiſtent. 3. If that Law *James* VI. had abrogate the former Laws, whereby it is appointed, That the Principal ſhould be diſcuſt before the Acceſſories, then it had follow'd by a neceſſary Conſequence, That theſe Laws could not have taken place after that Act: But ſo it is, that Defences are daily ſuſtained upon theſe Laws, as in the Caſe lately of *George Graham*; which ſhews very convincingly that they are not abrogated.

THE Reaſons likewiſe whereupon that Law was founded, ordaining, That Acceſſories ſhould not be purſued before the Principal be diſcuſs'd, are ſtill in Vigour, and are ſo juſt and neceſſary, that it were unjuſt to abrogate a Law founded upon them; for the Law conſidered, that if the Principal were called, he might know many Defences, which, if they were known to theſe who are alledged to be Acceſſories, would certainly defend them; as in this Caſe, if the Uncle were called who threw down the Houſe, it may be he would alledge, That he did not throw down this Cottage, till the Accuſer had conſented; which Conſent he poſſibly hath: And this may be neceſſary in a Thouſand Caſes; as if a Perſon were purſu'd for having been acceſſory to the driving away Sheep, or Nolt, he might be convicted, tho' he were innocent, if the Principal were not called; which Principal, if he were called, might produce a Diſpoſition from the Party, or a legal Poinding; either of which being produc'd, would defend both: Whereas upon the other Hand, if it were lawful or ſufficient to accuſe any Perſons as Acceſſories, without purſuing the Principal, the Accuſer might collude with the Principal, and ſuffer him to go unpuniſhed, providing he would keep up the Defences and Warrants, and ſo ſuffer the innocent Acceſſories to be condemned.

IS it not a Principle in Nature, That *Acceſſorium debet ſequi ſuum principale?* And doth not the Law ſtill require, that *prius debet conſtari de corpore delicti?* And how can a Man be purſued for hounding out another to throw down a Houſe, until it were firſt known that the Houſe was thrown down? Nor is the giving an Order to throw down a Houſe, criminal, tho' it were proven; except the Houſe were, according to that Order, thrown down, and that it was thrown down by virtue of that Order, and upon no other account. By all which it clearly appears, That the throwing down of the Houſe, which is the principal Guilt, muſt be firſt tried, before it can be enquired who gave the Command.

THE laſt, and one of the great Arguments, I ſhall uſe to prove, That the Principal who threw down the Houſe muſt be firſt diſcuſt, before my Client can be pannel'd for Commanding or Ratihabiting, is, That by this Method, Probation ſhould be led againſt Abſents, contrary to the known Principles of our Law; and by the Connivance or Ignorance of the Acceſſories, the Fame of an abſent Perſon may be wounded, and Witneſſes ſuffer'd to depone, who dared not have deponed if he had been preſent: And tho' that Probation led againſt him in Abſence would not be concluding, yet it would leave a Stain; and would engage the Deponers to adhere to theſe prejudicate and falſe Depoſitions in another Proceſs, to ſecure themſelves againſt Perjury.

WHEREAS it is pretended, *That ſometimes Command is a Crime, tho' nothing follow*. It is anſwered, That where a Mandate is of itſelf criminal, tho' nothing follow, as in Treaſon, there the Giver of the Mandate muſt not be purſued as a Complice, or acceſſory, but as the principal Tranſgreſſor. Nor would the King be prejudged (as is alledg'd) if the Principal behoved firſt to be diſcuſs'd; becauſe it is pretended, That that Principal might abſtract himſelf, and thereby cut off the public Revenge, which would otherwiſe juſtly fall upon the Acceſſories if they could be apprehended. For to this it is anſwered, That it is eaſy for His Majeſty's Advocate to raiſe a Purſuit againſt the Principal, and if he compear, to proceed againſt him, or if he compear not, he may be denounced Fugitive; which is a ſufficient Diſcuſſing of him as a Principal, and will open ſufficiently a Way to proceed againſt the Complices.

IT is likewiſe alledged, That the Witneſſes which are offered to be adduced againſt my Clients, for proving that they committed this Crime, are not *teſtes habiles*, and cannot be admitted, becauſe I offer to prove by their own Oath, that they were at the pulling down of the Houſe, and did actually pull it down, and ſo are *ſocii criminis*, and conſequently are repelled from Witneſſing, by the 34. *Cap. Stat.* 2. *Rob.* I. where there is an Enumeration made of thoſe who cannot be admitted to be Witneſſes, amongſt whom are *ſocii & participes ejuſdem criminis*.

TO which Exception the Accuſer anſwers, " That tho' *ſocius criminis* cannot be admit-
" ted *pro ſocio*, yet he may be admitted *contra ſocium*, that he may be Witneſs againſt, tho'
" not for thoſe who were engaged with him. 2. Tho' *ſocius criminis* may not be admitted

“ as a Witneſs *contra ſocium*, where the Crime in which they were engaged fixes Infamy up-
“ on the Committers, as Treaſon, Witchcraft, Murder, *&c.* yet in Delicts, or rather Riots,
“ ſuch as is the caſting down of a Houſe, that tends to infer a pecuniary, and not a capital
“ Puniſhment; there *ſocii criminis* may be received as Witneſſes: For, the Reaſon why they
“ are ordinarily repell'd, is, becauſe in deponing they confeſs a Crime againſt themſelves, &
“ *ſe infamant*, which Reaſon ceaſes in Delicts or leſſer Crimes, *quæ non infamant*.

It is likewiſe repreſented, “ That it is moſt clear from Law, that the only Reaſon why
“ *ſocii criminis* are repelled from being Witneſſes is, becauſe *deponendo ſe infamant*, and ſo
“ they forfeit the Capacity and Confidence of Integrity that the Law repoſes upon all Per-
“ ſons that ought to be believed as Witneſſes, by the whole Contract of the whole
“ Titles, *ff. & C. de teſtibus*. And by Clar. *Quæſt*. 21. *Num*. 8. *Dictum ſocii criminis*
“ *ad hoc ut fidem faciat, requiritur, ut ſit confirmatum in tormentis, cum enim ex pro-*
“ *prio delicto ſit infamis, nec debet admitti pro teſte ſine tortura.* And the foreſaid Text
“ of the Majeſty, ought, as is alledged, to be interpret only ſo, as to take place *ubi*
“ *crimen infamat*, and that *delicta non infamant* is endeavoured to be prov'd by the Statute
“ of King *William, De his qui notantur infamia*, where it is ſaid, That *fures, ſacrilegii, ho-*
“ *micidii*; and others, *qui ſunt irretiti capitalibus criminibus, repelluntur a teſtimonio.*

“ If Witneſſes in Delicts and Riots ſhould not be admitted becauſe they are *ſocii crimi-*
“ *nis*, no Delict (ſays the Purſuer) ſhould ever be prov'd; for ordinarily none are preſent
“ but the Committers: And ſince after their Confeſſion they may be purſued themſelves,
“ it is not probable that they will depone againſt others falſly, eſpecially when they may be
“ overtaken upon their own Depoſition.

To which it is duplied, That it is a Rule in Law, that *ſocius criminis, nec pro, nec contra ſocium admitti poteſt, L. quoniam C. de Teſt.* Maſcard. *Concluſ.* 1418. By which it is clear, that the Law makes no Diſtinction whether he be adduced for, or againſt his Comrads; whether he be adduced in Crimes or Delicts: And *ſocius criminis* is not only repell'd from being a Witneſs, becauſe he ſtains his own Fame whilſt he depones againſt his Companions, but becauſe the Law preſumes, that being himſelf under the Mercy of the Purſuer, he will, by an unjuſt Depoſition, ranſom himſelf from the Event of the Purſuit, and therefore the Law caſts him as a Witneſs; for the Law is unwilling to uſe thoſe who hath offended it: And Lawyers have always been unwilling to tempt Men, by forcing them to depone upon their own Errors, for they judged, that theſe who would commit a Crime, would eaſily forſwear it. And the Law of the Majeſty formerly cited doth repel *à teſtando ſocios criminis, & infames*; whereas it needed not have expreſs'd both, if it had comprehended the one under the other, and only repelled *ſocios criminis*, becauſe they were *infames*.

I perceive by Lawyers, that ſometimes they allow Witneſſes in attrocious and great Crimes, whom they would not have admitted to prove Crimes of leſs Conſequence, which proceeds both from the Hatred they carry to theſe great Crimes, a Part of whoſe Puniſhment it is that the Crime can be eaſily prov'd; but likewiſe to the End the Commonwealth may be the better ſecured; whoſe great Concern it is, that Judges be not too nice and ſcrupulous in receiving Witneſſes againſt its Enemies. Nor did the Law think, that Men would be ſo baſe and malicious, as to ſeek the Death of their Enemies by a falſe Depoſition, even where poſſibly Revenge would be content to reach their Eſtates. Therefore, by the common Law of Nations in attrocious Crimes, ſuch as Treaſon, Simony, or Sacrilege, *ſocii & participes criminis admittuntur, L. quiſquis C. ad L. Jul. majeſt. gloſſa in L. fin. C. de accuſ. ſpecul. Tit. de prob.* § 1. Boer. *Quæſt*. 319. And according to our Law, it is appointed by an expreſs Act of Sederunt, *Anno* 1591, that *ſocii criminis* may be Witneſſes in the Caſes of Treaſon and Witchcraft; but I do not at all read, that *ſocius criminis* is allowed to be led a Witneſs in Delicts; and all the Reaſons that militate for the former Cauſe, do militate againſt this. Nor is it poſſible to believe, that the Law which allows *ſocii criminis* to be Witneſſes in great Crimes, becauſe they are great, would likewiſe allow them to be led Witneſſes in ſmall Crimes, becauſe they are ſmall; for ſo the Law would contradict itſelf, and would build Contrarieties upon the ſame Foundation. And ſince the foreſaid Act 1591, allows them to be led Witneſſes in Crimes of Witchcraft and Treaſon, they ought not to be admitted in any other Crime, how ſmall ſo ever; for in *privilegiatis, incluſio unius, eſt excluſio alterius.*

It is very clear, that the Law would not admit the Teſtimony of a Partaker of the Crime to have the Force of a Preſumption, nor to be the Ground of an Accuſation, *Salicet. in L. fin. C. de accuſ.* nor gives it any Credit to his Depoſition, tho' he were otherwiſe eſteem'd a moſt credible Perſon, *probatiſſimæ fidei, Grammat. conſil.* 21. *Num* 3. Nor doth it believe him tho' he were deponing againſt a Perſon ſuſpected to be guilty, *Bert. conſil.* 268. Nor doth it believe a Thouſand ſuch Witneſſes, tho' they agreed in their Depoſitions; for all theſe joined together weigh not one Preſumption, *Maſcard, ibid. Num.* 8. By all which it may appear very clearly, that the Law which reſpects *ſocios criminis* ſo little, doth in no Caſe deſign to receive them in a criminal Court, whatever may be debated for receiving them in civil Courts for proving civil Concluſions.

As to the Inconveniency adduced, wherein it is contended, That if ſuch Witneſſes were not admitted no Crime could be proved; it is anſwered, That this Argument would urge Judges to receive *ſocios criminis* to be Witneſſes, as well in all Crimes, as in ſmall Crimes; for it is a *Brocard* commonly received amongſt the Doctors, That *quod admittitur ob incommodum, eo magis admittitur, quo magis urget incommodum*; and yet here it is confeſt, that they could not be admitted Witneſſes in Murder, and thoſe great Crimes. But the only natural Concluſion that could be drawn from this Inconveniency, is, That *ſocii criminis* ſhould be admitted Witneſſes in occult Crimes, ſuch as Conſpiracies; but not in ſuch Crimes as this, where there could be no Penury of Witneſſes, being alledged to be committed in open Day, in the Midſt of a Town, and with a Convocation. But to conclude all, I need only ſay, That my Objection againſt theſe Witneſſes is founded upon an expreſs Law, and therefore it cannot be taken away by this Diſtinction, except this Diſtinction can be eſtabliſh'd upon, and maintained by another Law as expreſs.

*THE Juſtices found, That theſe Minors being* puberes, *might be try'd, and ſo found that they ſhould paſs to the Knowledge of an Inqueſt.*

II. *THEY found the Father ſhould paſs to the Knowledge of an Inqueſt, as Art and Part, tho' the principal Actors were not yet diſcuſs'd.*

III. *THEY found, That* ſocius criminis *could not be received a Witneſs in any Criminal Purſuit, tho' the Puniſhment could only reach to a pecuniary Mulct.*

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# AN ANSWER

## To ſome REASONS printed in *England*, againſt the Overture of bringing into that Kingdom, ſuch *Regiſters* as are uſed in *Scotland*.

IN the Firſt Ages of the World, when Man had not fallen ſo intirely as now from his original Innocence, Laws were made rather to govern reaſonable Men, than to prevent Cheats. But when Fraud did begin to grow up with Subtilty, Legiſlators being warned to guard againſt future Abuſes, by theſe they had ſeen committed, did in all Places endeavour to reform their People, by reforming their Laws, & *ſic ex malis moribus bonæ ortæ ſunt leges*; and becauſe wiſe Men look upon themſelves as ſprung from the ſame Divine Original, therefore they have ſtill been intent to borrow from one another, what excellent Conſtitutions they found to have been invented by them. Thus, tho' *Scotland* did adopt the Laws of the *Romans* (called now the Civil Law) into the firſt Place next their own; yet, ſuch Eſteem hath that Kingdom always had for their Neighbours of *England*, that they have incorporated into the Body of their own Laws, very many *Engliſh* Forms and Statutes. And as ſome Sciences, Trades and Inventions flouriſh more, becauſe more cultivate in one Nation than another, humane Nature allowing no univerſal Excellency, and God deſigning thus to gratify every Country that he hath created; ſo *Scotland* hath, above all other Nations, by a ſerious and long Experience, obviated moſt happily all Frauds, by their public Regiſters. And tho' they are not further concerned to recommend this Invention to their Neighbours, than in ſo far as common Charity leads them; yet finding their Regiſters ſo much miſtaken, in a Diſcourſe, entitled, *Reaſons againſt regiſtring Reformation*, I thought it convenient to repreſent a ſhort Account and Vindication of them. Regiſters are appointed in *Scotland*, either for real Rights, (for ſo we call all Rights and Securities of Land) or for perſonal Obligations, by which a Man binds his Perſon, but not his Eſtate. Men ſell their Land in *Scotland*, either abſolutely, or under Reverſion; if abſolutely, it muſt be either to the Seller's own Superior, or to a Stranger; if to his Superior of whom he holds his Land, it is tranſmitted with us by an Inſtrument of Reſignation in the Hands of his Superior, *ad perpetuam remanentiam*; whereby the Propriety is conſolidated with the Superiority, and this Inſtrument muſt be regiſtrated. But if he ſell it to a Stranger, then the Acquirer muſt be ſeaſed, and this Saſine muſt be regiſtrate within Sixty Days. Or if a Man do not abſolutely diſpone his Eſtate, but retain a Power to redeem the ſame, upon Payment of the Sum for which it is wadſet or morgaged, then the Paper whereby this Power is allowed, is called a Reverſion, and it muſt be regiſtrate within Sixty Days alſo. If any Heritor be ſuſpected by his Friends to be prodigal, or unfit to manage his own Affairs, he interdicts himſelf to his Friends in a Paper, wherein he obliges himſelf to do no Deed without their Conſent: Or, if a Creditor who lent his Money to an Heritor, find that Heritor intends to ſell his Eſtate, without paying him, albeit he did lend his Money in Contemplation of that Eſtate, which the Borrower then had; he makes an Application to the Supreme Judicature of the Kingdom, called, *The Lords of the Seſſion*, and from them obtains a Warrant to inhibite his Debitor to ſell that Eſtate till he be paid; which Interdiction or Inhibition muſt be firſt publiſhed at the Mercat-croſs where the Lands ly, and then regiſtrated within Forty Days.

THERE are Two of theſe Regiſters, or public Books, one in the chief Town of the Shire, and another at *Edinburgh*, which ſerves for all the Shires; and in either of theſe, all theſe Saſines, Reverſions, Interdictions, and Inhibitions, may be regiſtrated. So that when any Man intends to buy Lands, he goes to the Keepers of theſe Regiſters, who keeps a ſhort Breviate of theſe in a Book apart, called the *Minute Book*, (bearing the Day when any Inhibition was preſented againſt ſuch a Man, at the Inſtance of ſuch a Man) and there he finds for a Crown, what Incumberances are upon the Eſtate he intends to buy, and if he find none, he is ſecure for ever.

AS to perſonal Bonds, they need not be regiſtrated; but if the Creditor reſolve to ſecure his Bond againſt loſing, or if his Debitor refuſe to pay his Money when he calls for it, then he gives in the Original, or principal Bond, to the Regiſter, who keeps it ſtill, and gets out an Extract or Copy of it, collationed by my Lord Regiſter's Servants, and ſubſcribed by himſelf or his Depute; for there is a Regiſter for Bonds in every Shire, Town, and Juriſdiction, as well as at *Edinburgh*. This Regiſtration hath with us the Strength of a judicial Sentence, and warrants the Creditor to charge his Debitor, to pay under the Pain of Horning (or Outlawry) and if he diſobey, the Horning is regiſtrated. And thus every Man knows in what Condition his Debitor is, as to his perſonal Eſtate, if he begin not to keep his Credit; and this Regiſter ſerves both for Execution and Information.

THIS being the State of the Regiſters in *Scotland*, the Uſefulneſs of that Inſtitution may appear from theſe following Reaſons.

I. THERE is nothing diſcourages Men more from being vigilant in their Employments, than when they apprehend that the Money which is that Product, by which their Pains uſes to be rewarded, cannot be ſecured to their Poſterity, for whoſe Advantage they diſquiet themſelves, and toil ſo much. And thus the Commonwealth will be but lazily ſerved, Trade will be ſtarv'd, and ingenious Spirits diſcouraged. Nor is it to be imagined how Purchaſers will be, or are induced to be at much Pains and Expences, to improve their Grounds, and adorn their Dwellings; when the Looſeneſs of their Right lays them open to renewed Hazards, nor can they enjoy with Pleaſure, what they cannot poſſeſs with Certainty. And what frail Securities have ſuch as are forced to reſt upon the Ingenuity of Sellers, who of all People are leaſt to be truſted? For ſuch as ſell Lands, are either Prodigals, who are too vicious; or diſtreſs'd Perſons, who are ordinarily under too many Neceſſities to be believed.

II. REGISTERS are, of all others, the greateſt Security againſt the forging of falſe Papers; for Forgers uſe to conceal for ſome Time the Papers they forge: Whereas the Neceſſity of regiſtrating them within ſuch a Time, will either fright the Contrivers from doing what they muſt expoſe to the Light, or will at leaſt furniſh ſuch as are concerned to have the Fraud detected, with Means which may be effectual; ſeeing it is much eaſier to expiſcate Truth whilſt the Witneſſes are alive, and all Circumſtances recent, than after that a long Interval of elapſed Time hath carried away the Perſons, and obſcured the Circumſtances from which Truth could have received any Light.

III. PURCHASERS being fully ſecured by the public Faith of Regiſters, need not burden the Seller with a Neceſſity of finding Surety to them for the Validity of the Rights ſold; which, as it reſolves ſtill in a perſonal (and conſequently an unfix'd) Security for the Buyers, ſo vexes very much the Seller and his Friends.

IV. THE Security which flows from Regiſters cuts off much Matter of Pleading, and thereby defends againſt thoſe Feuds and Picques, which laſt ever after amongſt ſuch as are concerned, and keeps Gentlemen at home improving their Eſtates, and Merchants and Tradeſmen in their Cantors and Shops, enriching the Nation.

V. WHEN Men are to beſtow their Daughters, they are by our Regiſters informed, and aſſured of the Condition of thoſe with whom they deal; and by their Means, Men are kept from giving their Daughters and their Fortunes, or a conſiderable Share thereof, to Bankrupts and Cheats. Likeas, the Daughters are by them ſecured in their Jointures, and not expoſed after their Husbands Death, to tedious Suits of Law, the Dependance whereof draws them to public Places unfit for their Sex, and the Event whereof drives them to Begging and Miſery.

VI. BY theſe, the Price and Value of Land is much raiſed; for by how much more the Purchaſe is certain, by ſo much more it is worth.

VII. BY theſe, Heritors who are oppreſs'd by Debt, are relieved by the Sale of their Lands, upon which Buyers now adventure freely; whereas, if they were to rely upon the Faith of the Sellers, their Eſtates might continue unſold till the Rent of their Money ſhould eat up the Stock.

VIII. BY theſe, Uſury and unfrugal Tranſactions with Brockers and others, are much reſtrained; for if Purchaſes of Lands were not ſecure, Men would rather chooſe to hazard their Money ſo, than upon Land.

IX. BY theſe, Parents know when their Children and Kinſmen, when their Relations debord, and burden their Eſtates, and are thereby warned to check or aſſiſt them.

X. BY theſe, Strangers and Foreigners are ſecured who reſolved to match with us, or to purchaſe amongſt us; for our Regiſters are equally faithful to all.

XI. BY theſe, Commerce is very much ſecured; for, if a Merchant, or ordinary Tranſacter, refuſe to pay his Debts, then his Bond is put in the public Regiſter, by which the Creditor is ſecured of Payment, and the Debitor is deterred from owing too much.

XII. BY theſe Regiſters, Papers are ſecured againſt Fire, Loſs and Accidents, to which they are expoſed whilſt they are kept in private Hands: Whereas, after Regiſtration, nothing can deſtroy them but what ruines the whole Kingdom; and even in that Caſe, there is ſtill Hope of recovering public Regiſters, as in our laſt Revolutions.

IN this laſt Place, I muſt crave Leave to wonder, why *England* hath already taken ſo much Pains to ſecure againſt fraudulent Cheating of Creditors, and of Buyers, as is clear from the Statutes cited by the Author, if they intend not to proſecute that worthy Deſign. But as an evident Mark to know whether Regiſters be neceſſary, they may conſider, That if any Man in *England* can for a Crown, know in the Space of a Day, the Condition of theſe from whom he purchaſes, then Regiſters are not neceſſary; but if otherwiſe, they are: If any Lawyer in *England* can aſſure his Client, that the Purchaſe he makes is ſecure above all Hazard, then Regiſters are not neceſſary; but if they cannot, then Regiſters are neceſſary: So that it ſeems, *England* hath done too much already, or elſe, that they ſhould do more to ſecure their People. Yet ſince I only deſign to defend our own Law, and not to impugn their's, it were impertinent for me to recommend too zealouſly, that wherein I am not much concerned.

AGAINST this ſo juſt, and ſo neceſſary a Conſtitution, founded ſo ſtrongly upon Reaſon, and approv'd ſo firmly by Experience, the Author of the *Reaſons againſt regiſtering Reformation*, hath put his Invention and Wit (both which, I confeſs, are very fertile) upon the Rack, to find out, and muſter up ſome Arguments, which owe their Number and Beauty to the Unacquaintedneſs of his Countrymen with the Model he impugns, and which the Author had beat out by too much Induſtry, to a Thinneſs, that is not able to bear the Weight he lays upon them.

HIS Firſt Argument is founded upon the Dangers that ariſe from Innovations, wherein Legiſlators are not able to have a full Proſpect of all Inconveniencies which may follow. But to this it may be anſwered, That the Law of *England* had not deſerved the Honour done it by the Author, nor had it ſwelled to its preſent Bulk, if it had not been frequently augmented by new Additions. And as to this Project of keeping Regiſters, *England* may be wiſe upon the Hazard of their Neighbours, who by being firſt Practiſers, have run all the Riſque, and taken all the Pains which was neceſſary for accompliſhing ſo great a Deſign.

THE Second Reaſon bears, “ That by Regiſters, the Lowneſs of the Fortunes of ſuch as “ ſuffered for His Majeſty would be diſcovered, and they thereby expoſed to much Rigour “ from their Creditors.” But this, I humbly conceive, proves more the contrary Opinion, than that for which it is adduced; for as it were unjuſt to gratify ſuch as have ſuffered for His Majeſty, with the Liberty of preying upon ſuch as probably lent them, becauſe they were of their Principles, and of devouring poor Widows and Orphans, whoſe Neceſſities will doubtleſs load one Day very much the Conſciences of ſuch, as might have ſecured their petty Fortunes by the Help of the Regiſters now propoſed. And this Argument preſſes no more againſt Regiſters, than it doth againſt all thoſe laudable and well contriv'd Statutes, which are already invented in *England*, againſt fraudulent Conveyances, Forgeries, and Impoſtures; for Regiſters will not debar them from Courſes which are legal and honeſt.

WHEREAS it is in the Third Place urged, “ That Commerce would be a great Sufferer “ by Regiſters, ſeeing they would lay open the Lowneſs of Men's Fortunes, who do now “ enrich the Kingdom, and themſelves too, upon mere Credit; and that they would diſco- “ ver to Foreigners, the low Eſtate of *England* at preſent, and make every private Eſtate “ too well known.” It is anſwered, That all theſe Inferences are drawn from the Author's Unacquaintedneſs with what he impugns, as was formerly obſerved; for no Man is obliged to regiſtrate a Bond, which obliges only to pay Money; nor do Men regiſtrate ſuch, except where the Debitor refuſes to pay; and ſo theſe Regiſters will not weaken Commerce, nor Credit, ſeeing Commerce is not immediately concerned in real Eſtates: And even as to perſonal Eſtates, or Money, no Man ſuffers by Regiſters, or is concerned in them, but ſuch as have no Reſpect to their Credit; and Commerce owes little to ſuch: Whereas upon the other Hand, the Fear of this will be yet a further Tie upon Men to pay punctually, without which Commerce will ſoon be ſtarv'd. And by the Regiſters, Bankrupts will be ſoon diſcovered, whereby honeſt Men, who are the true Nurſes of Trade, will be much cheriſh'd and ſecured. And by this Anſwer it appears clearly, That the Riches of *England*, neither perſonal nor real, can be made known by the Regiſters; for only the Bonds of Bankrupts are to be regiſtrated: And tho' all real Rights muſt; yet the *Quota* of the real Eſtate is not expreſt in the Papers to be regiſtrated.

AFTER the Author of that Diſcourſe againſt *regiſtering Reformation* found, that ſo unanſwerable Advantages ariſe from Regiſters, as that they could not be balanced by the Inconveniencies which he laid in the other Scale, he is pleas'd (which is ordinary for ſuch as cannot prevail by Reaſon) to reflect upon *Scotland*, as a poor Country; and againſt the *Scots*, as an unmerciful People; and to alledge, that their Poverty, and Severity introduc'd thoſe Regiſters, and made them neceſſary with us; but that they would never agree with the rich, and tender-hearted *Engliſh*: Which Reflections deſerve rather our Pity, than our Anſwer. Leaving then this womanly Way of arguing, as unfit for the *Scots*, who ſtudy to be Philoſophers in their Writings, as well as in their Humours; it is humbly conceiv'd, that Regiſters do reſtrain no Man's Compaſſion; for no Man doth virtuouſly indulge his Creditor, but he who knows the Lowneſs of his Condition, which he cannot without Regiſters: Ignorance is leſs the Mother of Virtue, than of Devotion. Regiſters prejudge only ſuch as are Cheats; and ſuch deſerve little Compaſſion. Nor are our Laws more ſevere againſt Debitors who pay not, than the Laws of *England*; for both impriſon ſuch: And the only weak Side in our Law is, That it allows too much our Judges to ſuſpend the Payment of Debts; and I never heard the *Engliſh* who live amongſt us, complain of any other Defect in our Laws. Our Laws are extracted from the Civil Law, and ſuch Doctors as write the Law of Nations: And Strangers underſtand our Law ſooner than any other Law in the World, except their own: And our Captions for impriſoning Debitors who refuſe to pay, are expreſly warranted by that Law of the *Romans*, which tho' it was the beſt Law in the World, and is univerſally acknowledged to be ſuch; yet was more ſevere than our's. The comparing of Nations as to their Poverty and Riches, brings more heat than Light: Nor can any Difference betwixt the Nations in theſe, make any Difference as to this Deſign; or if it doth, it may be debated with Reaſon, That Regiſters are fitter for a rich, than a poor Nation; for where there are moſt Buyers, and moſt Land to be bought, Regiſters are there moſt neceſſary; ſeeing they were invented to inform Buyers, as to the Incumberances wherein Eſtates are involved by the Multiplicity of Purchaſers. Where there is but little Land, and where the Creditor is poor; there the Creditor may have Time and Leiſure ſufficient, to watch the ſmall Eſtate of his Debitor. Our Nation ſupplies their Neighbours with Corns, and Cattel, Lead, Copper, Timber

ber, Coal, Salt, and many other Neceſſaries; whereas in Exchange of theſe, it receives only from them, Wine, Spices, Silks, and other Superfluities; which as *England*, no more than *Scotland*, hath growing within their own Countries; ſo 'tis probable, that both Nations would live more happily without them: And thus it appears, that *Scotland* is not ſo poor as theſe Reaſons are.

I would here put an End to theſe Obſervations, if I were not unwilling to ſuffer that Gentleman to continue in his Error of thinking, that our Regiſtration of moveable Bonds owes its Origine to the *Caurſini*, the Pope's Brokers in *England*; and to the *Camera Apoſtolica*, under the Reign of *Henry* III; for as it is moſt improbable, that our Nation would borrow ſo fundamental a Conſtitution, from what was practis'd in a Nation that was in Enmity with them at that Time; ſo it is nowiſe probable they would have followed the Methods of the Pope's Agents at that Time, when they were oppreſt by their Maſter, the Popes endeavouring to ſubject their Clergy of *Scotland*, to the See of *York*; and by theſe Agents themſelves, in ſuch mercileſs Exactions.

BUT the Truth is, That tho' the completing of this excellent Conſtitution, is an Honour due to *Scotland*; yet its firſt Origine is rooted in the *Roman* Law: And moſt Nations in the World do, at this Day, uſe Regiſters, which may be thus cleared.

THE *Romans*, to reſtrain exceſſive Donations, appointed them *inſinuari apud judicem, ut obviam iretur fraudibus*; which Inſinuation was the ſame with our Regiſtrations: Thereafter they uſed *Regeſta, quæ vulgo Regiſtra, quaſi regeſtaria dicuntur*; *illa erant acta tabulæ publicæ*, which were at *Conſtantinople*, and in the Eaſtern Empire, called πνυμηταμοα, as *Prat.* obſerves; and by *Vopiſcus in Probo*, are called *Regiſtra: Uſus eſt enim* (*inqut* Vopiſcus) *regiſtris, ſcribarum porticus prophyreticæ.*

THE *Romans* had likewiſe public Books, wherein Papers were preſerved; which were under the Weſtern Empire, called *Archiva tabularia & tablina*; but under the Eaſtern Empire, were called *Grammatophilacia*; *ubi inſtrumenta publice deponuntur*, as *Ulpianus* obſerves, *L. Moris. ff. de pœnis*, § 6.

THAT other Nations beſides *Scotland* uſe to preſerve their Papers in public Places, and appoint their private Rights to be made public and known, by regiſtering them, appears from *Alex. Conſil.* 16. wherein he treats of the Regiſters *Civitatis Rheg.* and by his *Conſil.* 23. wherein he treats of the Regiſters *civitatis Arimini:* And at *Rome*, they uſe *Regeſtrum ſupplicationum Apoſtolicarum*, and another Regiſter *Literarum Apoſtolicarum*, *Caſtr. Conſil.* 345. But the Regiſters uſed by us, have been allowed, and imitated by the *French* moſt exactly: For a Conſtitution, *Anno* 1553, made by *Henry* II. provides, That all Diſpoſitions, Contracts, and Obligations, exceeding Fifty Livres, ſhall be regiſtrate; and if it be not regiſtrate, it ſhall be null, in ſo far as concerns Third Parties; the Narrative of which Law proves the Advantagiouſneſs of Regiſters; for it bears, *That after all other Means have been eſſayed, we find, That there was none ſave this of Regiſters, to make our Subjects live in Aſſurance, to obviate all Debates, and to prevent Cheats:* In which, and theſe other Conſtitutions which follow upon it, all the Methods us'd by us are exactly ſet down; ſuch as the marking of Regiſters in every Leaf, the having particular Regiſters in every inferior Juriſdiction, and the marking of the principal, or original Papers upon the Back; there alſo the Copies collationed are called *Extracts*. But that in this they imitated us, is clear; for we had Regiſters before the Year 1449. becauſe by the 27 Act, 5th. Parl. *Jam.* III. Reverſions are appointed to be regiſtrated; which Act ſpeaks of Regiſters as then in Being, and fully eſtabliſhed.

I find alſo, that in the old Hanſiatic maritime Laws, *Tit.* 11. *Art.* 4. it is provided, That *nullus nautarum ullam ſilliginem, aut alia bona navi importet, vel exportet, ſine ſcitu naucleri, & ſcribæ navalis, ubi etiam in regiſtro poni debent.* Which I obſerve, to clear that all Ages and Nations, Trafficquers by Sea, as well as Lawyers by Land, have thought Regiſters advantagious for Commerce, and a ſure Fence againſt Cheats: And if Regiſters be neceſſary in ſuch mean and tranſitory Occaſions, as Loadings and moveables, much more are they neceſſary in Lands; which as they are of the greateſt Importance, ſo are of the longeſt Duration.

SINCE then Regiſters have been found ſo advantagious, and that Experience hath herein ſeconded Reaſon; 'tis humbly conceiv'd, that *Scotland* is much to be magnified for their Regiſters; and that *England* may, without Diſparagement, introduce this new amongſt their old Statutes, whereby they cannot be ſo properly ſaid to innovate, as to enrich and augment their own Law; *nec pudet ad meliora tranſire.* But I know that Nation to be ſo wiſe and provident, that if they underſtood our Regiſters, as well as they do their own Concern, they would eaſily prefer them to theſe Reaſons which this Gentleman has offered againſt them.

*FINIS.*

# IDEA ELOQUENTIÆ
# Forenſis Hodiernæ:

UNA CUM

## Actione Forenſi ex unaquaq; juris parte.

## Hujus Seculi ADVOCATIS,
## *GEORGIUS MACKENZEUS*
## S. P. D.

SATIS *hactenus datum* Commentariis *Jus Civile jam nimium gravantibus, ſatis nos hucuſq; onerarunt* Deciſiones, *ſatis diſtraxere* Conſuetudinum *ſcriptores; nihil jam novi habet Juriſprudentia præter* Actiones *ſuas* Forenſes, *quæ, ut novitate ſua eodem nos modo quo ver & juventus delectant; ita & pompa, & varietate dicendi, iiſdem nos illecebris captunt, quibus ambitio, & divitiæ ſuos allicere ſolent. Sed hæ vernaculo adhuc ſermone arctatæ, quaſi in carcere languent, tam paucis legendæ, ut vix authores ad eam quæ decet curam excitare poſſint; & cum ætate qua ſcribuntur, velociter adeo ob ſtili vernaculi mortalitatem perituræ, ut ſcribentibus vix operæ pretium rependere queant. Opera linguæ municipali conſignata, dum nova ſunt, corrodit invidia; & antequam invidiæ perit livor, fugitivus noſter perit ſtilus. Nos ergo cum his erramus, qui lapide contabeſcente monumenta extruunt, & in arena influente mari obruenda ſtulte ſcribunt.*

*JUDICES a vobis illuminati, ea quæ ipſi decrevere; anteceſſores, ea quæ ipſi docuere, currente ſcribunt calamo: Nos autem* Actiones Forenſes, *quas ſociali ſtudio expolivimus, faſtidientes* Commentarios, & Tractatus, *majori cura quam ſucceſſu ſcribimus. Licet ex his rarior laudum meſſis, quam ex illis proveniat; quia in illis nulla niſi nova, dubia, & utilia ventilantur, aliàs enim in foro diſputanda non proponerentur: In* Tractatibus *autem* Commentariiſque, *criticæ, aridæ, ſterileſq; ſubtilitates lectores ſæpe morantur;* Actiones Forenſes *conjunctis ſtudiis, & ingenti ingeniorum colliſione limantur:* Commentarii *autem,* Tractatus, *&c. per immenſa volumina, ab uno ſolo, nulla contradictione monito, nec auditorum plauſu, nec clientium liberalitate ſtimulato, priorum authorum dictata repetentes, fuſe prodeunt. Quapropter mihi viſum* eſt, paucas haſce Actiones Forenſes linguæ Latinæ tradere, juſtæ illi & tenaci famæ depoſitariæ, quæ nunquam ſibi commiſſa perdit, nec ſenſum, ſi quis in authore ſit, deprimit unquam: quo vehiculo etiam omnia in foro, valido ingenio, vigiliq; cura exculta, ad poſteros tranſmitti certum eſt. Et licet mihi ad hoc diſſuadere poſſit, quod nemo mortalium poſt Ciceronem, hoc auſus fuerit, a quo plus ingenio, quam tempore diſto; quiq; dum orare docet, ab orando deterret, me plus dicendi nervis & robore, quam Latinæ linguæ peritia ſuperans: Senecæ enim & Quintiliani declamationes pictæ ſunt potius, & larvatæ actionum imagines, quam Actiones vere Forenſes. Hoc tamen ſum aggreſſus, quia non me fallit hodiernum forum pluribus auxiliis ſupra Auguſti tempora eſſe inſtructum, quam ut nobis de ſucceſſu penitus deſperandum ſit; hodie enim Corpus Juris Civilis tenemus, cujus authores poſt Ciceronem, fere omnes floruere; hodie per tot annos exercitata diſputatio elocutionem, ac vim forenſem ad ſuam evexit perfectionem. Leges municipales variæ, & clariſſimarum Actionum Forenſium theſaurus, materiam inexhauſtam Ciceronis ætate incognitam, ſuppeditant, mentemq; acuunt; ita ut ſi non & nos fama beet, hoc ignaviæ noſtræ, non rei ipſi imputandum, ſitq; fortitudinis, potius quam ingenii defectus. Sed & cæcus forſitan amor nummi, fallax & fragile illud ingenii monumentum, indignumq; ſalarium, nos a veræ gloriæ ſtudio nimium avocat, quid lucri potius, quam quantum famæ acquiri poſſit, anxie in negotiis quærentes? Mihi etiam objici poteſt, quod ultra Solis fere vias natus, novum hoc opus ſubactis ingeniis, tam ſuſpectum aggredi ſim auſus; ſed cum animus cælitus deſcendat, Geopraphiæ regulis non eſt menſurandus, cumq; a Deo inſpiretur, ad ſublimia aſpirare debet, nec elementariis hiſce auxiliis indigens, nec terreſtria hæc obſtacula reformidans. Generoſus emulationis ardor, ſole fortior & vegetior, ingenia noſtra fovet, vires quas requirit ſuppeditans; ejuſq; ignea virtus vinci neſcia, animos ad Cælum unde fluxere, elevat; plureſq; hodie regiones integras accendit, quam Romæ numerabantur oratores. Vivimus eo in regno, quod Romano imperio fortitudine ſua, & Romano eloquio in Buchananis, Barclaiis, Blackwoodiis, aliiſq; ſuis ſcriptoribus limites poſuit: Et ſi illi in eruditionis diluculo viventes, & in ſcholæ umbra educati, tanta præſtiterunt; Quid ab advocatis noſtris feliciori ſeculo natis, liberaliori educatione, otio, opibus, obſequio, aliiſq; adminiculis adjutis, ſperari poteſt? In quorum ſocietate, jam ad invidiam uſq; evecta, me inter mediocres eſſe non erubeſco. Multis forſan moleſtum erit, quod lingua Latina non tam noſtra ſit, ut eam noſtris conceptibus facile accomodare poſſimus; ſed cum Textus Juris Civilis ex fontibus Romani eloquii puriſſimis nitide fluat, ejuſq; Commentarii a criticis illius linguæ ſint conſcripti, & ex purioribus Romanis ſcriptoribus illuſtrati: Juridici omnium literatorum hac caſtiſſime, & copioſiſſime uti & poſſunt, & debent; eiq; neſcio quid tam excelſi & diaphani ineſt, ut quæ aliis tradita vix a gentibus æſtimentur, hac veſtita, & fulgeant & colantur: Quod non ſolum majeſtati Romanæ, in hac ruinis ſui imperii ſuperſtiti, aſcribendum eſt; ſed & authores Latine ſcribentes, fælici curioſitate, verba juſtius adaptare, & materiam penitius intueri tenentur, dum ſenſum ſuum omnibus, & omni ævo exponunt. Teſtes ſint (ut abſit invidia) noſtrates Craigius & Buchananus, quorum ſi alter Jus, alter Hiſtoriam noſtram vernacule ſcripſiſſent; jam olim de eorum ſcriptis (nunc in literarum fatalia duraturis) facilius triumphaſſent tempus, rerum optimarum edax, & invidioſa vetuſtas.

TANTUM tamen apud me hæc valuere argumenta, ut a nimia ſcriptione me retinerent; nam ne lectores dubio hoc gravarem fætu, unam ſolummodo Actionem Forenſem ex unaquaq; Juris parte, inter has quæ ſeſe intra anni curriculum obtulere, ſelegi: ſi hæ placuerint, dabuntur & aliæ; ſi non, ſatis ſuperq; ſcriptum credimus; facilius enim erit plures addere, quam has excuſare; quas vobis (quibus recta ratio, & mortalium animi in poteſtate & tutela ſunt, quiq; eruditionem prudentia regitis, & prudentiam eruditione ornatis) tanquam Patronis pio affectu ſubmitto, ne coram vobis tanquam Judicibus accuſentur.

# IDEA ELOQUENTIÆ

## Forenſis Hodiernæ.

INTER ſublimia erecti animi vota, nihil Eloquentiam ſuperat, pauca æquant. Reges non ſuis, ſed matrum laboribus, diademata ut plurium debent. Politicorum artes, & Imperatorum laureæ ſunt ſucceſſu, potius quam ingenio metiendæ; & ex eventu nimium pendent, ut noſtræ pure dici poſſint: Oratores autem ſoli ſibi ſuas quærunt palmas, nec cum fortuna prædam dividunt; illi tantum corpora, hi animos vincunt; illi perdunt quos vincunt, hi delectant.

INTER hos qui Eloquentiam fovent, primas Advocatis facile concederem; hi enim Aulicos acumine, Philoſophos varietate, & Prædicatores præſentia animi ſuperant. Aulici enim ineptias & blandimenta ſua mira cum ſuavitate inſinuant: Philoſophi eadem dogmata obviis, & ſæpe repetitis argumentis urgent; nihilq; inopinatum vel tenent, vel aſſerunt; & apud eos, quæ probatione ægent, nec probari debent, nec poſſunt. Prædicatores ab omni interpellatione & reſponſione ſecuri, ea promunt, quæ cum optato otio apud ſe ſine ſtrepitu cogitavere; nos templa petimus, credentes antequam audimus, thematis, non prædicationis proſelytæ. Advocati autem, varios caſus mira cum argumentorum varietate indies agunt; ſine præcogitatione, & hæſitatione meditatis reſpondent; & onerati negotiorum multitudine, ita unumquodq; tractant, ac ſi huic uni vacaſſent; & ita alternatim ſeſe vincunt, ut qui ultimo reſponderit, ſemper auditores poſſideat. Poëſis eſt florum tantum faſciculus, & ita florum inſtar, nec alit, nec durat: nam poſtquam umbratili ſua luxuria voluptati noſtræ eſt aliquantiſper lenocinata, ex nihilo producta, in nihilum facile evaneſcit, nec authores ditans, nec amicos protegens. Quid eſt in fatis optabilius, quam innocentes ex accuſantium faucibus, & opprimentium unguibus liberare, judices illuminare, adſtantes delectare, veritati faciem prebere, criminoſos terrere, & ad ſupplicia perducere? Hi ſunt qui mulcent, etiam dum errant, & dum fulminis inſtar tonant. Quis eſt contra quem perorant, qui non palleat? Nullus ſuos affectus regit concionante oratore; nullus ſuus eſt, nec a ſe, ſed ab oratoris ore pendet: ille enim per aures auditores quoquo vult leniter ducit, & eloquii ſui pondere æquilibrium juſtitiæ ad ſe molliter inclinat. Cauſidici etiam omnium jucundiſſime ſe exercent, dum veritatem per ſophiſmatum latebras, & difficultatum mœandros venantur; dum ex memoriæ cellulis Topica quærunt, & inventa in luminoſa judicii ſui officina cudunt, & fingunt, ſimilia cum ſimilibus componentes, & oppoſita cum oppoſitis conferentes. Quorum dignitatem, L. 14. C. de *Advocat. diverſ. jud.* his verbis ornant Imperatores *Leo* & *Anthemius*: "Advocati, qui
" dirimunt ambigua fata cauſarum, ſuæq; defenſionis viribus, in rebus ſæpe publicis ac priva-
" tis, lapſa erigunt, fatigata reparant; non minus provident humano generi, quam ſi præliis
" atq; vulneribus, patriam parenteſq; ſalvarent. Nec enim ſolos noſtro imperio militare cre-
" dimus illos, qui gladiis, clypeis, & thoracibus nituntur, ſed etiam Advocatos: militant
" namq; cauſarum patroni, qui glorioſæ vocis confiſi munimine, laborantium ſpem, vitam, &
" poſteros defendunt.

CREDIT dialecticorum, & metaphyſicorum turba, juriſprudentiam non rationibus, ſed authoritatibus ſuffultam, & ita ſubtilitates omnes reſpuere: Verum longe errant; hæc enim omnium ſcientiarum eſt in ratiocinando exercitatiſſima: Nam Theologia ignorat quæ de Deo ſunt diſputanda; cœcutientibus enim mortalibus, ineffabili ſuo lumine effundit Deus Optimus Maximus, nihil noſtri non videns, in nihilo ſui videndus. Certant inter ſe Phyſici, & Medici, experimentis & conjecturis contrariis hypotheſibus nitentes, & hinc inde principia negantes. Mathematica non diſputat, ſed demonſtrat: Metaphyſica autem, & Dialectica, multa adeo puerilia, & ab uſu humano themata tractant deflectentia, ut in his vix ſanus quidem operam & oleum collocet. Unicus vero Juriſperitus principia ſua ex rectæ rationis penetralibus haurit, humanæ vitæ commodis inſervientia, & neceſſaria; & ex longa rerum obſervantia argumenta ſua ducens, pari lance diſputat, quid conveniat rectæ rationi, quid ſit hominibus, & reipublicæ aptius; aliarum gentium leges intuetur, & analogiam legum ſuæ patriæ variè diſponit. Cumq; ex 24 literis alphabeticis tantus inexhauſtus verborum acervus exſurgat, quanta varietas attendi poteſt, ex tot legum, deciſionum, & circumſtantiarum numero, earumq; ad ſe invicem vario aſpectu, & varia relatione? Et licet plurima ſint in jure, & a legibus ſtabilita, non poſſunt tamen omnes articuli ſigillatim, aut legibus, aut ſenatus-conſultis comprehendi: & ideo ad ſimilia procedit judex, & ſimilibus utuntur Advocati. Qui in illis diſciplinis verſantur, vix in menſem diſputando ſe exercent: Advocati autem indies & in horas, intonſa & nova argumenta tractant, non in ſcholis, & inter puerulos, ſed corona nobilium cincti; non impari præmio, nec vacua laude ducti, ſibi invicem cotis vice funguntur:

*Et ſtimulos dat æmula virtus.*

NON deſunt inter Juriſperitos, qui Eloquentiam a foro hodierno exterminandam affirmant, ex eo quod judices corrumpat venifico verborum lenocinio, tempus rebus gerendis idoneum luxurioſe terat, & Advocatorum animos ab intima, & ſeria juſtitiæ intuitione ad floridam verborum corticem avocet: Et quanquam olim pro Roſtris *Romanis*, quo craſſa multitudo demulcenda venerat, affectuum inflammatio erat utilis, & oranti neceſſaria; nec erant tum temporis leges fixæ, quæ litium fata dirimerent; ſed ex bono & æquo argumenta petebantur, ut videre licet in orationibus *Ciceronianis*. Hodie tamen res in alium caſum devenit; nam legibus, & deciſionibus diriguntur judices probi, & arctantur mali; ſuntq; ut plurimum ætatis adeo provectæ, ut capi non poſſunt pictis, & fucatis verborum formulis.

QUIBUS omnibus repono, me non probare Eloquentiam inanem, & ex nihilo tumidam; nec laſcivam, & adulteram, qua orator argumenta deſerens, inter flores errat; ſed puram & nitidam, in qua juriſprudentia induit tantum Rhetoricam, & recta ratio ſe exprimit verbis materia gravidis, & ad convincendum aptis natis, quibus thema non opprimitur, ſed illuminatur: Et oratio facile emanans fœliciter circumfluit argumenta quibus inſervit, ipſaq; facili curſu ad optatum vehit ſcopum; ita ut orator nec hæſitet inopia verborum, nec hallucinentur judices ipſorum obſcuritate. Sublimis oratio non eſt turgida, ſed naturali pulchritudine exurgit, grandis ſine faſtu, & pulchra ſine fuco. Quis eſt qui negare poſſit, etiam in materia maxime ſeria, epitheta bene ſelecta in ſe continere argumenta, & argumenta aliàs valida, acriori adhuc vi ab his animari? Et licet non probarem ingenia ſemper ludentia; ſunt tamen plurimi caſus, in quibus veritas non ex legibus, nec doctorum authoritatibus; ſed ab indiciis, preſumptionibus, aliiſq; rationibus problematicis pendet; in quibus orator a legum ſeveritate ſolutus, florida Eloquentia ubi poteſt libere, ſed non licenter. Et in omni caſu arbitrario, ubi in æquilibrio dubia pendet veritas, ibi oratio flexanima ſemper præponderat. In caſibus etiam nunc primum foro oſtenſis, & nunquam hactenus deciſionem paſſis, licet libere orare; Et in Politicis, & in Criminalibus, ubi pathemata ſunt excitanda, neceſſaria eſt Rhetorica nec ullus eſt caſus ubi non eſt grata, modo ſit caſta, & pudica: Nam ut amicam, licet divitem, & virtutibus ornatam, pulchram optaremus; & a militibus arma nitida, & fulgentia deſiderabat *Cæſar*; ita orationis venuſtas placet, & ejus fulgor terret ubique. Ligat etiam Eloquentia orantibus judices, ita ut nihil ſine obſervatione tranſolvet; hærent quæ placent, & profunde ſe exprimunt delectantia. Et cum non ad neceſſitatem, ſed ad pompam nos, noſtraq; domicilia ornemus; Cur non multo magis indulgendum eſt genio, & gratificandus animus, cui pluſquam oculis, famulantibuſq; ſenſibus debemus; & cujus perſpicacitas majorem a nobis deſiderat acribeiam, temnens vulgaria, deſpiciens humilia, & faſtidiens uſitata? Intueamur mundi fabricam, & ubiq; plurima ad ſolum ornatum creata inveniemus: Intueamur S. Paginam, & ubiq; ſublimem Rhetoricam agnoſcemus, ſtilum metaphoris, exclamationibus, hyperbolis, aliiſq; ornamentis decoratum. Nec ulla ornatior, & ſublimior extat oratio, quam quæ a Deo ipſo *Jobo* dicta eſt, quam cum gaudio trementes legimus. Et ſi pectora noſtra conſulamus, confitebimur etiam nos hac arte capi, alioſq; nos ea capere poſſe; & quo magis ipſa eſt tribunalibus ſuſpecta, eo magis ab Advocatis eſt colenda. Oritur enim illa ſuſpicio ex inſita nobis ejus virium recognitione, quarum ope nihil mediocre conatur Juriſperitus, & ſine quibus nihil ſublime producit juriſprudentia. Caveat tamen orator forenſis, ne nimiam Eloquentiam impendat rebus humilibus, & ſordidis; ita enim non thema ſuum eriget, ſed ſuam deprimet artem. Caveat etiam ne in rebus ſeriis laſciviat; hoc enim eſſet clericum, aut ſenatorem muliebriter, vel ſcenice, licet plurimis ſumptibus ornare. Singulis ſcientiis variæ ſunt ſtili; legiſlatores ſtricto, oratores fuſo utuntur. In morali philoſophia frequens eſt ſententiarum uſus, ut hæreant auditoribus, & ab his in poſteros facile tranſmittantur; in foro autem rarior: Orantis enim eſt, non docere, ſed ſuadere: Sed ſi ſententiæ placeant, cavendum eſt ne ſint nimium accerſitæ, & e longinquo petitæ, hoc enim affectationem argueret; & ne a junioribus proferantur, hoc enim præſumptionem, vel arrogantiam ſaperet: Nec ſint etiam nimis multæ, nec nimis ſibi in-

invicem vicinæ; nam cum afferantur, ut pulchritudinem augeant, idem in illis hic, quod in maculis illis fictitiis clariſſimarum fœminarum facies decorantibus dici poteſt; quæ tum ſolum placent, cum ſunt & paucæ, & a ſe invicem remotæ. “ Curandum etiam eſt, (ut ait *Petronius*) ne ſententiæ emineant extra corpus juris expreſſæ, ſed intexto veſtibus colore niteant. Eſt tamen ut in ornatu, ita & in ornatus contemptu affectatio quædam. Et ut optime notat *Quintilianus*, “ Ita dum timent ne aliquando cadant, ſemper jacent. Ferendus eſt etiam aliquando heroicus animi impetus, quo natura libera demonſtrare gaudet, quantum ipſa omnem ſuperet artem. Nec prægredi poterit orator, quos ſequi tantum ſibi proponit.

ORATOREM olim ita definiebat *Cato*, *Orator eſt vir bonus, dicendi peritus.* Sed cum hodie in tantum creverit Corpus Juris, addendum eſt, Oratorem virum eſſe bonum, & *doctum*, dicendi peritum. Requiritur ut ſit vir bonus; nam ſine probitate dicentis, omnia ſuſpecta ſunt auditoribus: Et cum perſuaſio ſit effectus orandi, nemini fidem faciet, qui non ſit ipſe fide dignus. Et qua fronte quid honeſtum, quid juſtum ſit, aliis ingeret, qui non ſit ipſe integræ frontis? Cavendum eſt ergo oratori, ne fidem ſuam apud bonos gravet, vel nimium urgendo Paradoxa; vel proponendo quæ nec ſunt vera, nec veriſimilia: Et ne famam ſuam gravet maculis famæ inuſtis ex frequenti vitiorum patrocinio, vel habitu. Deus qui nec virtutem, nec religionem indotatam nobis proponit, ut plurimum ſucceſſum cæptorum noſtrorum integritati noſtræ reſpondere facit: Et homines eadem facilitate bonos errantes ſequuntur, qua a pravis, etiam dum juſte agunt, inſidias metuunt. Animus eſt veneranda juſtitiæ ideâ imbuendus; fama per incuriam, divitiæ per alluvionem veniant: Juſtitia autem eſt per ſe, & pro ſe anhelo ſtudio ſemper expetenda.

SINE eximia juriſprudentia Cauſidicus eſt inermis miles, ejuſque oratio ſonus vacuus; & ſicut docti ſine eloquentia hac populari, ita nec diſerti ſine eleganti hac doctrina famam in foro unquam aſſequentur. Calleat humaniores literas, ex quibus hiſtoriam juris, & mores *Romanos* diſcet; terat frequenti manu *Corpus Juris Civilis* veræ eloquentiæ & juſtitiæ purum putum fontem, ejuſque gloſſam, & commentatores omnibus aliis præferat, nec memoriam grandibus tractatuum, & conſiliorum authoribus obruens, nec judicium controverſiarum, & conſuetudinum Scriptoribus diſtrahens. Sana enim ratio modo non ſit nimia ſpeculatione attrita, vel nimio ſtudio laſſata, facile ſupplebit quæ lecturæ deſunt. Ubi alii hiſtorias, legat Cauſidicus deciſiones; ubi illi poemata, legat hic actiones forenſes; & ita alternatione ſtudiorum animum gravi negotiorum uſura depreſſum foveat, & relaxet. Habeat apud ſe tractatum tractatuum Bertochinum, Tuſcum, alioſque indices, ſed nunquam ſe indicibus credat; qui eſt enim ad indicem tantum doctus, doctus dici nequit. Mendicata enim illa Scientia nec meditanda ſuppeditat, nec replicanda miniſtrat; licet ſcientia ſit orantibus & decus, & tutamen. Peccant tamen, qui nimia citationum farragine ſua onerant ſcripta; & multo magis, qui hiſce hebetant orationes; quod initiantibus frequentius contingit, qui a quotidiana lectura adhuc calentes, nec adhuc experientiam, rerumque deciſarum notitiam adepti, argumenta a natura rerum, ab analogia juris patrii, & a caſibus ſimilibus petita prorſus ignorantes, ea quæ nuper legerunt, cruda evomunt. Ego actiones forenſes apud *Gallos* ſua lingua, ſed facundia *Romana* ſcriptas multum veneror. Extranei tamen fere omnes ægre ferunt tot ſanctorum patrum, claſſicorumque citationes ubique interpolatas; hæc enim nihil ad edictum Prætoris. Nec ſuadebit S. *Auguſtinus*, ubi ſuadere debuit *Ulpianus*. Errant & juniores dum nimium juri, potius quam facto in cauſis a ſe perorandis ſtudent, credentes ſe dum facta urgent, humilia nimis tractare, & ideo extraneas ſæpe a caſu ſuo controverſias movent, & docte, ſed inepte agunt; ſe lectione, ſed non judicio pollere monſtrantes. Verum in *Cicerone* inveniemus ſummam in ſingulis circumſtantiis tractandis fidem, & diligentiam. Dum *Milonem* defendit, etiam ad ejus decalceationem, veſtiumque mutationem, uxoriſque in ſe veſtiendo delicatas morulas, ancillarum, puerorumque comitatum, & ejuſmodi minutula rerum ramenta fœlici cura, & curioſitate deſcendit. Ut judicibus inde inſinuet *Milonem* non conſpiraſſe in *Clodii* necem, nec inſidias ei paraſſe. In quo Oratores pictores imitantur, qui in ſingulis capillitii crinibus hærent, & ax aſſimilatione, naturæque imitatione plus laudis, quam ex colorum fulgore ſperant. Ut ſuus eſt cuique genius, ita & ſtilus; & illum quem neceſſario nobis impoſuit natura, tanquam optimum aliis ſuademus. Et hinc fit, quod alii ſtilum effuſum & copioſum, alii ſtrictum & nervoſum, tum praxi, tum laudibus ſuis extollunt. Ego ingenium meum non torquerem, ut aliorum ſtilo meum aſſimilarem; multo magis lædimur violentia illa nobis impoſita, quàm exemplaris licet optimi adumbratione, & imitatione adjuvamur. Qui ab imitatione vim ingenii augendam ſperant, dubitare merito poſſunt, num authores illi ſint magis imitandi, qui ad genium ſuum magis accedunt. Cum his enim conformatio erit facilior, tranſituſque naturæ inclinantis brevior & paratior; quod & mihi placet. Sed ubi natura vitioſe ad exceſſum nos ducit, aut in ſtilum nimis diffuſum, aut nimis amputatum; ibi in adverſos auſus detorquendi ſunt conatus. Et *Cicero* legendus eſt *Lipſiacis*, & *Lipſius* in profluvium *Ciceronianum* tendentibus. Conſulendi ſunt amici, & familiares, de hiſce ſtili peccatis: Nemo enim ſibi judex eſt, vel verus, vel juſtus; nec ſenſus ſuper ſenſorium ſenſationem producit, ut loquuntur Philoſophi. Sed abſtrahendo ab omni eo, quod cuique proprium eſt, ſtilus diffuſus & copioſus mihi videtur cauſis orandis aptior, & mage ſuaſurus. Quod & *Romanorum* experientia comprobatum eſt, & *Marco Tullio* ſemper viſum. Et ideo ne nimio hujus ſtili amore decepti Cauſidici extra omnes metas vagarentur, *Pompeius* omnium primus evaganti eloquentiæ fræna injiciens, accuſatori duas, reo autem tres aſſignavit clepſydras. Magnificum quiddam eſt omnis longitudo (ut ait *Phalereus* de Elocutione) quemadmodum in heroicis carminibus apud Poetas, & in auguſtioribus palatiis apud Architectos, nihil ſine amplitudine eminet. Videmus etiam corpora omnia a natura ita eſſe formata, ut majora quæque robuſtiora etiam exiſtant; & quemadmodum repetiti ictus, cum vi, tum numero ferrum licet in ſe durum ductile, & obſequens reddunt; ita & plurima licet conſona judices emolliunt, & flectunt.. Non enim amputata oratio, & abſciſſa; ſed lata, magnifica, & excelſa tonat, fulgurat, & omnia evertit. Quod judicem inadvertentem prius effugit, ſupplebit repetitio; & ſi minus feliciter ſe expreſſit in primo conatu Orator, in ſecundo felicius forſitan ſuccedet. Varianda etiam eſt phraſis. non ſolum ut auditores aucupemur; ſed quia ſenſus eodem in loco icti, & laſſati alternatione hac quieſcere gaudent. Sed cum ex hac variationis, & gratificationis neceſſitate introductæ tantum ſint Metaphoræ; licet lautius in poeſi his luxuriare ſoleamus, parcius tamen in foro ad ſeria deſtinato iis utendum eſt. Qui nimium ſe reſtringere conatur, vel dicenda ſupprimit, vel dicta obnubilat. Qui autem nimium ſolummodo inhæret, omnia judici proponit; faciliuſque judex optima quæque eliget, ex his quæ proponuntur, quam quæ dicenda erant, conjectura ſua aſſequetur. Eſt hoc peccatum felicis ingenii; & ferax illa terra, quæ inculta uberrimam loliorum meſſem producit, eadem labore ſubacta colentium reſpondebit votis. Curandum ergo ante omnia orare diſcenti, ut ſtilum nanciſcatur fluidum, quem poſtea limare, & ornare facilius diſcet. Nihil enim tam naturale, quàm materiam prius parare, quam expolire; & quoſdam ipſe novi, qui ſine omni verborum delectu, & ornatu currente ſtilo famam Oratorum aſſequuti ſunt; ubi illi qui verborum delectui immorantur hiatum talem, & tale chaſma ſæpe efficiunt, ut pro balbutientibus ſæpe habeantur; friget enim attentio, ubi non continuo ſuſtinetur. Verum illi tantum laurea debetur, qui verbis gravibus, nec uſu vulgari tritis, periodis ſemper inter ſe æqualibus, ſuavibus periodorum caſibus, & undante ſtilo judices delectando eorum judicium captat, & emit. Eſt tamen Oratoribus ſtilus pro varietate materiæ variandus; in Prologo & Epilogo ſit fuſior, in argumentis vero contractior: Et ut eleganter notat *Cicero, Is eſt eloquens, qui humilia ſubtiliter, magna graviter, & mediocria temperate dicere poteſt.*

LICET ſtilus preſſus decernentibus tribunalibus, effuſus autem ſonoris conveniat roſtris; nutrienda tamen eſt in perfecto Cauſidico, amphibia, & ambidextera eloquentia; qua qui pollet, adverſarium fluentem ad punctum juris redigere, & circulo quaſi magico circumſcribere; adverſarium autem argutum, & ſtrictum, mellifluo effluvio opprimere, & campo ſuo evocare facile poterit. Eſt & duplicis hujus ſtili uſus neceſſarius, ut uno expedire, altero impedire negotia in publicis comitiis ad libitum poſſit Orator. Luſtrata facti ſpecie, penſitatis rite ejus circumſtantiis (a quibus actiones, ut a lineamentis facies variantur) ego in foro oraturus inventionem meam ſuſcitarem, antequam pro re nata libros conſulerem; qui enim prius libros adeunt, genium ſuum pigrum reddunt, & vix argumenta ulla in poſterum ex ſuo promunt penu. Et ſi liceret vel cum ſociis, vel cum adverſariis, inventorum vim experirer; cumque mea inveniſſem argumenta, meque convenienti inſtruxiſſem lectura, & velitatione, meditationem iterum repeterem: Et planum, ſeu ſchema, totius orationis chartis committerem, deliberaturus an ſubjecta oculis argumenta eſſent concocta, & rite diſpoſita; quæ poſtea ea methodo, & eo quo decet abſolverem ſtylo, tangeremque ultima manu. Et licet nunquam ſerviliter dictatis in repetitione adhærerem, ſcriberem tamen tanquam fideliter repetiturus. Acuet etiam Oratorem dicendorum perſuaſio, ipſiuſque pro Cliente, & cauſa affectio. Ex hiſce enim fontibus, torrentes ſæpe eloquii erumpere audivi, qui rapido curſu omnia everterent, quorum impetum ne vel pares ſuſtinere poterant. Ex hoc enim amico calore ardet Orator, ſibi lumen, & adverſario flammam excitans.

PARTITIONES orationis forenſis hodie in uſu tantum ſunt, Exordium, Narratio, argumentorum Diſpoſitio, ad argumenta contraria Reſponſio, & Concluſio. Exordia tantum in foro obtinent in actionibus auguſtioribus, ſuntque orationi, quod porticus palatiis: Et ut porticus ampla, & ornata domui ad uſum privatum deſtinatæ adſtructa, riſum excitaret; ita qui actioni tenui, & minus ſolenni Exordium præfigeret, riſui ſe exponeret. Licet eadem ex cauſa, Exordia ſicut porticum lautiori luxu ornare; nunquam tamen illa placent, quæ locis communibus effodiuntur; ſed quæ ex cauſa ipſa, ſicut flos ex ſtipite naturaliter exurgunt. Et reſpondenti hoc feliciter evenire poteſt, quod ex adverſarii oratione Exordium ſuum elicere poſſit. Quo caſu tanquam ex improviſo diceret, ingenii facilitatem, & orationis ſinceritatem, proximis ſine ſtudio contentam judicibus, alte inſinuet. Quod ut gratius fieri poſſit, ego prius univerſam orationem exararem, quam Exordium, aggrederer; ut tota cauſa perſpecta, quod magis in ſe naturale, & auditoribus gratum, inde pro Exordio eligerem. Nam qui ab Exordio meditari incipiunt (ut moris fere omnibus eſt) florida potius, quam apta in Exordiis producunt. Eſt Exordii officium, judicis iram, ab iniqua fama accenſam deprecari, invidiæ aciem pravis artibus præacutam retundere; ejuſdem benevolentiam, a Clientis merito, & adverſarii odio captare. Ubi Narratio longa, ibi Exordium ſit brevius; & e contra, reſpondere etiam debet orationi Exordium, ne aliàs, veluti per rachetidem, caput nimia ſua mole corpori reddatur monſtroſum. Si plures pro eodem ſint dicturi, prius tantum dicenti convenit Exordium. Et ſi ab his judices ſint hactenus laſſati, reſpondentes Exordiis utendo nauſeam excitabunt. Hi etiam, qui pro eodem Cliente ex una diſputant, a ſe arguenda conferre debent, ne contrariis argumentis ſeſe jugulent; optime enim hi orant, qui duorum varietatem, unius autem contextum habere videntur.

EXORDIUM ſequitur Narratio, quæ nobis factis ſpeciem, omnibus ſuis circumſtantiis decoratam, & vallatam proponit. In qua, vis potius judicii, quam eloquii apparet. Non tamen requiritur, ut veritas omni denudetur facundiâ; non enim a teſte, ſed a patrono procedit Narratio. Verum eloquentia Narrationi propria, illa eſt, qua Orator res etiam præteritas, & abſentes præſentes reddit, ita ut auditores ſe non audire, ſed videre credant. Ut in actionibus *Ciceronianis* contra *Verrem* (optimis narrationum exemplaribus) facile apparebit. Licet etiam hic blanda vivacitate judicem ab omni tædio liberare; inhærendum eſt his, quæ cauſam noſtram magis firmant; prætereunda quæ lædunt, ſi quæſitis coloribus elevari non poſſunt. Sed ſpontanea confeſſio eorum, quorum probationem evitare non poſſumus, multum conciliat; ideoque potius reſpondeamus, quam ea velemus. Sicut Exordia non ſunt apud omnes in uſu; multi enim eloquentiæ ſuæ haud confiſi a Narratione exordiuntur: Ita ubi Τ*ο κρινομενον*, ſeu cardo controverſiæ in puncto juris arctatur, & tanquam thema a Senatu proponitur; Narratio non eſt neceſſaria, niſi ubi circumſtantia quædam juri noſtro opitulari poteſt: Et hoc in caſu, licet, quæ in facto nocent, præterire. Sed ſi judex ſtatum controverſiæ, per conceptam formulam non propoſuerit, ita ut orantibus relinquatur proponendus; eo caſu, quo arctior proponitur, eo magis ſuaderi poteſt, eo facilius obtinebit apud judices, & paucioribus infeſtabitur incommodis. Et ideo mihi multum placet eorum methodus, qui antequam argumenta proponant, ita liberant controverſiæ ſtatum ab omni fere dubio, concedendo omnia quæ concedi poſſunt, & removendo omnia dubia, quæ incommodare videntur, ut nihil relinquant urgendum, quod ſit ullatenus neceſſarium, & anticipent quæ aliàs ab adverſariis objicerentur.

FACILI tranſitione, a Narratione ad Argumenta deſcendendum; & licet plurimi ſint, qui unum aut alterum tantum argumentum proponendum affirmant; in puncto enim veritatem collocant, idque premendum tantum volunt: Mihi tamen nulla videntur ſpernenda, quibus caſus urgeri, vel illuſtrari poteſt. Ubi enim plures idem tribunal capit judices, ibi alii aliis capiuntur argumentis; & quod oranti forſan temnendum videtur argumentum, illud aliquem inter judices flectere queat. Quod & *Plinio* placuit, qui *Epiſt.* 20. ſe & Regulum ita inter ſe diſſidentes introducit; “ Tu omnia, quæ in cauſa putas exequenda, ego jugulum ſtatim “ video, hunc premo; reſpondi, poſſe fieri, ut genu eſſet, aut tibia, ubi ille jugulum putaret. “ At ego qui jugulum perſpicere non poſſum, omnia pertento. Neque enim minus imper-“ ſpicua, incerta, fallaciaque ſunt judicum ingenia, quam tempeſtatum, terrarumque. Ad-“ jiciam quod me docuit uſus, magiſter egregius; inde qui eandem cauſam ſimul audierunt, “ interdum idem, ſæpe diverſum, ſed ex diverſis animi motibus ſentiunt.” Fugienda tamen eſt in ſtilo tautologia, & repetitio, & in inventione garrula argumentorum fertilitas. Qui enim nimiæ loquacitati ſunt dediti, judices vexant, & vim rationum ſuarum nimia ductilitate infirmant, & enervant. Qui argumenta etiam nimium findunt, ex profundis vadoſa reddunt; ut flumina in ramulos diviſa, profunditate ſua mulctantur. Suſpicantur etiam judices argumentorum vim, ubi plurima detegunt non concludentia; ut mercatores iis in poſterum non credunt, qui corruptas merces olim ipſis impoſuere. Debet ergo Orator concludentibus inſiſtere, & minus concludentia per tranſennam tantum offerre, vel fortioribus adjicere; ut tanquam adjumenta prægravent, quæ ſuo pondere non gravant. Habeant tamen illa imbecilliora cum fortioribus affinitatem, ut unitas numerum auget: Nam aliàs ſi ex materia ſubjecta naturali conſequentia non educuntur, chimæram imaginaria conjunctione producent. Si tamen mihi *Achilleum* eſſet argumentum, huic uni fiderem, nec alia proponerem; ne adverſarii latum diſputandi campum invenirent; hoc unum iterum atque iterum repeterem, & hac fiducia ipſius augerem valorem. Sed ſunt, qui vanitati ſuæ gratulantes campo ſuo egrediuntur, ſibi potius plauſum, quam Clientibus victoriam quærentes.

NON mihi placet eorum methodus, qui omnia argumenta in continuam orationem ſine ulla diſtinctione fundunt, & diſſolvunt. Licet & hæc ſit in his neceſſaria, ubi & ex præſumptionibus & judiciis coaleſcit oratio: In quibus, ex una præſumptione in aliam reptim gliſcit Orator. Signat numerum, & confirmat judicem, ſingulorum notatio, & inter ſe diviſio, per deſignationem primi & ſecundi. Sed illorum in Syllogiſmos reductio, nec eſt poſſibilis, nec ſtructuræ Rhetoricæ analogica; ſiquidem huic magis conveniant Inductio, & Enthymema: Sæpenumero enim omnia argumenta Rhetorum ſunt tantum vice ſubſumptionis, ſeu minoris propoſitionis, ut in falſo, & aliis apparet criminibus. Si tamen unum emineat argumentum illud obſervantiæ ergo in Syllogiſmum redigi poteſt; ut & omnia quæ dicta ſunt in unum Syllogiſmum loco Epilogi coacervari poſſunt.

In diſpoſitione, non minus quam in inventione argumentorum, vis apparet ingenii; in tantum ut ſint, qui hac facultate tantum aliis, quantum docti indoctis excellant: Argumenta enim extra ſuum locum vagantia, ſunt inſtar militum extra ordines ſuos errantium. Fingit ſibi quiſque ſuam methodum in ſuorum argumentorum diſpoſitione; mihi placet ea quam natura invenit, & confirmavit experientia: Quâ *viz.* illa argumenta primo proponuntur, quæ naturam rei controverſæ magis illuſtrant. Poſt hæc ad leges & citationes tranſirem, ut ultimo loco incommoda urgerem. Et in hiſce omnibus, a minus urgentibus ad firmiora procedendum; naturale enim eſt unicuiq; rei creſcendo novas vires acquirere: Et judex qui prius firmiora audivit, leviora ſpernit; nec languet qui optima quæq; ventura ſperat: Et altius imprimuntur quæ ultimo loco urgentur; prima enim poſterioribus, quaſi nova ſuperinductione delentur. Idcirco *Phalereus* præcepit, ne defeciſſe videamur, a validiore ad infirmum deſcendentes; nec quidem eget hic natura authoribus. Ubi tamen argumenta inter ſe cohærent, ego ea ob mutuam affinitatem ſibi invicem adjungerem; & ubi unum alteri eſt quaſi baſis, eiq; viam ſternit, ibi hoc ordine ea producerem. *Ciceroni* tamen placuit, firmiſſimum quodq; prius eſſe producendum, dummodo ea quæ æque excellunt, ſerventur etiam ad perorandum, mediocribus in turbam & gregem conjectis. Quod & mihi tum præcipue verum videtur, ubi vel orator eſt ſe primum foro oſtenſurus, cui amica in initio auditorum opinio multum proderit; vel ubi cauſa ipſa male per famam publicam olet, ita ut pollenti argumento auditorum animos quamprimum reducere neceſſe ſit.

In reſpondendo adverſariorum argumentis, reſpondens, apud nos, omnia argumenta adverſarii fideliter in ipſo repetit limine, antequam refutationem ſuam aggrediatur. Et qui in repetitione vires argumentis adverſarii detrahit, monſtrat ſe ipſorum robur vel non capere, vel timere. Sed in reſpondendo, licet adverſariorum argumenta in claſſes diſtribuere, ſubtiliterq; ita numerum diminuere, dum ad capita pauciora rediguntur. Licet etiam argumentorum ſtationem innovare, eiq; primo reſpondere, per quod reſponſio ad ſubſequentia magis elucеſcet, quamvis non fuerit inter urgentis prima. Sunt qui ſpernere videntur quæ magis timent, & iis plaudere, eorumq; refutationi inhærere, quæ evadere certo ſciunt. Mihi tamen hæ diſplicent artes, ut in ſe minus tutæ, & quas judices ſagaciores cum noſtro, cauſæq; detrimento detegere poſſint.

Exolevere etiam hodie digreſſiones illæ *Quintiliano* Egreſſiones dictæ, priſcis tamen oratoribus pro ornamento habitæ. Nec nobis pro *Archia* Poeta orantibus, in Poeſeos laudes, cum *Cicerone* excurrere liceret: Judices enim ad controverſiæ cardinem nos redire cogerent; & auditores nos, tanquam locorum communium ſectatores, irriderent. Quamvis autem prius ad argumenta quam deſcendamus, ſubjungenda ſint narrationi quæ de rei laudibus proferri poſſunt; ut hæc accuſationis aſperitati aliquid detrahant, judiciſq; animum, ut patienter ſaltem audiat, concilient: Convitia tamen, quæ in accuſatorem ſunt effundenda, (ſi ſint defenſioni neceſſaria, rebuſq; tractatis affiniia) non niſi poſt eadem argumenta plene deducta, proferenda credo. Nam ne vix quidem permittendum eſt, accuſatorem, accuſatione adhuc ſalva, incuſari; nec cum vigore, & audacia neceſſaria, eum diffamare poſſumus, quem falſæ accuſationis non prius coarguimus: Cujus exemplum extat in aculeata illa *Demoſthenis* contra *Æſchinem* oratione.

Ubi ad Concluſionem, ſeu Epilogum ventum eſt, orator fiducia argumentorum ſuorum fretus, non ſicut in exordio, humili obſecrat ſtilo; ſed de jure ſuo ſecurus, ad affectus judicis conciliandos ſe intendere debet. Hic eſt ergo Eloquentiæ campus; hic omnes ejus cataractas effundere, hic omnia ejus vela tendere licet; & quod prius juridicè firmatum, hic eleganter, ſed breviter repetendum, ut vires unione creſcant; quæ antea per ſe, & diſtincte dicta, hic ſunt conglomeranda. Admonendi ſunt hic judices, quid detrimenti ab adverſarii petitione capiet reſpublica; quid ejus intererit pro cliente judicium; quænam doctiorum, & vulgi, hactenus hac de lite ſententia, & quæ expectatio.

In Epilogis hiſce, & exordiis menſurata periodorum æqualitas noſtro ſæculo inveniri poteſt; in argumentis autem urgendis, vel refellendis, non eadem nunc, quæ olim, invenitur: Illi enim Præſumptionibus, & Eloquentia; nos, Citationibus, & Rationibus oramus. Quippe ut milites, dum pugnant, ordines ſuos negligunt; Ita & nos, non cum æqualitate periodi, ſed materiæ, argumenti ſtructuram finimus; & Rhetoricam, ſicut compedes quibus tollutare olim didicimus, dum iter ingredimur, removemus.

Quantum oranti proſunt geſtus, accentuſq; bene ordinati, ex ſcenicorum ſucceſſu intelligi poteſt, qui auditorum affectus quoquo volunt ducunt; omniumq; paſſionum meteora ad libitum excitant. Cumq; lyra blande garrula, rabidos lymphatæ mentis affectus demulcere poſſit; Quid non ſperandum ab animata hac muſica animo cognata? Animi enim animis, ſicut lumina luminibus facile accenduntur. Debet ergo orator, ſingulis affectibus correſpondentes effingere voces, & geſtus, dictaq; faciendis hiſce animare; ita tamen ut oratorem, non hiſtrionem, vel mimum loqui reminiſcatur. Togatum enim non decet, latera & judices fatigare, aut rabioſa vociferatione bacchantium, & canum latratu ſanam exuere mentem: Quis enim credere poteſt iſta a ſedato animo procedere quæ a furibundis proferuntur? Caveat etiam, ne eodem calore a pecunia, qua a juſtitia accendatur, iras atq; odia locando. Eodem vituperio, licet ob diverſum errorem, dignus reor, qui nec ſe, nec alios movent, & frigida actione frigide orant: Credunt enim auditores eum non credere, nec curare, qui in dicendo non commovetur. Et actio per oculos in animum demiſſa, ſimilia excitat Pathemata; bis autem orat, qui & corpore & animo orat. Solvit etiam orantis ingenium congruus calor, metum omnem (glacialem illum affectum) diſſolvit; & hiſce concitatis alis, ad famam pervolat animus. Porro autem vox orantis ſingulis orationis partibus adaptanda eſt; quæ juris ſunt, graviter urgenda; quæ rogantur, vel in Prologo, vel Epilogo, voce flexanima; quæ narrantur, voce media pronuncianda ſunt. Roganda vocem ſubmiſſam, urgenda vocem requirunt ſonoram. In initio ſemper voce ſubmiſſiori recitanda eſt oratio; niſi in his quæ ex abrupto interdum ad excitandos auditores in materia inexpectata exclamationes requirunt. Epilogi etiam proprium eſt voce læta & triumphali, modeſta tamen pronunciari; ut ſpem de bono actionis ſuæ fato conceptam exprimat cautus Orator; niſi ubi ſupplicandus judex, non autem flere ei ſuadendum eſt; ut in actione *Ciceronis* pro *Quinctio.* Varianda præterea eſt vox pro varietate figurarum; nam in Proſopopœia, quia alius inducitur loquens, ideo & alius requiritur vocis flexus. In Antitheſi oppoſitionem vocis requirit materiæ oppoſitio. In Anadiploſi, ſeu rerepetitione unius dictionis, ſecunda altiori voce ſignanda eſt. In Apoſtrophe, quia abſentes, & ideo diſtantes alloquimur, elevanda eſt oratio. Quæ gaudium & admirationem imprimere debent, voce alta, ſed blanda; quæ dolorem & metum voce licet alta, tremula tamen; indignanda, voce acuta; pudenda, voce quaſi fugitiva pronunciari debent. In tranſitionibus, ad vocis extremitates lente ſemper procedendum eſt. Odit vero natura motus ſubitaneos; vult enim non trahi, ſed duci. Hiſce quidem varietatibus formandis, lectura forſitan aperta, in modum repetitionis, vel ſuarum compoſitionum, vel orationum *Ciceronianarum*, vel *Gallicarum* hujus ſæculi multum conduxerit præſentibus amicis, qui pronunciationis errores reprehendere poſſint. Totus homo in vultu eſt, vultus ideo & dictis aſſimilandus eſt; nihil enim tam abſonum, quam ſerio vultu ridicula, vel inania; ridente autem ſeria proferre. Cooperari etiam debent manus; eas ſemper movere ſcenici, nunquam vero ſtatuæ eſt; ſed neutrum declamantis dici poteſt. Hæc tamen, & multa alia potius ab obſervatione, quam ex libris diſcere oportet. Proponendus eſt imitantibus ille, cujus geſtus feliciore cum ſucceſſu aliis ſæpius placuit; & conſulendum fortaſſe ſpeculum, dum domi ad praxin fori nos fingimus.

In pluribus vocum flexionibus, & geſtuum formationibus, indicat ipſa materia, quid faciendum. Quis de Cœlo pronunciaturus terram aſpiceret? Et quis quæ admiranda voce ſubmiſſa pronunciabit? Rerum conjunctio manuum conjunctionem; rerumque attractio, manuum attractionem, & e contra deſiderat. Et ſi actio per unicam manum præſtari poteſt, unica, eaque dextra uti debemus. Animadvertendum tamen orantes non debere naturalia ſemper imitari. Quis enim de Sclopetario, aut Citharœdo in foro dicturus, eorum actiones imitaretur? Mos etiam unius cujuſque gentis quoſdam motus corporis, & vocis tinnitus ſpeciales legitimavit, aliis indecoros. Multoſque geſtus a *Cicerone*, & *Quintiliano* traditos antiquavit hodierna conſuetudo; cujuſmodi ſunt frontem, vel genu percutere, deambulare, corpus torquere, &c. Sed qui in aliis affectus fortiter imprimere cupit, eoſdem prius in ſe excitare debet. Ita *Polus Electrum Sophoclis* in theatro acturus, urnam ſui filii nuper mortui pro *Electri* urna in manibus ſuis tenuit; cujus aſpectu lachrymarum imbrem ſibi, & auditoribus extorſit. Affectio enim erga Clientem amicum orantis genium ita accendet, ut flammæ inſtar exarſerit ejus oratio, cujus vigori nihil reſiſtere poterit.

DUBITARI merito poteſt, cur indies creſcente experientia (ſelectiſſima orandi magiſtra) & locupletato jure variis legibus, deciſionibus & argumentis, (verâ orationum ſupellectile) decreſcat tamen *Eloquentia hæc forenſis?* Cujus rei ratio mihi alia vix apparet, quam quod olim eloquentia in ſe adoranda, propter ſe expetebatur; eique, gloriam & reipublicæ adminiſtrationem, non tanquam mercedes, ſed quaſi tributum rependebat grata, & prudens antiquitas. Divina enim illa apud *Græcos*, & *Romanos* ingenia, defendendo privatos, privatorum ſuffragiis ad Rempublicam defendendam ſunt evecta. Hodie autem ſoli coluntur nummi (unica voti menſura) & de pane lucrando certatur. Sic enim ingenium humile & repens redditur, nec ad magna ſe erigens ſumma attingit; judices etiam plurimi ex alata litium expeditione famam colligentes negotia vix audire cupiunt; atque ſic amputata orandi libertate, cum licentia orandi decrevit facultas. Turba quidem Procuratorum (quibus negotia a Clientibus creduntur) veræ eloquentiæ ignara, iſtos eligit & laudat Advocatulos, qui ſubtilitate cæca, & ſubterranea quaſi fraude; caute, ſed non culte cauſas agunt. Forſan & Philoſophiæ ſpuriæ ſtudium, argutiis ineptis, & verbis horrentibus lactentes diſcentium animos in ipſa diſciplinæ aurora obfuſcat; quibus diſtracti, & fæculente imbuti ad juris (ut aiunt utriuſque) Doctores tranſmittuntur, qui barbaro ſtilo *Romana* tradunt jura. Olim quidem Oratores in libera Republica degentes liberius orabant, & nihil ſupra ſe credentes, ad ſuprema ſpirabant; & ex pectore a nemine arctato, & neminem timente fundebant omnia libertatem olentia, & libertate ſua digna. Apud populum enim orare ſueti, omnes, præter ſuos, ignorabant limites: Quicquid placuit, licebat, & omne illud placuit, quod nobilem ingenui animi ardorem ſapiebat. Denique plurimi ex inſito mortalibus æqualitatis ſtudio, quoniam ad eloquentiæ culmen ſe erigere nequeunt, quos Oratores æquare non poſſunt, temnere ſi ſimulant; eoſque ad ſuam exilitatem deprimere conantur, ad quorum proceritatem ingenii aſſurgere nequeunt: Artemque ipſam ornate dicendi, cujus fama eoſdem cum orbe terminos, & eundem cum mundo finem habitura eſt, convitiis lacerant; atque ſic ad forum accedentes, ne affectare videantur, Oratores videri nolunt. Et eſt ita ruſticitas noſtra ut plurimum non ingenii, ſed ſeculi crimen.

# ACTIO FORENSIS PRIMA.

## *Qua* Jure Naturali *accuſatur* Infanticida *coram vicinis, qui ſunt apud* Scotos *Judices in quæſtionibus criminalibus ex facto puro orientibus, ubi oratur more* Romano, *ſine legum vel doctorum citationibus.*

HODIE vobis (Cives optimi) demonſtrabitur, quanto ſecurius ſub legum umbra, quam in matrum ſinu quieſcant infantes. Cumque leges veſtro miniſterio dignentur uti, tanquam pio juſtitiæ organo: Videat DEUS Optimus Maximus, acerrimus legum vindex; videant concives, qui juſtitiæ ob patrocinium ſuum tantum debent; quam ſecura ſint jura vobis credita. Nullus hic reus aulæ inſidiis petitur, nec magnatum invidia opprimitur. Nulla hic avaritiæ in accuſatione eſca; nec ſtimulos addit accuſatori cœca vindicta. Leges, non homines, ſumptibus ſuis, & paterna curâ pauperrimam hanc *infanticidii* accuſant. Illa enim apud *Belgas*, ab ignoto (& hac præſumptione adultero) gravida facta; ne hypocriſis ſua una cum partu detegeretur, (puriſſimam enim devotionem ſimulabat) famam plus, quam animam curans, partum medicamentis tollere conata eſt. Natura vero venenum ſuperante, in *Scotiam* patriam rediit. Cumque apertis perjuriis, & cœcis artibus conceptionem celaſſet, cui antequam vitam dederat, mortem eſt machinata; tandem maturum edidit partum, ſub ſtragulis tamen, ut ſuffocaretur ſine reſpiratione infans. Quem cum ſub lectulo per dies aliquot condidiſſet, multis indiciis oppreſſa ſæpenumero ejeravit. Verum puerperio mulierum peritia detecto, velari diutius non poterat. Faſſa tamen partum, infantem celare voluit; ne vulnerum characteres, corpori impreſſi, teſtes aſſurgerent. Et ideo in aquæductu merſum dicebat: Verum cum ibi non reperiretur, ſepultum credi voluit; ſepulchrum tamen vaga, ſed inutili inquiſitione diu non inveniens, horrore & importunitate tandem victa, infantem detexit; ſed ita ſub lectulo (ut celarentur vulnera) preſſum; ut unum eſſet pro vulnere corpus.

SI vir virum, ſi mulier inimicum, ſi inimicus reſiſtentem occidiſſet, etiam & hos feriiſſet gladio *Lex Cornelia*; ſed ſi nutrix infantem hunc trucidaſſet, quas pœnas exegiſſet? Quibus exclamationibus vos fatigaſſet mater hæc? Quid ergo dicendum, ubi mulier homicidii, & mater infanticidii rea, in uno ſcelere, omnia hæc eſt complexa? Facinus per ſe odioſum, in muliere prodigioſum, in matre incredibile; adverſus eum perpetratum, cujus ætas miſericordiam, propinquitas amorem, innocentia favorem demereri poterat!

CUJUS criminis ut hanc ream eſſe evincam, ponendum credo, omnes hos homicidii reos, qui hominem dolo malo necant; nec ex emiſſione ſanguinis, ſed ex amiſſione vitæ, crimen hoc metiendum: Atque adeo qui ſenem in rupe mari circumfuſa, vel infantem in montis cacumine exponeret, non minus ſecuri feriendos, quam ſi ſub ipſorum gladio periiſſent mortui. Leges non media, ſed effectum puniunt: Facinoroſi enim aliàs leges potius fallerent, quam violarent; eſſetque pro indulgentia calliditas. Nec pereunti refert, quibus artibus pereat. Inter omnia animantia, infantes violentiæ minime reſiſtere, ſub eàque breviſſime ſubſiſtere poſſunt, rebus ad vitam neceſſariis deſtituti. Qui maturioris ſunt ætatis & ingenii, variis mediis & artibus, necem deſtinatam evitare queunt; infantes verò, auxilium quod ſibi præſtare non poſſunt, ab aliis implorare nequeunt. Et ideo *Jus Civile* expoſitionem infantum, in diſtinctum crimen erexit; idque tanquam homicidii ſpeciem vindicandum ſtatuit. Et merito; Quis enim parceret ei, qui infantem expoſuit, & exponendo necavit? Adulti, vel ab illata injuria crimen ſuum minuere, vel in vindicta ſpem unicam reponere coguntur: At in infantibus nec antecedens offenſa, nec ſubſequens vindicta obtinent; ad hanc memoria, ad illam judicium deficit. Omnium vero infanticidarum, mater longe ſeverius eſt punienda, in qua ipſamet ϛοϱγια & defectus naturalis affectionis, eſt per ſe non infimus criminis gradus; & ubi non curaſſe, eſt necaſſe. Hæc autem non ſolum per incuriam infantem neglexit, ſed & per crudelitatem necavit. Hic enim Ream partus ſui necem diu deſtinaſſe, ut ignominiam evaderet, vel hoc evidenti indicio conſtat; quod poſtquam ſe gravidam eſſe cognoviſſet, violentis illis medicaminibus, abortum naturaliter procurantibus, viſcera ſua attrivit, unicum earum aſylum, quæ nullum aſylum merentur. Quibus maleficiis, Deum & Conſcientiam adhuc vincere eſt conata, licet naturam vincere non potuerit: Adeoque crimen crimini nectens, inficiationibus repetitis, & jurejurando ſacrilego, dum conſcientiæ callum indies inducit, tandem parturiit, etiam eò loci ubi mulieres aderant; ſed eas ad auxilium nequaquam advocavit: Et licet illæ ream appellarint (cujus erat potius eas advocaſſe) obſtinatè tamen renuit ſuam conditionem iis aperire, aut agnoſcere; unde non ſolum opem illam detrectavit, cujus ipſam omiſſionem, jura, ut crimen notant; ſed & partum, dum ſub ſtragulis lecti edidit, vere ſuffocavit. Nullus enim fœtus non interiiſſet, ſi per breve duntaxat momentum ſub ſtragulis jacuiſſet: Multo magis ſi per noctem integram. Et ſi verum ſit, quod pro certo medici, & obſtetrices affirmant, prima reſpiratione impedita infantem ilicò mori; quomodo potuit infans hic mortem evadere, cujus reſpiratio omnis per multas horas impedita fuit; & qui, ſi non eodem momento vitam finiit, quo incepit, credendus eſt non diu inter ſanguinem & excrementa ancipiti fato volutaſſe; omnibus iis deſtitutus auxiliis, quorum ſingula, ad vitam conſervandam ſunt omnino neceſſaria? Cumque in jure, qui alimenta negat, necet; multo magis necaſſe dicenda eſt mater, quæ reſpirationem negat; cujus defectu, citius & certius, quam ex alimento abſtracto moriuntur omnia, quæ ex reſpiratione vivunt. Et quis dubitaret eam partum interemiſſe, quæ ipſum capſulæ incluſit? Quandoquidem ergo leges juſte cavent adverſus necem infantum, tam ut ei occurrant, antequam fiat, quam ut factam ſevere vindicent: Cur quæſo, hoc quod omnium homicidiorum, quæ hominum malitia excogitavit, facillimum, tutiſſimum, & efficaciſſimum eſt, iret impunitum? Fortuitus advena infanti expoſito poſſet ſuccurrere, & charitatem, qua deſtituta erat impia mater, ei elargiri: Infantis expoſiti ploratus, miſericordiam prætereuntium excitare, & ejus lachrymæ etiam extraneum, & peregrinum emollire poſſent: Sed infans ſtragulis & veſtibus involutus, & oppreſſus, non ſolum ope materna deſtituitur; ſed & omni alia, quæ ei uſui eſſe poſſit. In tali caſu, mater illa minus eſſet culpabilis, quæ ſe morti ſubduxiſſet, quam intueri non poterat: In hoc verò, barbara, quæ vitam primam embryoni dederat, jam fœtum quem peperit, morientem ſceleratè perſentiſcit; & potius vitam ſuam ultimo periculo exponere elegit, horridos nimirum illos dolores ſupprimendo, quos ſola impietas, & infanda crudelitas tegere poterant; quàm vicinarum opem implorare, ubi auxilia omnia ſunt, & pauca ſatis, & infirma.

Si a me infanticidii cauſas quæritis, non vos latet, quam vehementes habeant mulieres in utramque partem affectus: Impotenter amant, immoderate oderunt, & quocunque inclinant, non conſilio reguntur, ſed impetu feruntur. Quæ cum de ſexu ipſo vera ſint, quid de hac noſtra credendum, quam nunquam pudor a libidine, ſexus a crudelitate, ab impietate religio revocavit? Et quæ hoc infanticidio adulterii pœnam, hypocriſeos notam, & meretricis infamiam evitare credebat? Ego autem ab ea quærerem, cur amico hoſpitio exilium ſervile prætulerit? Cur partum matribus omnibus ita gratum cum vitæ ſuæ diſpendio abigere ſit aggreſſa? Cur ventrem nefando perjurio, & partum lethifero diſcrimine celaverit? Unde vires prodigioſæ in officiis obeundis immediate poſt partum? Unde terror ſubitus a prima ſuſpicione? Unde confuſio illa miraculoſa, qua infantis ſui ſepulchrum nec invenire, nec diſſimulare poterat? Sunt hæc conſcientiæ, an innocentis, an territæ indubitata teſtimonia? Et ſi non legibus, naturæ, reæ ipſi, & Deo ſaltem de hoc crimine credamus.

Hinc videre licet facilem ad objectiones illas, quas defenſores tanti æſtimant, reſponſionem, quibus mihi imponere volunt neceſſitatem probandi fœtum a partu vixiſſe. Nihil enim, inquiunt, dici poteſt occiſum, quod non prius vixerat. Omnia etiam hæc aſſerunt præſumptionem tantum fundare; & ex præſumptionibus nullum crimen inferri poſſe, quod alia quam arbitraria pœna ſit vindicandum. Ad primam ſic reſpondetur, reæ ipſius confeſſione conſtat, eam fuiſſe gravidam, & fœtum maturum, & perfectum: Quod etiam patet ex oculari inſpectione habita a mulieribus ejus rei peritis. Idcirco juſta & neceſſaria conſequentia credendum eſt, infantem vivum editum fuiſſe; nam quod ineſſe debet, ineſſe præſumitur. Nec ulteriori probatione opus eſt adverſus eam, quæ ſua nequitia ulteriorem probationem occluſit; & crimine crimen texit.

PONAMUS duos teſtes vidiſſe matrem hanc jugulum ſui infantis ſecantem; an neceſſarium eſſet probare infantem prius vixiſſe? Vel ſi conſtaret matrem fœtum ſuum in cacumine montis, nocte picea & procellis horrida, expoſuiſſe; eſſetne prævia vita hoc caſu probanda? Nequaquam; nam contra verſantem in illicito, quod per ſe probari nequit, pro probato habetur. Nec ex aſſertione hac ullum ſive reipublicæ, ſive innocentiæ exurgit periculum; ſolis enim facinoroſis hinc gladius ultor imminebit. Ubi e contra, ſi hæc evaſerit, nulla mater, quantumvis rea, poſſet propter hoc crimen ad ſupplicium duci; licet infanticidium omnium ſit atrociſſimum, graviſſimum, & maxime horrendum: Adeoque alterum criminis dimidium perpetratum, alteri indemnitatem pareret. Inſuper, dum leges crimen aliquod vindicari volunt, ea omnia concedunt, ſine quibus crimen probari non poteſt; licet alioqui ea non permittant. Sic licet ſervis regulariter non ſit pro dominis, dum accuſant, teſtimonii dictio; ſi tamen quis dominum domi ſuæ, vel navarchum in navi ſua percuſſerit; benigna Juriſprudentia (quæ ſe noſtræ utilitati amica flexibilitate ſemper accommodat) a receptis ſuis definitionibus prudenter recedit, ſervos in teſtes admittendo; ne probatio injuriantis arte læſo deeſſet.

AD alterum quod attinet argumentum, reſpondeo; licet quaſdam præſumptiones teſtibus quibuslibet evidentiores aſſerere poſſem; eò quod ex naturæ viſceribus neceſſaria conſequentia deducuntur; adeoque fallere nequeunt, ut nos ſæpe ſæpius fallunt teſtes: Imo & ipſis etiam teſtibus adhibeamus tantummodo fidem, quia credimus, & præſumitur, homines quorum nihil intereſt, nolle ſuas in æternum damnare animas: Tamen in caſu noſtro probatio ſolis præſumptionibus non innititur; ſed eſt hic poſitivum maleficium liquide probatum, nempe quod mulier hæc ſceleſta infantem nuper editum ſtragulis lecti texit; & ſub eiſdem ſtragulis reliquiſſe teſtibus probatum eſt. Hoc autem efficacius fuiſſe conſtat ad partum necandum, quam ſi ſica, aut veneno mortem inſidioſe deſignaſſet. Sequitur ergo eam ream eſſe per indubitata naturæ dictamina. Hoc in caſu non lege a nobis lata, ſed nobiſcum nata utimur; hac de re legem non tulimus, ſed hauſimus; non quia factum non meretur mortem, ſed quia nullus judex, qui ſecus ſentit, meretur vitam. An non homicidium eſſet capitis ſupplicio vindicandum, etiamſi nullam haberemus legem ea de re conditam? Et an non apud nos, antequam legem condidimus, morte punitum erat? Etiamſi hominem ſuffocare non ſit lege aliqua capitali notatum, complectitur ne tamen & hunc reatum Lex *Julia*? Et licet nonnullæ gentes operæ pretium duxerint ſtatuto aperto mulieres opem præſentem non invocantes morte plectendas; non ideo concludendum, has quibus nullum tale eſt ſtatutum, ſeveritatem hanc remiſiſſe: Hæ enim legem non ferendo, idem quod illæ lege lata, dictavere: Præſertim etiam ubi criminis frequentia, ſæculi genius, & gentis inclinatio juſtam hanc ſeveritatem (ut apud nos) poſtulant. Quibus rationibus ducti, qui veſtro, judices, judicandi munere non ita pridem fungebantur; mulierem *Perthenſem*, aliamque *Lothianenſem*, ex hac omiſſione ultimo ſupplicio affecerunt. Venerandaque nobis ſumma DEI providentia in detectione trium aliarum, quæ ob conſimilem reatum ſunt hodie in carceres detruſæ; ut ex horrore recenti veſtra acueretur vindicta. Nos autem non ſimiles arctant circumſtantiæ; accuſamus enim nos matrem barbaram, & impiam, fœtum ſuum ſuffocantem; cui crimini, auxilii non imploratio tantum adjicitur.

NEC vos moveat præſumpta matris affectio, quaſi hæc omnibus præſumptionibus a nobis adductis prægravaret. Nam ne mater eſſet, medicamentis eſt conata; & poſtquam eſſet, matrem exuere horrendo infanticidio enixe curavit. Ut mater non eſſet, efficere non potuit; ut ſine materna pietate eſſet, effecit: Nihil præter affectum hunc purgavere medicamenta; cujus reliquias cum fœtu ſuo ſuffocavit. Quid, quod matrem redolebat, audivere mulieres, quæ auxilium parturienti obtulere? Quid in vultu? Quid in ipſius geſtu viderunt, qui cum ea, infantem per flumina, per cœmeteria ſcrutabantur? Quid vos adhuc in nitido & ſubridente vultu (a ſqualore & tabe orbarum tam alieno) invenire poteritis? Cum ergo infanti non prodeſſe potuerit, quod mater eſſet; ne matri proſit, quod matrem non eſſe tam miſere flagitabat.

NIMIUM (Viri integerrimi) accuſationi huic, fletu potius quam verbis inſtruendæ, inhæſimus: A tam truculento objecto oculos tandem removeamus; nec eſt in probatione, nec in ingenio veſtro, obſcuritas plura requirens. Orabit hic pro ſe natura, & in pectoribus veſtris, acrius quam nos in foro, cauſam ſuam aget. Illa amabilem infantis vultum in infanticidam ridentem; illa morientis tremula labra, matriſque efferæ execrandam duritiem vobis oſtendet:

Illa venturi ſæculi pericula, civiumque nondum natorum neces in eos transferet, quorum crudeli clementia rea hæc effugiet, ſi effugere poſſit; oculos veſtros imaginibus, aureſque gemitibus expirantium infantum ſemper territans; lectulos veſtros morientium ululatibus, & conſcientias doloribus non morituris implens. Agite igitur (Cives optimi) immortalitatem, dum adhuc mortales eſtis, laureaſque in Paradiſo cultas, & in æternum immarceſcibiles, ob vitia perdomita, per ſententiam veſtram adepturi; libidini larvam detrahite, & crudelitati ſtimulos tollite; ſanam rempublicam, ſanctaque reddite tribunalia.

# ACTIO SECUNDA.

## *Num Navis acquiratur* jure civili *per proſecutionem ſine actuali apprehenſione?*

NEC horrendus ſpumoſi maris fremitus, nec maritima *Batavorum* fortitudo, ſpe gloriæ & lucri accenſa, Clientem meum dimovere poterant, quin ſe, ſuaque omnio infido mari crederet; & navi ſuis ſumptibus armata victoriam Regi ſuo quæreret; gloriam pro præda, & fidelitatem pro ſalario reputans. Nihilominus cum prædam tot laboribus partam hoſtibus eripuiſſet, actores hi tempeſtatibus crudeliores, inviſioreſque ſcopulis, non ſolum pretium hoc ſanguinis ei adimere conantur; ſed & famam cum præda invadunt, & lite hac ſubditum hunc, a quo Regi ſuo nullum unquam pietatis, nullum fidelitatis, nullum fortitudinis officium defuit, tanquam prædonem diffamant, qui non ab hoſtibus, ſed a principe navem ſui ducis marte quæſitam inſidioſe ſurripuerit. Quorum calumnia ex hac facti ſpecie facile apparebit.

*RANQUINIUS* noſter, nave auctoritate Regis noſtri munita, hoſtium littora legebat; quibus adhærentem navem hanc, cui *Teſtudini* nomen, inſignia *Belgica* geſtantem proſpexit; quam plenis velis fugientem, per horas aliquot inſecutus, tandem aſſecutus eſt, velaque contrahere coegit; ab ipſius conſcenſu ſolummodo impeditus per appropinquationem navis bellicæ inimicis inſignibus etiam ſuperbientis: Sed quamprimum amicam hanc fuiſſe *Navarchus* noſter detexiſſet, ad prædam rediit, eique nautas, militeſque impoſuit, a quibus in *Scotiam* abducta eſt, & ei ſententia noſtri *Thalaſſiarchæ* addicta, & adjudicata; reclamantibus adverſariis, quorum argumenta non ego reor validiora, ex eo quod a ſupremo illo judice hactenus reprobata ſint.

Adversariorum Argumenta, quibus ſententiam hanc iniquitatis inſimulant, ex alia facti ſpecie oriuntur. Navis enim Regia, ut illi ferunt, prætoriam hoſtium navem, quæ tres alias onerarias ſuo præſidio tutabatur, quarum una erat hæc *Teſtudo*, aggreſſa eſt; dumque debellaret navis Regia præſidiariam hanc, fugerentque concitatis velis tres hæ fiduciariæ, *Ranquinium* ſurreptæ per inſidias navis, Regi in prædam certò ceſſuræ, accuſant. Et hac arte fieri poſſe exclamant, ut nihil Regi in poſterum cedat: Nam præda ab armatis hiſce bellum cauponantibus, naves regias (ut lupus aureus leonem) inſequentibus, ſemper ſurripietur. Cumque naves regiæ hoſtium præſidia navalia aggredientur, illæ præda furtivo dolo enucleata, his victoriam ſanguinolentam, ſed inanem relinquent; adeoque præda non jacturæ pretium, nec fortitudinis, ſed tectæ fraudis erit præmium.

Secundum argumentum ex ipſis elementis *Juris Civilis* petitur, ut illi aiunt, quibus traditum eſt, non ei qui prius poſſeſſionem nactus eſt, ſed ei qui prius proſequi incepit jus acquiri: Si igitur duo ſimul eandem gemmam in littore proſpicerent, ille ex duobus, qui prius gemmam detexit; non ille qui prius manu apprehendit, dominium acquirit: Si quis etiam theſaurum effoderet, jus ſuum non amitteret media induſtria intervenientis, qui, dum primus inventioni operam daret, rem ipſam adeptus eſt. In ferarum etiam venatione, quæ eſt occupationi bellicæ maxime analoga, *Trebatio* placuit *L. 5. ff. de acquir. rer. dom. Statim feram noſtram eſſe; euſque noſtram videri, donec eam perſequimur; quod ſi deſierimus eam perſequi,* *deſinere noſtram eſſe, & rurſus fieri occupantis: Itaque ſi per hoc tempus, quo eam perſequimur, alius eam ceperit, eo animo ut ipſe lucrifaceret, furtum videri nobis eum commiſiſſe.* Et licet *Trebatii* opinio ſit ea in lege repudiata, jure gentium tamen receptam *eſſe ex* Minſinger. patet: inſtitut. l. 2. § 13. cujus verba ſunt, *Quæ ſane opinio* Trebatii *magis hodie recepta videtur inter venatores; nam etſi nondum mea fera ſit, non licet tamen alteri eam eripere, meque proſequentem inſidioſe antevertere.* Quod & *Balduino* ad eundem § viſum eſt; *Nec enim, ait ille,* Trebatii *opinio ratione caret; debemus enim abſtinere non ſolum alieno, ſed etiam eo, quod jam prope eſt ut alterius ſit; ne propinquam alterius ſpem, multis jam forte laboribus quæſitam, ipſi invadamus.* Quis enim ferat ita fraudari fatigatam induſtriam? Nec ſolum hìc, ſed in juriſdictionibus idem obtinet;. nam in iis adeo locus eſt præventioni, ut ille, qui prius citavit, non ille, qui ſententiam prius tulit, ſemper præferatur. Poſtquam enim judex jus ſuum proſequi incepit, non ei præjudicabit æmula ſociæ juriſdictionis induſtria.

TERTIUM adverſariorum argumentum ex natura belli quæritur; nam cum bellum ipſum ſumptibus regiis geratur, ſitque penes Regem lex belli; is in diſtributione prædæ ſemper præferendus eſt, quæ ſemper ex miniſterio publico, & non ex facto privato deſcendere præſumitur: Ideoque præda ſemper reipublicæ & Imperatori eſt addicta; largitionibus militibus, & ſociis ob vicariam opem ſecundum merita conceſſis; ut apud *Grotium* videre licet, *Lib.* 3. *Cap.* 6. Hìc autem cum nihil præſtitum ſit a *Ranquinio*, nave regia ad victoriam ſufficiente, nihil ei deberi aſſerunt.

HISCE tamen omnibus non obſtantibus, (Judices Integerrimi) ego prædam hanc *Ranquinio* noſtro confirmandam contendo, hiſce argumentis. Juris authores dominium, & rerum proprietatem ſtabilire conantes, (ut quæ optima quæque in ſe eſſent, validioribus & certis inniterentur fundamentis) voluerunt, non ab intentione vaga & erratica, ſed ex ipſa captura, pendere, & transferri rerum captarum dominium: §. 12. *Inſtit. de rer. divis. Feræ igitur beſtiæ, & volucres, & piſces, & omnia animalia quæ mari, cœlo, & terra naſcuntur, ſimulatq; ab aliquo capta fuerint, jure gentium ſtatim illius eſſe incipiunt.* Et § 7. L. 5. ff. de acquir. rer. dom. *Item quæ ex hoſtibus capiuntur, ſtatim jure gentium capientium fiunt.* Et S. 1. L. 1. eod. Tit. *Omnia igitur animalia, quæ terra, mari, & cœlo capiuntur, capientium fiunt.* Quibus legibus luculenter & certo conſtat leges noluiſſe menſuras, & fundamina dominii arbitrariæ gratificationi exponere, & conjecturis incertis committere; ne teſtes evenirent judices, judices autem tyranni. Quid enim laxius excogitari poteſt, teſte de probabilitate deponente, & num navis evadere potuerit? Et quæ hìc ſenſibus fides? Ne ergo fluctuarent judices poſſeſſionem, eamque corporalem, actualem, & naturalem requirunt; quæ cum ſenſibus ſubjiciatur, nec falli, nec fallere poteſt. Et ideo *L.* 1. § 1. *ff. de acquir. & amit. poſſeſ. Dominium rerum ex naturali poſſeſſione cœpiſſe,* Nerva *filius ait; ejuſque rei veſtigium remanere de his quæ terra, mari, cœloque capiuntur; nam hæc protinus eorum fiunt, qui primi poſſeſſionem eorum apprehenderint.* Quam poſſeſſionem, *Theophil.* Φυσικην κτησιν appellat, ἡ λαμβανοντος γινεται. Et ut notat *Vinnius,* licet ad retinendam poſſeſſionem ſufficiat animus ad rem apprehendendam; requiritur tamen ut ſit corporaliter occupata, & naturaliter apprehendenda. *L.* etiam 55. *ff. de acquir. rer. dom.* definitur, *Aprum in laqueo meo captum meum non eſſe, licet in meam poſſeſſionem pervenerit, niſi manualiter (ut notat* Bart. *ad eam legem) capiatur:* Verba legis hæc ſunt; *In laqueum, quem venandi cauſâ poſueras, aper incidit; cum eò hæreret, exemptum eum abſtuli: Num tibi videor tuum aprum abſtuliſſe? Et ſi tuum putas fuiſſe, ſi ſolutum eum in ſylvam dimiſiſſem; eo caſu, tuus eſſe deſiiſſet, an maneret? Et quam actionem mecum haberes, ſi deſiiſſet tuus eſſe: Num in factum dari oporteret (quæro)?* Reſpondit, *Laqueum videamus, ne interſit in publico, an in privato poſuerim: Et ſi in privato poſui, utrum in meo, an alieno: Et ſi in alieno, utrum permiſſu ejus cujus fundus erat, an non permiſſu ejus poſuerim? Præterea, utrum in eo caſu ita hæſerit aper, ut expedire ſe non poſſit ipſe, an diutius luctando expediturus ſe fuerit? Summam tamen hanc puto eſſe, ut ſi in meam poteſtatem pervenerit, meus factus ſit; ſin autem aprum meum ferum in ſuam naturalem laxitatem dimiſiſſes, eo facto meus eſſe deſiiſſet, & actionem mihi in factum dari opportere. Et ideo* Puffendorf. de jur. natural. Cap. 6. § 9. tradit. *Res mobiles, ut noſtræ fiant, apprehenſione corporali indigere, & ut ex loco in quo poſitæ ſunt, in cuſtodiam noſtram transferantur: Sic pullos avium, & catulos ferarum in nido, vel antro hærentes, meos nondum fieri, licet tetigero, niſi eoſdem domum aſportavero.*

SECUNDO, Naturalem poſſeſſionem ad dominia acquirenda requiri, non ſolum a definitionibus hiſce poſitivis, multiſque aliis; verumetiam ex ratione in legibus illis adducta apparet: Nam cum captura ſit modus acquirendi ex jure naturali deſcendens, conſentaneum eſt, ut poſſeſſione corporali perficiatur; quæ ſola pro naturali a Juriſconſultis agnoſcitur; ut & modi ex jure civili deſcendentes, civili, vel civiliſſima poſſeſſione ſtabiliuntur. Multa etiam accidere poſſunt, ut notant *Inſtit. de rer. diviſ.* § 13. *Ne fera capiatur.* Et *L.* 5. *Multa accidere poſſunt, ne capiam.* Quibus accedit *Grotius, Cap.* 5. *de mari libero: Repertæ* (inquit) *proprietati lex poſita eſt, quæ naturam imitaretur: Sicut enim initio per applicationem corporalem uſus ille habebatur, unde proprietatem primùm ortam diximus; ita ſimili applicatione res proprius* *cujuſque fieri placuit. Hæc eſt quæ dicitur occupatio, voce accommodatiſſimâ, ad eas res quæ ante in medio poſitæ fuerunt.* Et eodem capite tradit *Grotius, occupationem in mobilibus eſſe apprehenſionem, & corporis ad corpus applicationem.*

QUOD vel etiam fuſius a *Theophilo* explicatur; *Nam forte,* ait, *longius me progredi vetuit, aut eripuit, quod vulneraverant; vel denique in proſequendo, in aſpera & inculta loca incidens inveſtigare beſtiam non potui.* Quæ omnia veræ Philoſophiæ, rectæ rationi, principiiſque juris optime conveniunt: Quomodo enim illud noſtrum dici poteſt, quod adhuc ſui juris eſt? Duo enim non poſſunt eſſe domini unius rei in ſolidum: Et cum adhuc meum eſſe, vel non eſſe poſſit; concludendum eſt meum non eſſe; concluſio enim debiliorem partem ſequi debet.

TERTIO, Si jus noſtrum huic notæ dominii acquiſiti non confideret, actualem & naturalem poſſeſſionem requirens, ubi ſe ſiſtere, & reponere poſſit? Omnia enim alia poſſeſſionis indicia, tam ſunt fallacia & incerta, ut cum requirant jura certas & circumſcriptas regulas, quibus minima quæque fixa, & extra omnes conjecturas eſſe poſſint, certitudinem æquitati præferentia, dominium tamen, rerumque proprietas (quæ ſunt omnium optima) in incerto relinquerentur. Quomodo ſine hac poſſeſſione, militibus jus prædæ, venatori feræ, inventori gemmæ, effoſſori theſauri adjudicari poterit? Sed inter omnia quæ apprehendi poſſunt, nihil eſt re navali, prædaque maritima incertius, quæ proinde omnium maxime actualem poſſeſſionem requirit; ubi eventus inſtar ventorum, & maris, a quibus dependet, infidus eſt & fluctuans. Quam cito enim poſſunt, quæ dudum tumuere vela malis, ſiſtente malacia, applicari, vel ſtridente procella ab ipſis avelli? Potuit ipſa etiam navis vel uliginoſa nebula abſtrahi, vel occultis rimis ſubito mergi; rixa etiam inter nautas avertere proſequentem, vel navarchi error divertere curſum poterant, ut cito ſpes cum nave evaneſceret.

QUARTO, In bello magis quam in ulla alia occupatione, certas ego metas requirerem: Quis enim vitam & ſanguinem pro præda tam diſputabili exponeret? Ita enim nihil præter vulnera certo acquiri poſſet, & in lites gladii converterentur. Quam male etiam conveniret, milites inter armorum ſtrepitus, tubarumque clangores, ſubtilitatibus forenſibus diſtrahere? Et inter ſe ob prædæ incertitudinem armare? Nec eſt quod magis reipublicæ nocere poſſit, quam milites hiſce difficultatibus ab hoſtibus proſequendis avocare; qui cum legiones a ſuis ſociis debellatas viderent, fugientes non caperent: Et a regiis navibus mercatorum claſſe diſperſa, nulla ex armatis fugientes aggrederetur, ſibi conſcia nihil ex præda ſibi adjici poſſe. Quibus rationibus Juriſconſulti noſtri adducti, ſtatuere, capta indefinite capientium eſſe. Et ut ait *Alberic.* Gentil. de Advocat. *Hiſpan.* C. 4. *Capienda non habentur pro captis, nec quæſitis hoſti:* Nec unquam militibus in dubium revocatum eſt iis, qui captivos apprehenderunt, λυτρον deberi, licet alii cauſam fugæ dediſſent, ipſos diſſipando, & debellando. Nec ullum eſt bellum, in quo hæc capturæ licentia magis extendi debet, quam in hoc, ubi ſuis ſumptibus a ſubditis geritur. Eſtque tam effera & horrida belli navalis facies, ut ſic hæc licentia loco ſalarii, ſitque ſalarium ob pericula ingruentia augendum; ſatiuſque ſit ſubditos licentia hac diteſcere, quam hoſtes inter tot ſubtilitates & dubia tutos effugere. Statuto etiam ſpeciali *Jac.* II. *Parl.* 12. Cap. 53, apud nos cavetur, ne quis captivum, vel aliud quidpiam quod in alterius poſſeſſione eſt, ab ipſo rapiat. Quod indicat, majores noſtros poſſeſſionem tanquam unicam dominii in bello acquiſiti teſſeram reſpexiſſe, tantumque ſolummodo intellexiſſe acquiſitum, quantum poſſeſſum.

QUINTO, Licet actualis & naturalis apprehenſio non eſſet neceſſaria, negari tamen non poteſt, primum aggreſſorem nunc tantum præferri deberi, ubi difficilis non erat proſecutio: *Inſtit.* de rer. diviſ. §. *Examen quoque quod ex alveo evolaverit, euſque tuum eſſe intelligitur, donec in conſpectu tuo eſt; nec difficilis proſecutio eſt, alioquin occupantis eſt.* Unde difficilem proſecutionem omnem dominii ſpem deſtruere agnoſcunt Juriſconſulti. Quæ deciſio, meo judicio, ideo Juriſconſultis noſtris placuit, quod magis optandum foret prædam, vel feram a quolibet cive capi, quam cunctos eludere, dum ſinguli de jure ſuo incerti redderentur. Et ſi poſſit difficultas hæc etiam eorum, quæ noſtra ſunt, dominium transferre: Poſſitne multo magis acquiſitionem eorum quæ adhuc ſui juris ſunt, impedire? Et in noſtro caſu apertiſſimum eſt, & documentis adſtruetur, navem hanc effugere potuiſſe, & actorem hunc evadere, aut certe difficilem hic fuiſſe proſecutionem; evaſit enim aliam ejus navi velociorem & qui vincit vincentem, & me vincit. Erat etiam actor aliarum navium capturâ impeditus; & conferendo velificationem, qua præda hæc prius aufugerat, cum intervallo quo tunc a ſuis littoribus diſtabat, liquide apparebit eum eam aſſequi non potuiſſe. Quod & clarius conſtabit ex nautis navis amicæ & *Gallicæ,* quæ intervenit. Quibus probationibus inſtructus *Thalaſſiarcha* (cui judici, ob inſignem hac in re peritiam, credendum) prædam hanc *Ranquinio* adjudicavit, & auctoritas rei judicatæ ſuperioribus argumentis adjicitur.

QUOD ad argumenta contraria attinet, reſpondetur, inſidioſam interventionem non poſſe vel dominii ſpem intervertere: Agnoſcimus quidem multa per ſe licere, quæ non licent in æmulationem vicini, inſidiaſque vitiare titulum: Adeoque leges, authoritates, & exempla ab adverſariis adducta nos non tangunt; cum illa inſidioſum interventum præſupponunt, nos autem nullis uſi ſimus inſidiis. Et ideo nihil nobis cum gemma ſurrepta ab eo qui prius ipſam oculis notaverat; nec cum eo qui induſtriam primi venatoris fatigatam fraudavit; nec cum fera per vulnerationem attacta, cum hìc nulla eſſet manuum immiſſio. Atque adeo ne vel ex *Trebatii* ſententia (licet & ipſa ſit in jure noſtro repudiata) præferendus nobis eſt adverſarius noſter, cujus bombardis tormentiſque navis noſtra non erat vitiata; licet ex vulneribus non perinde navis ad fugam, atque fera inepta reddatur. Nos autem eodem caſu teneri videmur, ac ſi contrariis & oppoſitis itineribus eandem gemmam vidiſſent duo, ex quibus ille certe qui prius gemmam nactus eſt, quanquam poſterius detexiſſet, dominium acquireret. Et licet qui theſaurum effodiebat, eique incumbebat, ſpe ſua frauderetur interventu ejus, qui ſciens eum incumbere occupationi, loculoſque adepturum, noctu, vel aliis artibus ipſum prævenerit; tamen extra omnem controverſiæ aleam eſt, ſeriùs effodientem non conſcium, ſed ex adverſa parietis facie aggredientem, acquirere poſſe theſauri dominium; quod cum caſu noſtro ſummam habet affinitatem. Tantum enim abfuit, quin diligentiam defraudaremus, ut nequidem in conſpectu eſſet navis regia, cum prædam adortus eſſet *Ranquinius*, alteriuſque navis capturæ operam tunc temporis daret, eſſetque noſtra veriſimiliter evaſura; ut ex probationibus hactenus adductis apparet. Nec valet argumentum a præventione juriſdictionum petitum; nam in ſociis illis juriſdictionibus ineſt utrique prævium citandi jus: Hìc autem acquirendum eſt ipſum jus ex diligentiæ primogenitura; nec præſupponitur, ſed acquiritur. *Grotius* etiam nobis potius opitulatur, quam obſtat; nam *L.* 3. *C.* 6. *Num.* 42. Poſſeſſionem naturalem in naturali hoc acquirendi genere aperte requiritur; leges a me ſupra allatas adducens: Et *Num.* 4. concludens non qualemcunque poſſeſſionem ſufficere, ſed firmam requiri. Quodque durius videtur, vult eas tantum naves captas cenſeri, quæ in navalia, portuſque noſtros ſunt perductæ, vel in poteſtate noſtra per viginti quatuor horas fuere. Et licet inter hos qui ſtipendia faciunt, Imperatori cedat præda; hoc tamen obtinere non debet contra hos quibus præda in ſalarium imputatur; & *C.* 4. Tract. *de maribus*, irridet *Luſitanorum* jus ad *Indos* hiſce verbis; *Si vero ante alios navigaſſe, & viam quodammodo aperuiſſe, hoc vocant occupare; Quid eſſe poteſt magis ridiculum?* Nec ullus eſt caſus noſtro magis analogus.

ILLI ergo fiſci, nos Principis; illi compendii nummarii (ſubditorum ſolicitudinis) nos gloriæ regiæ cauſam agimus. Et ſi nunquam pejor ſit cauſa fiſci, quàm ſub bono Principe; ibi certe peſſima, quum gloriæ & gratitudinis pretia in ærarium ſunt redigenda. Fœlicia imperia, quæ a tribunalibus magis leges, quam fiſcum curantibus ſunt ſuffulta! Legibus debent Principes quicquid poſſident: Ærarii autem incremento vitia ſæpe ſæpius aluntur: Atque adeo cum *Javoleno*, L. 10. ff. de jur. fiſci, *Non puto delinquere eum, qui in dubiis quæſtionibus contra fiſcum facile reſponderit.*

# ACTIO TERTIA.

## *An Conatus puniatur ultimo ſupplicio in crimine* Aſſaſſinii?

SUBDUCAMUS pompam hujus conſeſſus, quem aggregavit nova & mira in reo criminum accumulatio; eloquentiam Advocatorum, quibus paradoxam hanc tutelam invitis extorſit clementiſſimi veſtri tribunalis mandatum, ne criminis horror reum reliquiſſet indefenſum; popularem annuentium auram magiſtratibus ſuis ſemper invidentium; & inveniemus nudum reum, tanto crimine gravatum, ut ſingulæ ejus circumſtantiæ, extra vicinarum conſortium, in crimen per ſe aſſurgere poſſint: Clericum arma contra canones tractantem; ſubditum in conſiliarios regios contra leges inſurgentem; paſtorem non lacte, ſed ſanguine agnos ſuos paſcentem; non homicidio, niſi præmeditato; non præmeditato, niſi ſacrilego ſatiatum; tam criminibus inhiantem, & ad audendum inſana, & proterva quæque tam projectum, ut nec eum terrere; ſacer Epiſcopi quem invaſit character; nec multitudinis, nec ſolis præſentia, ab aperto in plateis noſtræ metropoleos parricidio. Si tamen hic ſubſtitiſſet nequitia, inveniſſet in Rege ſuo clementiam, crimina etiam hæc ſuperantem; ſed ſceleſtiſſimus, ſe infœlicem ob fœlicem fruſtrationem ratus, abſens ſcelus fervido pectore ſæpe repetebat; omnibuſque avide inſtillabat quàm ſuave, & (Proh ſcelus!) quàm ſanctum foret, univerſos Eccleſiæ noſtræ Epiſcopos ad unum trucidare. Illum ſemel vicit horrens delicti conſcientia, ſubduxitque pœnæ, longinqua in regiones exteras fugâ; ſed eundem reduxit DEUS Optimus Maximus, ſine ullis præter juſtitiam divinam ſatellitibus; ut ſolatio eſſet bonis omnibus, malis autem terrori, pœna reddita, quo facineroſus iſte eodem loco crimen peregit.

HORRENDUM ſcelus, cujus ipſa defenſio ſcelera ſuperat! Nam aſſerere ſe hoc ductu conſcientiæ, & illuminatione divina perpetraſſe, eſt in DEUM crimen transferre; peccatorumque vindicem, peccati non ſolum participem, ſed authorem reddere; & non ſolum crimen commiſiſſe, ſed reatum ipſum canonizare, & ad ejus commiſſionem poſteros ſpe & premio æternæ ſalutis allicere: Quaſi Divinum Numen, cui tot ſunt Angelorum exercitus, vel non juſtum eſſet; vel juſtitiam ſuam nimium differret; ideoque arripienda eſſent huic arma, ne ſupprimeretur veritas. Agnoſco DEUM inſpiraſſe quibuſdam ſub veteri teſtamento, (dum Ipſe *Judæis* pro Rege imperaret) ſanctam criminum ultionem, qui ex eo *Ζηλοται* dicebantur, quorum poteſtatem, ne falleretur vulgus, miraculis ſignavit. Inter quos primus extitit *Phineas*; ſed ſecta hæc zelum hunc adeo fœdavit devotione in furorem accenſa, & judicio in rapinas verſo, ut *Grotius*, *An.* in *Act.* 7. & 57. hæc verba ſcribat; *Iſtorum hominum, quos Zelotas* Joſephus *vocat, creſcens indies audacia, tandem & iram excitavit* Romanorum; *& urbi, temploque exitium attulit.* Poſt autem beatiſſimi noſtri Servatoris incarnationem, armis tantum ſpiritualibus uſus eſt DEUS; cumque *Zebedei* filii fulmen optaſſent, reſpondit JESUS, *Neſcitis qualis ſpiritus ſitis*; & cum D. *Petrus* gladium contra hominum ſceleſtiſſimos pro ipſo hominum Servatore evaginaſſet, reſpuit Ipſe *Θεανθρωπος* inculpatam tutelam, quam iræ debiturus eſſet.

SED accuſationem ipſam inſtruamus; in qua primo probandum eſt reum Archiepiſcopi *Sancti Andreæ* necem decreviſſe, ejus necandi cauſa cum ſclopeto diu ambulaſſe, ſclopetoque Archiepiſcopum petiiſſe, dum curru ſuo veheretur; ſed terrore conſcientiæ ſuæ perculſum, ſclopetum tremula manu exploſiſſe, Epiſcopi Orcadenſis Archiepiſcopo aſſidenti brachium mutilaſſe, quo vulnere poſt languidum, hærentemque morbum confectum obiiſſe. Horum criminum probatio non teſtibus, non fallacibus remotiſque præſumptionibus nititur; ſed confeſſione ipſius rei, non per equuleum educta, nec per errorem lapſa, ſed ſæpius repetita, plurimiſque circumſtantiis adminiculata: Adeoque graviſſima crimina clariſſima probatione adſtruuntur.

CONATUM hunc licet inefficacem morte plectendum contendo, ex triplici medio. Primo enim apud juriſperitos noſtros, affectus pro effectu punitur: Et in criminibus atrocioribus, conatus ſemper morte plectitur, ubi reus omne, quod in ſe erat, fecit; & ad actum proximum conamen ſuum produxit. Quod introductum credo, tam in favorem invaſi, quam in odium invadentis. Leges enim ſaluti hominum conſulentes conatum etiam repreſſerunt, & e longinquo nobis providerunt. Ut & homines faciunt, qui, quod ipſis charum eſt, plurimis involucris, vel multiplici defendunt muro, vel ſigillo. Et cum crimina puniantur, non tam ob id quod factum eſt, quam quia idem ab iiſdem ſemper expectandum; remaneatque malitia, licet actus non fuerit conſummatus: Ideo conſultò & prudenter, leges ipſum conatum legitimæ pœnæ ſemper in criminibus atrouioribus ſubjecerunt, ubi & voluiſſe crimen eſt. Et ideo ſtatuerunt Imperatores *Honorius* & *Arcadius*, *L. quiſquis C. ad L.* Jul. Ma. *Eadem ſeveritate voluntatem ſceleris, qua effectum puniri*; adeoque addiderunt in ea lege *jura hoc voluiſſe*; quam in *Baſilicis* traductam inveniemus. Et *Paul.* 51. *Sent.* 23. § 1. diſerte ait, *Conſilium uniuſcujuſque, non factum puniendum eſſe.* Quod præſertim in ſicaris, hoc noſtro crimine obtinet. Et hinc ſicarius eſt, *qui cum telo hominis necandi cauſa ambulaverit*, *L.* 1. *ff. ad. L. Cor. de Sic.* & in hoc crimine *voluntas ſpectatur, non exitus L.* 14. *ad L. Cor. de ſic.* Et ſi tanta ſit reverentia ab infidelium legibus hominibus præſtita, ex eo quod hi lumine rationis eminerent; quanta major iiſdem a legiſlatoribus & judicibus debetur, qui lumine divino ſunt illuſtrati, & norunt hominem ad DEI imaginem fictum. Nam cum hi, qui *Cæſarum* imagines & ſtatuas licet inanimatas corruperunt, tanquam Majeſtatis rei damnabantur: Quanto magis puniendi ſunt, qui Regis regum imaginem homicidio corrumpere ſunt conati? Sed inter homicidia nullum eſt, in quo tam punitur conatus, quam ubi conſpiratum eſt in necem vel Regum, vel Senatorum; quibus Senatoribus ſucceſſerunt jam Conſiliarii *Regii, qui & pars corporis noſtri ab Imperatoribus appellantur.* Et hoc caſu ipſum conatum puniri teſtis eſt *Matth. de Crim. pag.* 7. in omnibus etiam criminibus tum punitur conatus, cum ad actum proximum deventum fuerit. *Gothofred.* § *Conatus Covar. in Clem. ſi furioſus numero* 6. Et qui mitiores videri volunt, tria tantum requirunt. 1. Ut deventum ſit ad actum morti proximum. 2. Ut non ſteterit per invadentem, quin conſummeretur delictum. 3. Ut occidendus fortuito caſu tantum evaſerit. In hiſce caſibus, plus voluiſſe peccare nocuit, quam non peccaſſe profuit. Nam licet, ubi reus vel omnia, quæ conſummanda erant, non conſummavit, ita ut non conſtet, num pœnitentiam acturus eſſet; vel ubi parum abfuit quin crimen perficeret, pœnitentia tamen ductus non perfecit, emolliendus ſit judex: Ubi tamen aggreſſurus maturè apud ſe homicidium concoxit, perfecitque omne quod in ſe erat; & non ſolum cum telo hominis occidendi cauſa ambulavit, ſed telum ipſum ſumma animi deliberatione in Conſiliarios Regios projecit, quis reum hunc a reatu relaxaret? Et quæ objiciuntur, ut probent conatum non puniendum capitaliter; de conatu nudo ſolummodo loquuntur, qui nec ad actum proximum pervenerit; non autem de perfecto, ſeu conſummato, ubi quicquid potuit malitia fecit, licet non effecerit quicquid voluit. Inefficacia enim hæc non reo, ſed Deo debetur. Nec tegit Deus ſceleratos iſtos, qui & leges, & imaginem ſuam violare ſunt conati; hoc enim eſſet providentiam divinam contra ipſum Deum armare: Uti nec protegunt leges iniqua clementia facinoroſos iſtos, qui in leges peccant; hoc enim eſſet, ſceleratos in futuram civium necem conſervare, ut in quo ſemel fruſtrati ſunt crimine, id repetitis conatibus perfecte addiſcant.

Sed licet conatus non eſſet in omnibus lethificus, in crimine tamen *aſſaſſinii* conatum nudum morte puniri, refert conſentiens Doctorum Schola: Quod in odium inſidiarum introductum eſt, contra quas nulla defenſio, nullus murus. Inimicos expectamus, & parcunt leges immaturæ malitiæ ex injuriis, vel ipſa injuriarum umbra ortæ: Sed ignobili cædi, nec ex juſta cauſa, nec ad honoris vel imaginariam metam tendenti, nunquam pepercere jura. Cui nihil reſponderi ab adverſariis poteſt, niſi quod illud tantum aſſaſſinium eſſe reputatur, ubi homicidium ob pretium aliquod definitum committitur, & ſuam in occidendo occidens operam locat. Quod ex *Matthæo* probant, *Tit.* 5. *Cap.* 1. *Num.* 1. & *Clar. C. aſſaſſin.* & hoc introductum in eo crimine aſſerunt ex ſumma nequitia conductorum, & avaritiæ odio; & potiſſimum, quia *Saraceni* aſſaſſinos hos (*Phœnices* gente) conducebant in Chriſtianorum necem. Sed non placet infirma exceptio; nam ſpecialitas hæc conatum coercens ex odio inſidiarum oritur; atque adeo, ubicunque reperiuntur inſidiæ, ſequitur pœna. Nec intereſt Reipublicæ, nec ejus civium, an ſpe contributionis ex cæde profecturæ, an ſpe gratiæ, an præmii indefiniti inductus ſit ſicarius. Et ſi crimen hoc non egrederetur occaſionem unde eſt ortum, *Phœnices* tantum delinquentes, & ob Chriſtianum tantum trucidatum punierentur conantes. Sed hiſce omnibus repugnat recta ratio; nam argumentatur ipſe *Matthæus, Eum aſſaſſinio teneri, qui Paganum occiderit. L. enim Cor. naturam ſpectat; nec de certo hominum genere loquitur; ſed ipſam humanitatem tuetur. Ita & ſua argumenta retorquendo, argui poteſt, eum aſſaſſinii teneri, qui per inſidias hominem occiderit; non diſtinguendo an pecunia conductus, an ſpe præmii, an gratiæ inductus fuerit.* Et ſpecialitatem hanc non ex corruptione, ſed inſidiis oriri apparet etiam ex *Matthæo*, qui *pag.* 563. in hæc verba fatur. *Quapropter cum & majores noſtri graviorem judicaverint cædem, quæ ex inſidiis ſit; & valde deformes atque degeneres inſidiæ ſint, difficulterque caveri poſſint; idcirco non immerito quis dixerit, etiam capite puniendum eſſe conatum. Quod tamen ita temperabimus, ut non aliter ſit, niſi deventum ſit ad actum cœdi proximum. v. g. inſidiatus es, inſediſti latera viæ latronis more. Sed non incidit in inſidias, cujus caput petebas; hoc caſu extraordinariæ pœnæ locus erit: At præcipitavit ille in inſidias, tu a tergo adortus incautum vulneraſti, reliquiſti ſeminecem, ille præter ſpem atque opinionem convaluit; hoc caſu ordinariæ pœnæ locus erit: Et cum plures ſint, quibus inſidias ſtruere perſuaderi poteſt, vel ut captent famam, vulgique capiant plauſum; vel ut cœlum mereantur (fatuitate Hereſiarcharum ducti) æquius ex hiſce cauſis, potius quam ob acceptam pecuniam reos condemnari judicamus. Nam quo fortior & communior eſt peccandi occaſio, eo magis peccatum ipſum puniendum credimus. Ad hæc, L. 5. & ad L. Jul. Majeſt. De nece etiam virorum illuſtrium, qui conſiliis, & conſiſtorio noſtro interſunt; Senatorum etiam (nam & ipſi pars corporis noſtri ſunt) vel cujuslibet poſtremo qui nobis militat, cogitaverit (eadem enim ſeveritate voluntatem ſceleris, quâ effectum puniri jura voluerunt) ipſe quidem utpote majeſtatis reus gladio feriatur, bonis ejus omnibus fiſco noſtro addictis.* Quod *Græcus* Scholiaſtes, *Inſidians Senatori*, optime vertit. Qui vero fuerint *Romanorum* mores ex *Quintiliano* apparet, qui de Orator. *L.* 5. *C.* 10. concludit, *Injuriam feciſti; ſed quia Magiſtratui, Majeſtatis actio eſt.* Et cum Conſiliarii Regii Regis ſui radiis fulgeant, ſintque fictione juris pars corporis ipſius (ut Lex 5. loquitur) & ſint in ſenſu politico membra imperii, ſine quibus nihil perfici poteſt; conſonans eſt, ut aggrediens Conſiliarium eodem modo puniatur, ac ſi Regem ipſum aggreſſus fuiſſet. Ut membrum quodvis corporis vulnerans eodem modo punitur, ac ſi caput vulneraſſet. Quo artificio legali venerationem conciliant leges legum magiſtris, ipſoſque a temerariis vulgi auſibus defendunt. Verum non ſolum *Jure Civili*, ſed etiam ſtatuto ſpeciali apud nos inſtruitur hæc accuſatio; nam ſtatuto 4. *Parl.* 16. *Jac.* VI. nudus conatus in attentando & invadendo *Conſiliarios Regios* morte punitur. Licet huic ſtatuto reſpondeatur, ſtatutum hoc tantum obtinere, ubi inſultus fit in Conſiliarium, dum Regis ſui mandata exequitur, ut ex ipſo ſtatuto apparet: Et ideo cum non ipſa aggreſſio, ſed aggreſſionis qualitas mortem inferat, ex hoc ſtatuto oportet ipſa qualitas probetur. Ut conſtat ex Claro, § Aſſaſſ. Num. 2. *Vbi agitur de imponenda pœna alicujus conſtitutionis ſpecialis, requiritur ut concurrant omnes qualificationes in ipſa conſtitutione expreſſæ:* & 4. § 5. *Num.* 9. *Vbi agitur de imponenda pœna alicujus ſpecialis conſtitutionis, oportet ut in illo caſu verificentur omnes qualitates in ipſa conſtitutione expreſſæ; aliàs pœna non committitur.* Hæc tamen reſponſio facile eluditur, ſi rem ipſam penitius intueamur. Nam ratio concedendi hoc privilegium Conſilariis eſt, ut leges hos, quos invidiæ exponunt, contra invidiam muniant. Et ideo interpretanpretandum eſt hoc ſtatutum, ut hunc effectum producat: Sed hoc effici nequit, niſi omnes attentantes puniantur; licet non probatum fuerit invadentes hoc attentaſſe ex cauſa publica. Nam cum motus hi ſint latentes actus animi, qui ſe non in ſua cauſa, ſed in effectu produnt, publica cauſa præſumitur; modo aliæ cauſæ attentatio hæc attribui non poſſit, *v. g.* ſi quis accuſatus fuerit de eo, quod attentaſſet Conſiliarium Regium occidere; audiendus forſan erit replicans, interceſſiſſe ipſi cum Conſiliario illo inimicitias graves, & forſan capitales ex cauſa privata ortas. Sed ſi præſumptio ulla adſit has proveniſſe ex cauſa publica, veluti in executione ſui officii, & ob mandata ſui Principis; tunc qualitas hæc præſumptione juris, & de jure præſumitur, & eſt ex earum numero, quæ allegari, ſed probari non debent. Quod & tradunt obſervationes ad Clarum, 4. §. 5. *Num.* 17. *Vbi qualitates a jure præſumptæ allegari poſſunt ſine alia probatione. Et* Maſcard. *concluſ.* 1284. *vel.* 3. *latiſſime tradit non opus eſſe qualitatem illam deducere; ubi ineſt qualitas ex natura rei.* Alciat. præſump. 3. Reg. *Boer.* deciſ. 118. Et ut ex una, inane eſſet ſtatutum, ſi hoc non obtineret; nam intrinſeca hæc qualitas vix probari poteſt; poſſintque inſidiantes, quæſito colore, ex cauſa ficta invidiam publicam tegere: Ita & ex altera, nullus eſt, qui gloſſam hanc reprobare poſſit; nam ex ſe pendet, ne in barathrum hoc incidat; & ſibi imputet, qui, quod facere non debuit, fecit. Et hinc facile erumpit reſponſio ad citationes ſuperius ex *Claro* allatas, quæ intelligi debent de his qualitatibus, quæ crimen augent, & probari extrinſecus poſſunt, *v. g.* Inſultus in templo factus augetur quoad pœnam, ex qualitate; ideoque probanda eſt qualitas. Fratricidium homicidio eſt gravius, & ideo probandum eſt non ſolum hominem, ſed & fratrem fuiſſe occiſum. In noſtro autem caſu, plurimæ concurrunt præſumptiones, ex quibus qualitas hæc inferri poteſt. Nam erat reus hic ex Sexta Puritanica ordini Epiſcopali ſemper infeſta, cujuſque libri frequenter Epiſcoporum necem tanquam Chriſti inimicorum ſuadent; & hac doctrina non ſolum inquinabat manus ſuas reus, ſed & omnibus, qui quolibet conſortio ſibi jungebantur, ſe hoc effecturum promittebat: Et hoc a ſe effectum gloriabatur, ex eo quod Archiepiſcopus *Sancti Andreæ*, quem invaſit, effundere curaſſet ſociorum ſuorum ſanguinem. Quæ jactatio, licet factum ipſum non præceſſerit, facti tamen rationem abunde demonſtrat; præſertim cum ad nullam aliam inſultus ſui occaſionem confugere poſſit reus, nec Archiepiſcopo notus, nec ipſum noſcens; infra ipſius obſervationem, & extra omne commercium cum ipſo poſitus. Cum ſit ergo confeſſio omnium probationum lucidiſſima, reus hic non habet unde ſe tueatur, niſi confeſſionem ſuam retractet; adeoque ſe mentitum fuiſſe, judicibuſque ſe illuſiſſe perfricta fronte nunc fateatur; quæque prius faſſus eſt, negare jam non erubeſcat, contendatque confeſſionem ſuam invalidam; quoniam coram judice incompetente eſt emiſſa: Cum Concilium Regium, cui crimen hoc retexit, non habeat jus gladii, nec de ſubditorum vita & nece jus dicere poſſit. Quod commentum mihi ipſius reatum altius imprimit. Et quid tam rationabile, quam eum, qui conſcientiæ ductu ſe hoc perpetraſſe jactitavit, ex confeſſione ſua (vero illo conſcientiæ dictamine & interprete) condemnari? *Confeſſio, inquit* Seneca, *contraverſ.* 8. *conſcientiæ vox eſt.* Et ſi ſancti Patres (conſcientiæ ductores puriſſimi) conſulendi eſſent: Audiemus *Ambroſium* ita docentem ſermone 50. *Quem alter judicat, poteſt utcunque eſſe excuſabilis; reus autem ſine excuſatione eſt, qui conſcientiæ ſuæ judicio condemnatur. Quid juſtius* (*inquit* Tertullianus *ad Scapulam*) *quam nocentes confeſſos damnare; negantes autem ad tormenta revocare?* Hæc eſt illa probatio, quæ Θεόπνουςῶς fit, & ab afflatu divino inſpiratur: Probationes alias homines, hanc Deus ipſe elicit. Sed ut in puncto juris reſpondeam; ego regulam, ſeu potius brocardiam illam, qua traditur confeſſionem extrajudicialem, ſeu extra bancum eſſe inefficacem (ut loquuntur forenſes) tantum obtinere credo, ubi qui confeſſus eſt, non ſerio agebat cum ſuis auditoribus, ſine obſervatione ludens, & ſe credens non teneri, dum quidlibet fatebatur; nullam agnoſcens in his juriſdictionem, apud quos ludebat. Quo caſu jus noſtrum noluit ex jactatione, vel incuriâ inſidias incautis parare, linguæque lapſum in crimen imputare, Sed ubi quis conſulto ad ſupremum Regni Concilium examinandus venit, cui eſt criminum inquiſitio jure delata, ego confeſſionem illic emiſſam confitentem ligare mordicus affirmo. Nam illic non ſolum reus novit ſe in dubio vitæ conſtitutum; ideoque attendere debet: Sed & illo remoto, inquiſitio a jure delata fruſtranea & omnino ridicula foret. Cur enim examinari deberet, qui hac examinatione teneri non poſſit? Cumque qui inquirere poteſt, & confeſſionem recipere poſſit, non video cur Concilium Regium incompetens dici quæat; cum inquiſitio ei ex jure noſtro ſemper ſit delata. Et quicquid dici poteſt, ubi confeſſio ex continenti retractatur; & ubi docere poteſt confitens de errore, lapſuſque ſui errorem probare; nunquam tamen auditur, ubi cauſam ſui erroris demonſtrare nequit. *Boſſ. Tit. de Confeſſ. Num.* 64. Sed quid plura? Confeſſio hæc coram Prorege emiſſa, (cum ſit Regali authoritate auctus, ejuſque fulgorem & dignitatem referat) confeſſioni coram ipſo Rege æquipollet; at nemini dubium eſt, reo ultimum ſupplicium irrogari poſſe ita confeſſo. Cum penes Regem ſit vitæ, neciſque cognitio, poſſitque juriſdictionem illam ipſe explicare, quam aliis eſt elargitus. Fingamus jam caſum noſtro ſimilem; Cancellarium Regni noſtri plurimis vulneribus confoſſum periiſſe; quendam illi, dum viveret, inviſum de crimine ſugillatum, ſe eum necaſſe fateri; de cæde apud ſuos gloriari, & de crimine inquiſitum coram Rege, & in Concilio Regio confeſſionem ſuam denuo confirmare: Quis adeo inſulſus eſt vel petulans, qui talem reum non teneri pronunciaret, ſiquidem docere non poſſit ſe circumventum, vel delirantem fuiſſe?

ULTIMUM rei refugium eſt, confeſſionem hanc ſpe veniæ evocatam; ideoque reum non ſubjiciendum pœnæ, vi illius confeſſionis contendunt ejus patroni. Indignum enim eſſe aiunt, judice Chriſtiano fidem fallere; & a majeſtate imperii alienum, fidem publicam diminuere; nihilque tam contrarium vero criminum ſcrutinio, quam veniam, qua confeſſiones eliciuntur, revocare. Hoc etiam confirmant authoritate *Matthæi* Tit. de Confeſſ. Num. 16. *Quærunt (inquit ille) an confeſſio promiſſa impunitate & ſpe veniæ elicita ſufficiat ad condemnandum?* Reſpondendum non ſufficere; *tametſi enim in judicis arbitrio non ſit, impunitatem ſpondere, adeoque ex conventu illo non obligetur princeps; tamen dolo extorta eſt, & per hanc fraudem etiam innocentes illaqueari conſtat authoritate* Clari, *qui fatetur, ſe non velle condemnare eo caſu: Et* Boſſii, *qui tutius eſſe fatetur, non ad mortem condemnare; cum negari non poſſit talem confeſſionem adumbratam eſſe.* Verum renuit juſtitia, renuunt & leges huic dogmati. Confeſſio enim eſt ipſa conſcientiæ vox, omniumque ſuperat ſententias: Cumque omnis probationis effectus ſit in eo poſitus, ut judici fidem faciat; quis eſt in quem fidem non creaverit confeſſio ſponte emiſſa? Et licet ſpes veniæ effulſiſſet, non hac illecebra minuitur crimen, nec ex nocenti fit innocens, qui confitetur: atque adeo cum innocens tantum ſit abſolvendus, quis talem confitentem abſolvere poſſit, cum innocentem dicere non poſſit? Sed 2. reſpondetur judicem nullum poſſe reum abſolvere; cum crimen remittere ſit inter regalia: Et ſi confeſſionem elicere ſpe veniæ pro remiſſione habeatur, nullus eſt judex tam diminuti ſubſellii, & repentis juriſdictionis, qui non poſſit crimina remittere; cum confeſſiones haſce recipere poſſit. Quo argumento in meam ſententiam ducitur *Boſſius Tit. de Confeſ. Num.* 12. Et licet confeſſio ſub ſpe veniæ elicita adumbrata dici poſſit, ubi minæ interceſſere, vel innocentia aliàs probari poteſt; nihil tamen ex his in hoc caſu interveniſſe dicitur, vel dici poteſt. 3. Licet confeſſio ſub ſpe veniæ a morte levaret, hoc tamen ſolum obtineret, ubi præceſſit confeſſionem ſpes veniæ oblata. Si autem reus prius fuerit confeſſus, quam de ſpe veniæ ſit conventum & tractatum; neceſſario ſequitur confeſſionem illam non eſſe elicitam ſub ſpe veniæ. Cumque ſuſpicio hujus confeſſionis oriatur ex præviis illecebris, ita ut qui fuerit confeſſus, non tam præſumatur verum confiteri, quam ab eventu dubiæ litis ſpe certa ſe redimere; ideo mihi neceſſario ſequi videtur, confeſſionem illam pro adumbrata non eſſe reputandam, quæ nullis admotis fidiculis, nec ullis humantibus illecebris, ſponte & ſine ullo prævio tractatu eſt emiſſa. Ut in noſtro caſu, ubi probari non poteſt ullam ſpem vitæ reo ante confeſſionem obtuliſſe, nec ullum de ſpe vitæ præceſſiſſe tractatum. Sed non ſolum ipſa confeſſione, quæ pura eſt; ſed & ſacramento omnium judicum, qui examinationi præfuere, conſtat, reum non ſolum ſponte, ſed ſtimulante conſcientia, flexis genibus, tentiſque ad cœlum palmis confeſſum fuiſſe crimen, ſine ulla veniæ ſpe oblata, vel precibus eum in finem effuſis. Atque adeo cum prima confeſſione jus quæſitum eſſet Regi & Reipublicæ; quicquid ex poſt facto indultum eſt, non qualitas confeſſionis, ſed criminis remiſſio dici poteſt; & remiſſio criminis ex Rege ſolo pendet. Et quem in finem, quæſo, diſſeritnr, qualitatem non poſſe a confeſſione ſejungi & ſeparari? Cum ipſa confeſsio nullam habeat qualitatem annexam; cum nulla ſpes veniæ, nulla impunitatis promiſſio ſit in ea expreſſa. Quoad actum vero Secreti Concilii, quo contineri dicitur ſpes veniæ, patet reſponſio; nam ſenatusconſultum illud non præceſſit confeſsionem, adeoque non confeſſus eſt reus crimen hoc ſpe veniæ in illo expreſſæ. Sed ut Sophiſma hoc radicitus diluatur; ſciant judices integerrimi, reum hunc nunquam ſpem veniæ ſibi propoſuiſſe, nec examinatores ipſam obtuliſſe; ſed ex poſt facto, ne falſus rumor ſpei hujus, & veniæ conceſſæ locum apud vos obtineret, emiſſum eſt hoc edictum, in quo ſpes veniæ ex poſt facto indultæ per tranſennam ſolummodo narratur: Et concluditur in ipſo edicto, reum beneficium hujus amiſiſſe, ex eo quod confeſsionem ſuam hac in Curia retractaſſet; cum nulla ſpes veniæ decreta eſſet retractanti, ut in totum abſolveretur; ſed ut repetitione confeſsionis firmaretur ſententia arbitraria in Reum. Atque adeo nec erat venia ſcopus hujus acti, & acta non ſunt extra ſcopum argumentativa, nec poſſunt in acto connexa ſejungi, ut adverſarii argumentantur.

III. NULLUS inter Juriſperitos tam inſanivit, ut confeſſionem ſub ſpe veniæ emiſſam, ex ſe inefficacem pronunciaret, ſi reus aliis indiciis oppreſſus fuerit: Illis enim tollitur præſumptio ex illecebris, vel circumventione judicis oborta, *Jul. Cla. Quæſt.* 55. *Num.* 9. *Cui. L. præſent. C.* de his qui ad *Eccleſ.* confugiunt. *Alciat.* in *L.* natura *ff.* de verbo. ſignif. & hoc caſu gravant ſponte, & ſine præmiſſa ſpe veniæ confitentem præſumptiones admodum violentæ. Sed in noſtra facti ſpecie nullus alius eſt hoc crimine unquam diffamatus; & in hunc communi populi ſuffragio tranſlatum eſt crimen. Hic eſt, qui fuga ſua reatum in ſe ſuſcepit, ſua tantum exagitatus conſcientia. Hic eſt, qui eodem ſclopeto armatus, quo vulnera ſunt illata, clam, & ſemper inter inermes, contra morem tam ſuæ civitatis, quam ſuæ profeſſionis ſemper inceſſerat. Cumque a ſatellitibus eſſet deprehenſus, tam incondita, varia, & contraria titubante voce expreſſit, ut facile conjicere potuerint adſtantes, hunc ſolum criminis hujus fuiſſe authorem. Et cum examini publico ſubjectus eſt, ille ſingulas actionis hujus circumſtantias, tam minutatim, & exactè aperuit (poſtquam aperire voluit) ut nemini in poſterum ſit de authore dubitandum. Quibus omnibus conjungendum eſt, eum ſæpè ſæpius ſe hujus criminis authorem jactitaſſe. Quo unico indicio, Regum mitiſſimus *David Amalekitam* morte affecit. Et licet ibi nulla prævia illuxerit malitia, hic tamen notus eſt odiſſe aggreſſos, eorumque vitæ diu inſidias ſtruxiſſe, & præconis inſtar in idem facinus alios accendiſſe plurimos. Concludendum ne ergo, confeſſionem hanc ex omni parte ſpontaneam, tot præſumptionibus adjutam, & toties repetitam, nec ullo contrario argumento diminutam, ſatis efficacem ad eum e medio tollendum, qui etiam tacitis ſuorum ſuffragiis indignus hactenus judicatus eſt qui aura vitali fruatur?

Si per delirium (ſanctiſſimi Judices) poteſtas gladii hominum fœci committeretur, qui vel religionem impie ſimularent, vel melancholiam maniacam pro religione colerent; quis cædium eſſet modus, aut quis finis? Plateæ quotidie ſanguine maderent, aer ululatibus mugiret, & non ſolum in victimas caderemus inulti, ſed & imparati; dum nec animarum ſaluti, nec rei familiari, nec liberis, nec poſteris ſatis conſulere liceret. Quo quiſpiam in Dei cultum & Reipublicæ commodum magis eſſet intentus, eo citius a Dei & Reipublicæ hoſtibus trucidaretur: Et ferrum illud, quod in Conſiliarios Regios jam ſævit, mox ſucceſſu ſuperbiens, & crudelitati aſſuetum, in ipſos Reges, quorum hi ſunt membra, evaginatum videremus. Ne noſtro igitur ſanguine noſtra maculetur religio, ne in exitium humanum detorqueatur, quod in remedium humani generis erat deſtinatum; & ne deformandæ Dei imagini inſerviat, quod ad reſtaurandam illam imaginem inventum eſt, enixe rogamus. Redeat memoria in tempora illa, quibus a furiis *Knaperdolianis* agitabatur *Germania*; hi enim a conſimilibus rudimentis, in eum veſanæ nequitiæ gradum evecti ſunt, ut uxores ſuas in ipſo foro capite mulctarent, mandato, ut ipſi ferebant, Spiritus Sancti. Vobis ergo (Judices integerrimi) hodie eligendum eſt, num *Petrum* errantem, an dulciſſimum Jesum infallibilem? Num *Knaperdolianos* delirantes, an jus tum gentium, tum noſtræ gentis ſequi libeat?

# ACTIO QUARTA.

PRO

## Domino *Thoma Dalzel* de *Bins*,

CONTRA

## Dominam de *Caldwel*.

### *Num Subvaſſallo ob perduellionem damnato, redeat feudum ad Regem, ita ut debita Subvaſſalli ſolvere non teneatur?*

PERDUELLIBUS, *Anno* MDCLXVI. Marte *Dalzellii* Ducis Regii exercitus fuſis, auctus eſt ille fundo *Calvalliano*, ex perduellione ad Regem devoluto; cujus fructus dum petit, ſe ei opponit damnati uxor, contendens terras ſuas eſſe, nec fiſco vendicandas; cum maritus eas non de Rege, ſed de Comite de *Eglintone* tenuerit; & cum in iis non fuiſſet maritus Regis Vaſſallus, eas non Regi, ſed Domino immediate Superiori confiſcandas, a quo ipſa confirmationem obtinuerat. Et licet jus Vaſſalli delinquentis ad Regem perduellione devolvatur, devolvi tamen cum onere juris ab ipſo in eam tranſmiſſi; quippe quod ſuccedat Rex ratione coronæ, ex jure communi tanquam Rex; non verò tanquam dominus vel ſuperior jure feudali. Inter quos ſuccedendi modos hoc intereſſe contendit, quod ubi feudum modo feudali revertitur, eo in caſu fatendum ſit, feudum tale ad Dominum ſuperiorem redire, quale olim ab eo proceſſerat; nec teneri ipſum debita ulla agnoſcere, niſi quæ ſibi comperta, & ab ipſo ratihabita, ſeu confirmata ſunt; (ut nos loquimur) cum hoc naturæ feudi inſit, & jure feudali ſancitum eſſe negari non poſſit: Ubi autem Rex jure coronæ ſuccedit; ibi ita reſtringi ſucceſſionem ex jure communi, ut nihil Regi acquiratur, niſi quod ipſius vaſſalli delinquentis erat, idque afficiatur debitis quæ vaſsallum gravabant. Privilegia enim feudalia (inquit illa) juri communi erant incognita; cujus authores juſtum & æquum ſemper penſantes, nihil ſucceſsori acquiri poſse voluerunt, quod ei non competebat cui ſucceſſit: Nec eſse crimen læſæ majeſtatis feudale, ſed ex jure communi oriens. Cumque in omnibus aliis, ubi Rex jure communi ſuccedit, agnoſcere debita, & præſtare factum delinquentis ſemper teneatur, ut in eſchetis, aliiſque bonis allodialibus; Cur non & hìc, ubi eodem modo ſuccedit?

II. SUBVASSALLUS (ait) non eſt Regis vaſſallus; nam vaſſallus vaſſalli mei non eſt, in jure feudali, vaſſallus meus; *Vulteius, L. 1. Feud. C. 10 Specul. Tit. de Feud.* § 2. *Ver.* 14. Nec exercere poteſt jura feudalia in ſubvaſſallum: *Iſern.* & *Belvis,* in *C.* 1. § *fin. de controverſ. feud.* Adeoque nec poteſt ſubvaſſallum ad ſibi inſerviendum compellere: *Khol. de Subinfeud. C.* 4. *Num.* 38. Nec ei fidelitatem jurat ſubvaſſallus: *Schrad.* 6. *Feud.* 18. Nec ab eo renovationem feudi petere debet: *Schrad. ibid.* Atque adeo cum non ſit nexus feudalis inter primum dominum directum & ſubvaſſallum, non poteſt feudum reverti modo feudali; nec ſuccedit Rex jure feudali, ſed jure coronæ.

III. NIHIL tam a jure alienum, & juſtitiæ contrarium, quam innocentem obrui alieno delicto; ſed opprimeretur ipſa innocentia, ſi ſubvaſſallus feudo ſuo ob domini delictum privaretur; cum forſan & ipſe contra dominum ſub ſignis regiis militaret, præberetque anſam rebellioni contraria deciſio: Nam ſubvaſſallus domini ſui forisfacturâ periturus, ne dominus perdatur, nullum non movebit lapidem; & in fortitudine ſua, dum dominum rebellantem adjuvat, præſidium illud quæret, quod ei negarent jura ſi regem ſuum juvaret.

IV. APUD nos hoc clarius ex eo apparet, quod ubi ſubvaſſalli feudum ad fiſcum devolvitur, Rex feudum hoc non in donatarium immediate, tanquam ad fiſcum devolutum transfert; ſed præſentationem alicu facit, qua ſubvaſſallum domino ſubvaſſalli offert. Qui vacandi modus, tanquam à propria devolutione contra-diſtinctus, traditur in *Stat.* 2. *Parl.* 9. *Jac.* VI. Qua lege cautum eſt, *feudum ſubvaſſalli redire ad dominum Regem:* Quod indicat feudum illud modo feudali devolvi; ideoque Regem non obligatum iri ut delinquentis debita ſolvat. Ubi enim feudum redit jure feudali, conſolidatur dominium cum proprietate, teneturque dominus tantùm onera realia a ſe confirmata agnoſcere. Vult tamen ſtatutum illud feuda ſubvaſſalli non redire, ut vaſſalli; ſed Regem præſentare poſſe domino delinquentis directo ſubvaſſallum alium, qui ſuccedat in omne jus, quod ſubvaſſallo læſæ majeſtatis reo prius competebat; ac propterea cum jus uxoris jam refragantis ad reum non pertinuerit, nec ad præſentatum per ſtatutum hoc pertinere poſſit-

V. Ex eodem ſtatuto apparet, ſubvaſſallos vaſſalli forisfacti non teneri apochas feudi firmarum ſuarum, & annuorum redituum præſentatis a Rege exhibere; ne alias innocens ſubvaſſallus opprimeretur; dominique ſui de ſalute ſua deſperantis dolo & pertinacia apochæ abſtraherentur in perniciem ſubvaſſalli, qui ex ipſarum productione tutus foret; quod ineptum fuiſſet, ſi ipſius ſubvaſſalli jus Regi ex forisfactura vaſſalli ceſſiſſet.

VI. LICET hæc ex forisfactura compendia ſæpiſſime ſint Regi acquiſita; nunquam tamen deciſum reperitur Regem ſubvaſſallos excluſiſſe; quod procul dubio, ſæpenumero inveniſſemus, ſi jura noſtra annuiſſent.

ABSIT tamen (Judices integerrimi) fucatis hiſce argumentis, nunc primum in lucem erumpentibus, & proavis noſtris incognitis, Regis, regnique noſtri avita jura everti poſſe. Et ut juris tum noſtri, tum feudalis ſchema integrum hoc in caſu unico intuitu perſpicere poſſitis. 1. In memoriam revocandum nobis eſt, feuda ab initio beneficia gratuita fuiſſe, & a domino tunc plene proprietario, conceſſa ſub fidelitate, & pro ſervitiis; cumque Dominus perſonam idoneam elegiſſet, cujus fidei ſe committeret; juſtiſſimum erat huic non competere alienationem; & feudum redire debere ad dominum nullis pactis, aut debitis gravatum, ad quæ dominus non conſenſerat. Unde concludendum, ineſſe feudo ut in cujuſcunque manus pervenerit, non poſſit affici a vaſſallo ullâ ſubinfeudatione, domino invito; eſſeque de natura feudi, ut ad dominum eodem modò redeat, quo ab eo eſt profectum. Nec juſtum aut æquum ſane cuipiam videri poteſt, feudum hoc gratuitum, & ob ſervitia conceſſum, in alios transferri poſſe, quos vel non noverit primus dominus, vel noverit ſibi inimicos, & a ſe alienos. Nec hoc tanquam durum quivis calumniari debet; Quis enim beneficium vel aliis legibus daret, vel his recipere recuſaret? Et ſi ſubvaſſallus incommodo huic non proſpexerit, non jus illi, ſed ille ſibi damnum intulit.

II. Cum jus feudale omnem alienationem, invito & inſcio domino directo ſeu ſuperiore; prohibuiſſet, ſubinfeudationem, quæ & ipſa alienatio dici poteſt, non aliter permiſit, quam ſi ſubinfeudatio fieret ſub conditionibus primi feudi, ut noſtras *Craigius* tradit *Pag.* 347. Et ut pinguius ei ſuccurratur, acquirit ille hac ſubinfeudatione vaſſallum novum, cujus ſervitiis quoties indiget, uti poſſit; & hac ratione ſubinfeudatio admittitur, licet alienatio reprobetur, ut tradit *Vulteius*, *L.* 1. *Feud. Cap.* 10. *Num.* 149. *Khol.* in *C.* 1. *qual. olim feud. alien. pot.* & *gloſſ.* ad § *Præterea, hoc Cap.* Unde *Hottomanni* obſervatio in § illud quoque; 5. *C. imperiale*, de *probib. feud.* duriſſimam eſſe conditionem vaſſalli, qui non ſolum domino immediato, ſed & primo tenetur. Et niſi hoc admitteretur, inſulſum & ridiculum fuiſſet ſubinfeudationem admiſiſſe, repudiatâ omni alienatione. Hoc tamen admiſſo, multo magis abſurdum foret, ſubinfeudationem hanc ita admittere, ut ſubinfeudatus poſſit ſubfeudo frui, vaſſallo primo læſæ majeſtatis damnato, feudumque retinere poſſe, ſine primi domini approbatione, & confirmatione prius habita. Nam hoc non eſt habere duos vaſſallos, ut agnoſcit *Duaren.* de *Feud. C.* 12. *Num.* 12. ſi uterque iiſdem conditionibus teneatur, nec pinguius ei ſuccurri ſi uno caſu purum feudum redeat; altero verò redeat tantum vaſſalli debitis, & alienationibus gravatum. Et hinc etiam concludendum, nexum feudalem reperiri inter primum dominum & ſubvaſſallum: Qui nexus inter dominum & ſubvaſſallum, ex nova forma fidelitatis *L.* 2. *Feud. Tit.* præſcripta, liquidò etiam conſtat: *Ero fidelis* Caio *domino meo, contra omnem dominum, exceptis Imperatore* & *Rege.* Et apud nos, ut & jure communi feudorum; ſi dominus immediatus feudum adire diſtulerit, poterit ſubvaſſallus, climace feudali, ad Regem tanquam primum dominum, gradatim ſcandere, ejuſque vaſſallus fieri. Quod etiam uſitatum apud nos eſt, ubi quis dominium directum, ſeu ſuperioritatem ſui feudi acquirens ſe inveſtiri non poſſe credit: Quod fieri non potuit, ſi non eſſet nexus feudalis inter Regem & ſubvaſſallum, & ſi non eſſent vaſſalli noſtri, Regi noſtro etiam vaſſalli.

III. Crimen læſæ majeſtatis eſt delictum feudale, eſtque inter hæc primum; nullum enim dari poteſt crimen quod magis repugnet fidelitati, & ligantiæ vaſſalli: Cur ergo alia, non autem hoc inter crimina feudalia ſit reputandum, ratio nulla reddi poteſt; imo & jure feudali confiſcatio hæc feudi delinquentium eſt ad hoc introducta, ut habeat dominus feudum in ſolatium, & ad criminis, quantum licuit, reparationem. Conſulitur enim ſemper domino ſuperiori, in quem peccatum eſt, ut ei de injuria illata, & damnis perpeſſis ſatisfiat. Quæ juris ratio *L.* 2. *Feud. Tit.* quæ fuit prima cauſa amittendi feud. § 3. hiſce verbis approbatur; *Quæſitum eſt vaſſallo præter juſtam cauſam a feudo cadente, Utrum ad dominum, an ad ſucceſſorem Vaſſalli beneficium pertineat? Sed hæc diſtinctio tam ratione quam moribus comprobata eſt; ut ſi quidam vaſſallus ita in dominum peccaverit, ut feudum amittere debeat, non ad proximos; ſed ad dominum beneficium revertatur, ut hanc ſaltem habeat ſuæ injuriæ ultionem.* Summarium igitur hujus legis pro regula tradit, ubicunque dominus principaliter offenditur per reatum vaſſalli, ibi ad dominum feudum redit, ut habeat ſaltem injuriæ ſuæ ultionem. Unde juſtè arguendum eſt, 1. Redit feudum ſemper ad dominum offenſum in injuriæ ultionem; ſed in crimine læſæ majeſtatis, Rex non dominus immediatus offenſus eſt, ergo ad Regem redit feudum. Quod fundamentum in aliis juris definitionibus ſemper recipitur; nam virgo Deo dicata habet ſolatium de rebus raptoris qui eam rapit: *L. Raptores*, *C.* de *Epiſc.* & *Cler.* Et dos redditur patri, loco ſolatii filiæ in matrimonio defunctæ, ne damnum pecuniæ ſentiat, & filiæ amiſſæ: *L. Succurſum*, *ff.* de *jur. dot.* 2. Si per hunc textum dominus præferatur fratribus in ultionem injuriæ, adeoque ob hanc rationem violentur ipſa jura ſanguinis; multo magis præferendus erit Rex, primus feudi author, vaſſallo ſuo, qui eſt dominus immediatus, nec læſus. Receptum etiam eſſe hoc juris feudalis fundamentum, nobis noſter tradit *Craigius*, *Pag.* 373. ubi principium hoc juris feudalis illuſtrans, concludit, *Unde neceſſario ſequitur feudum eo caſu ad eum redire debere, contra quem commiſſum eſt crimen;* & *cum crimen læſæ majeſtatis ſit in Regem commiſſum, ad eum, ex ipſis regulis juris feudalis, redire debet.* Et hoc *Gallis* placuiſſe teſtatur hiſce verbis; *Les droits feudaux ont ſeulment ordonnè, que le vaſſal perd ſon fief, lors qu'il a offenſè, le delict ne'ſt contre lui,* & *par conſequence la confiſcation ne lui appartient pas; mais au Prince, pour reparation d'offenſe commiſe contre Sa Majeſtè; pour reverence de laquelle tous les docteurs limitent les ſtatuts qui veulent que la confiſcation appartienne aux ſeigneurs des fiefs, qui n'ayent lieu au crime de leze majeſtè. Specul. Tit.* de *Homagio* & *fidel.* § *Quoniam, Num.* 63. *Oldrad. Concil.* 17. *Guid. Pap. Quæſt.* 341. Quod *Latine* ſic reddi poteſt; Voluere tantum jura feudalia feudum immediato domino applicari, ubi immediatus ille dominus eſt a vaſſallo læſus: Sed crimen læſæ majeſtatis non eſt in eum commiſſum, ei ergo non applicatur confiſcatio; ſed Regi, hoc crimine offenſo. Adeoque limitarunt doctores ſtatuta illa, quæ verbis generalibus ſtatuunt, feudum confiſcatum ad dominum immediatum redire. Si ergo doctores in ea fuerint ſententia, ubi ſtatuta dominis immediatis favebant, multò magis pro Rege nobis reſpondendum, ubi non renituntur ſtatuta.

IV. Si aliter ſtatuiſſet jus feudale, ſua funditus ſubvertiſſet fundamenta: Nam ſi feudum ad dominum immediatum rediiſſet, & non ad Regem, in quem crimen eſt commiſſum; tunc dominus ille immediatus potuiſſet infidâ ſed tectâ colluſione, feudum delinquenti conſervare, ejuſque poſteris tranſmittere; ita ut nec crimen puniretur, & poſſideretur feudum a primi domini hoſtibus, & contagioſa inimicorum ſerie. Hinc etiam omnis ligantia inverteretur & interciperetur: Subvaſſallus enim, omneſque fere ſubditi, non a Rege, ſed ab his dominis immediatis penderent; eorumque, non autem Regis nutu gubernarentur; eos in bello adjuvarent, iis ſuffragia in pace darent; & quibus feudum aperiretur, iis fidem præſtarent. Creditores etiam illi qui pecuniam debitori rebellanti, & forſan ut rebellaret, credidere, fiſcum hac arte eluderent, licet jus eos excluſerit; ut crimen hoc, quod pecuniam (nervos ſcilicet belli) requirit, alimento fraudaretur; nec gravari voluit dominum ſuperiorem debito in ſuam necem forte contracto.

V. Si ex vaſſalli delicto feudum ad immediatum ſuperiorem devolveretur, tunc palam eſt dominum ad ſubvaſſalli facta præſtanda non obligatum iri; atque adeo ſi per vaſsalli non introitum domino jus acquireretur, hæc uxoris ſubinfeudatio dominum non gravaret. Quæ ergo ratio reddi poſſit, cur dominus non teneatur in tenuiore crimine, cum tamen teneatur, ubi jus quæſitum eſt ex perduellione, criminum omnium apice, non video. Et cum Rex ſuccedat ex hoc crimine, ut alii intermediati ex aliis ſuccedunt criminibus; conſequitur, quod cum hi non teneantur debita vaſsalli agnoſcere, ergo nec ille teneri debet.

VI. Ut feudum ſubvaſsalli ad Regem redeat, non ſolum ex nexu feudali, ſed juris tum civilis, tum gentium fundamentis oritur. Tanta eſt enim criminis læſæ majeſtatis atrocitas, tantaque immanitas, & tranſcendens nequitia, ut altius repetat Rex jura ſua, quam ex ſeriore jure feudali, inferioriſque ſuperioritatis, & dominii feudalis jure. Erat enim inter Regem & ſubditos relatio illa eminentiſſima, cui aſcita tantum & ſuperaddita eſt hæc ſuperioris & vaſſalli, nova quaſi contingentiâ; illa etiam ſuo ſinu omnes claudit, hæc paucas: Et injuſtiſſimum foret Regem in impenſas belli teneri, noſtramque protectionem ſuſcipere, nec tamen feuda rebellantium ad eum redire; cum hæc prædæ loco cedant, ſintque gloriæ umbra, & victoris merces; nec ſit ulla gens in Reges ſuos adeo ingrata, quæ non tribuat, quæque Regi deberi non exiſtimet hæc ſollicitudinis publicæ præmia; ſitque fidelitas, quæ domino immediato debetur; non ſolum ligantiæ, & fidelitatis, quæ a ſubdito Regi debetur, ſpecies quædam infima, & quaſi adnmbrata imago; ſed & involvatur fidelitas in omni ligantia, & illa hanc excipiat in omni juramento dominis immediatis jure feudali præſtito.

VII. Si feudum Dominis immediatis confiſcaretur, illi ad probationes aſtruendas & inſidias Vaſsallis ſuis ſtruendas invitarentur; quod minus in Rege & præſumendum & timendum, cujus opulentia avaritiam, & amplitudo omnem excludit crudelitatem: His etiam feudis per hanc confiſcationem in ærarium publicum redactis Reſpublica augeretur, & in ſingulorum commodum erogaretur, quod a ſingulis per confiſcationem infertur. Unde ut Reſpublica rebus privatis, ita & Reges hac in lite Dominis immediatis merito præferendi ſunt.

VIII. Statuto 37. Parl. 2. *Jac.* VI. Cautum eſt Subvaſſallos, qui pro Rege tunc dimicabant, non privandos eſſe ſubfeudis ſuis ob Vaſſalli interpoſiti delicta; quod ſupervacuum & incongruens fuiſſet, ſi ex jure noſtro ſubinfeudationes hæ non apertæ fuiſſent Regi ex Domini directi delictis. Ne tamen indulgentia hæc ad conſequentias traheretur, expreſſe proviſum invenimus per ſtatutum 201. *Par.* 14. ejuſdem Regis, conceſſionem hanc ex archivis publicis eliminandam. Si ergo indulgentia hæc ne vel his, qui vitam & bona pro Rege ſuo contra Dominos delinquentes exponebant, per ſtatuta eroganda eſſet; quid dicendum, ubi amici? Quid, ubi uxor criminis eſt conſcia, & adhuc ipſa in reatu hærens? Et ne conjecturis ullis locus ſit, nos deciſionem apertam pro Rege adducimus menſe *Maio anni* ſalutis MDCX. in lite a Rege Comitis *Bothwelii* Vaſſallis mota.

Argumentis pro Subvaſſallis adductis apertiùs reſpondere ſuperfluum fere poſt hæc videtur. Ex his enim patet ſubtilitatem, quâ redire contendunt feudum jure coronæ, & non jure feudali, juri noſtro novam & peregrinam eſſe, nec in ſe validam, nec theſi noſtræ contrariam; cum luculenter a nobis probatum ſit, Dominum & Vaſsallum non ſolum in jure feudali connexos, quin & teneri Vaſſallum primo Domino ligantia eminentiori. Ubi vero in jure feudali ſcriptum eſt, Vaſsallum Vaſsalli mei non eſse Vaſsallum meum, nec poſse Dominum remotum in Subvaſsallos jura feudalia exercere; hoc intelligendum tantum de Dominis interpoſitis, qui & ipſi ſubditi ſunt; nullatenus quidem de Rege primo feudi authore, cui ab omnibus fidelitas debetur, & ad quem feudum redit omnibus delinquentium debitis immune, ne correi & criminis conſcii lucrum captarent; Conceditur ſcilicet hæc confiſcatio, & hæc immunitas, in ſolatium criminis contra eum commiſsi, & ut ab ipſo ejus penderent ſubditi, nec dimidiata fide inter Regem ſuum & Dominum immediatum diſtracti, mutataque fide pro Domino directo, ſi ei lucrum cederet, contra Regem ſuum & Rempublicam armarentur.

Capita etiam illa juris feudalis, feudiſtarumque reſponſa, ſubinfeudationes haſce in Dominos immediatos, & non in primos ſeu remotiores devolventia, ita ſunt interpretanda, ut obtineant tantum in criminibus his, quæ non in *Cæſarem*, aut Rempublicam directe committuntur: Ut ex hiſce verbis *Craigii*, Pag. 373. apparet; *Feudum autem* (*inquit*) *ob culpam amiſſum accreſcit Domino, niſi cum Rex ſuæ injuriæ ultionem perſequitur*; *nam tunc & illud feudum, quod de alio Domino tenet, ſi damnatus fuerit, ad fiſcum devolvitur.* Hanc plane eſſe iſtorum capitum ſententiam teſtantur *Speculator*, *Oldradus* & *Guido Pap.* locis ſupra a me allatis: Nam, ut æquum erat Domino immediato ſubfeudum deferre, ubi crimen contra ipſum eſt commiſſum; ita & eadem ratione æquum viſum eſt, ſubfeudum illud eodem jure ad Regem devolvi, ubi ſubinfeudatus perduellionis & læſæ Majeſtatis damnatus eſt; cum hæc crimina in Regem ſolum committi poſſint. Quin etiam illo caſu, quo ſubfeudum in Dominum immediatum devolvebatur, tenebatur Dominus immediatus Subvaſſallum Domino mediato exhibere, ut ei ſatisfaceret: Quod ſi præſtare hoc aut non potuit, aut noluit Dominus immediatus, revertebatur tunc ſubfeudum ad Dominum majorem, ſeu Dominum illius Domini. Textus habetur in § illud quoque præcipimus de prohibit: Feud. alien. per *Frederic*: *Illud quoque præcipimus, ut ſi Vaſſallus de feudo ſuo alium Vaſſallum habuerit, & Vaſſallus Vaſſalli Dominum Domini offenderit, niſi pro ſervitio alterius Domini ſui hoc fecerit, quem ſine fraude ante habuerit, feudo ſuo privetur*; *& ad Dominum ſuum a quo ipſe tenebat, revertatur*; *niſi requiſitus ab eo paratus fuerit ſatisfacere majori Domino, quem offenderit*; *& niſi Vaſſallus, idemque Dominus a Domino ſuo requiſitus eum, qui minorem Dominum offenderit, requirat, ut ſatisfaciat*; *ſuum feudum amittat.*

Nec movent argumenta ex ſtatuto adducta; nam cum ſtatutum illud pro Rege ſit ſcriptum, contineatque extenſiones etiam in ſe odioſas, ſi has non dictitaſſet perduellionis horror, miror multum illud ita detorqueri poſſe. Quis enim ita hallucinari poteſt, ut credat feuda omnia ſine ulla diſtinctione Vaſſalli a Subvaſſallo, quæ poſſederat damnatus per quinquennium, ad Regem devolvi, ſine omni non ſolum onere, ſed & neglecto omnium jure, & vero Domino; & tamen non poſſe ſubfeudum redire aliàs, quam Vaſſalli debitis onuſtum? Cum ergo in ſtatuto dicitur, Regem damnato Subvaſſallo debere Vaſſallum Domino præſentare, qui ſuccedat in omne illud, quod ad Subvaſſallum pertinebat; hoc ex eo provenit, quod non poteſt Rex Subvaſſalli munere fungi, ideoque alium præſentare ſeu nominare debet, qui Subvaſſalli vices ſuppleat, qui ſuccedat in omne jus Regi acquiſitum. Et verbum (pertinet) hic, ut ubique, ita interpretandum, ut ſenſus ſit, quicquid Vaſſalli erat, in quod fiſcus ſuccedere poterat, id omne ad præſentatum pertinebit. Alter etiam ſtatuti ramulus, quo Subvaſſallis conſulitur, ne quid detrimenti capiant ex ſubſtractione apocharum ſui Domini, idcirco tantum introductum eſt ex bono & æquo, ne facto alieno exhaurirentur. Quod neceſſarium ipſis erat, etiam ubi Rex, vel Dominus primus ſubinfeudationem approbaſſet; nam approbatio hæc non poterat Dominos hos remotos ab omni actione ob non ſolutum canonem, & actionibus aliis reſciſſoriis ex clauſulis irritantibus munire. Unde rationi conſentaneum erat Subvaſſallos hoc ſtatuto expreſſe ſecuros reddere, quos etiam protexiſſet in omnibus, ſi hoc legiſlatores voluiſent. Nec per incuriam, ſed conſulto hoc omiſſum, ut Subvaſſalli de jure ſuo ambigentes, Regi opem ferrent contra Dominos immediatos res novas molientes; Regiſque ſui munificentiam cordata fortitudine cierent, ipſum gratitudine devincientes, ubi jure non poſent; & ut a Rege confirmationem impetrarent, eumque omnes ſubditi ita, omni in caſu, Dominum agnoſcerent. Quæ confirmatio gravamen neutiquam reputandum eſt, cum impenſæ ad hanc requiſitæ vix ſint penſandæ; ſitque confirmatio etiam ad alia neceſſaria, ut ſcilicet excludantur non introitus, eſcheta, aliaque emolumenta fiſcalia ex Domini interpoſiti delictis exurgentia.

Si ergo prælationem hanc leges olim Regibus probitate ſæculi munitis conceſſerint, quando religio gratitudinem amplexa perduellionem quaſi horrendam nequitiam arcebat; cur non & hoc potius hodie concedendum, ubi rebellio ſe in ſanctitatem transformavit, ſeque in magnanimitatis ſpeciem erexit?

# ACTIO QUINTA.

PRO

## Magiſtratibus Urbis *Hadinæ*,

CONTRA

## Hadinæ *Comitem*.

### *Parochia adjutorem Presbyterum dotante, num ejus præſentatio Patrono Rectoris accreſcat, an vero ratione dotationis ad Parochiam dotantem pertineat?*

ECCLESIA hujus Urbis eſt inter locupletiſſimas hujus Regni *rectorias*; cujus Patronus cum eſset Rex in locum Papæ ſuccedens, ille *jus patronatus* Comiti *Hadinenſi* conceſſit. Sed Rectore ad curam tot animarum non ſufficente, Eccleſia hæc a Magiſtratibus ſubſidiario ſtipendio in uſum ſecundi Presbyteri, ſeu Miniſtri (ut vulgus loquitur) liberaliter dotata eſt, qua dotatione ſe merito Patronos hujus ſecundi credidere. Cum tamen ex more Presbyterum præſentaſſent, contendit *Hadinæ* Comes ſe ſolum Patronum eſſe; nam cum ſit Eccleſiæ ipſius Patronus, ſe Patronum etiam ſubſidiarii, ſeu ſuccurſalis Miniſtri jactitat; quia acceſsorium ſequitur naturam ſi principalis. 2. Nemo quidlibet poteſt in Eccleſia patronata ſine conſenſu Patroni; atque adeo ſicut is, qui Eccleſiæ inædificaſset, jus ea ædificationâ non acquiſiviſset, ſed quod ſuum erat, perdidiſset; ita & multo minus, qui ſalarium Presbytero in ea Eccleſia dotavit, dotando jus patronatus acquirere poterat. 3. Si aliter obtineret, quilibet in ſocietatem patronatus ſe ſine conſenſu Patroni ſuperfœtatione voluntaria intrudere poſset. 4. Injuſtum eſſe contendit, ædificium Eccleſiæ, quod à Patrono conſtructum ſupponunt canones, aliis Presbyteris ab eo non præſentatis impertiendum. 5. Hoc in terminis pro Comite deciſum affirmant ejus Advocati *Cap.* 3. *de Eccleſ. ædif.* ubi *Alexander* 3. ab Archiepiſcopo *Cantuarienſi* conſultus, quis Patronus eſſe debeat capellæ intra limites parœcialis Eccleſiæ conſtructæ? Reſpondet Rectorem, aut Parochum matricis Eccleſiæ, verum eſſe Patronum illius capellæ. Et gloſſa Hoſtienſis ſententiam ſequuta ait, illud ita conſtitui jure quodam compenſationis, quod nempe capella fundetur in præjudicium majoris Eccleſiæ, cum ſit ejus tantum membrum, & titulus parœcialis Eccleſiæ ut ait *Innocentius*, *Lib.* 2. *Reg. Epiſt.* 137. Ita ut Sacerdos in ea inſtitutus ſit tantum Vicarius perpetuus Rectoris Eccleſiæ majoris: Ut deciſum eſt apud *Guid. Pap. deciſ.* 36. Cum ergo Patronus principalis, & matricis Eccleſiæ ſit Patronus alterius & diſtinctæ Eccleſiæ, quam & ædificavit & dotavit alius, multo magis Patronus remanebit ſuæ Eccleſiæ a ſe ædificatæ.

SED hiſce non obſtantibus, ego Magiſtratus hujus Urbis, qui Miniſtrum ſoli dotarunt, Patronos hujus beneficii, iiſque ſolis præſentationem competere ex his concludo argumentis.

PRIMO, Ipſum jus patronatus ab initio introductum eſt, vel ut hoc ſtimulo excitarentur divites ad Eccleſias ſuis impenſis fundandas; quod adeo obtinuit, ut regnis hac inebriatione exhauſtis, neceſſarium Imperatoribus eſset modum & fibulam ædificandis Eccleſiis imponere. *L.* 16. *Co. Theod.* de pœn. vel ex devota potius primitivæ Eccleſiæ gratitudine, (cujus Antiſtites ſecularium tunc nec æmuli erant, nec ipſis invidentes) jus hoc patronatus in liberalitatis monumentum largiente: Et (ut ait *Canon.* 37. *Concil. Tolet.* 4.) Præbendum eſt a Sacerdotibus vitæ ſolatio indigentibus, & maxime his, quibus reſtituenda viciſſitudo eſt. Sed utrum ex uno, an ex altero fluxerit fonte, ſemper concludendum Magiſtratus hos, qui Preſbyterum hunc ſoli alunt, antidorali hac munificentia aggratiandos eſſe, eorumque exemplo alios in conſimilem liberalitatem invitandos. Et quænam gratitudinis ſpecies retributionem in ejus gratiam exigit, qui ipſe nihil contribuit? Hoc eſſet pia ingratitudine mea merita in alium transferre, & verum Dominum fame conficere, ut alius ejus cibariis alatur. Si vero hæc Eccleſiæ neceſſaria viſa ſunt in fervente & robuſta ejus juventute, quid in frigida hac ejus ſenectute dicendum vobis relinquo, quibus nimis nota eſt cum Eccleſiæ, tum devotionis noſtræ tenax parſimonia?

II. NON ſolum qui eccleſiam edificavit, ſed & qui eam dotavit, jus patronatus in ea acquirit: Nam (ut ait *Juſtinianus Nov.* 51. *C. ult. Si quis ædificans eccleſiam, aut etiam aliter in ea miniſtrantibus alimenta expendens clericos ad epiſcopum deducat.* Unde *Innocent.* IV. *ad rub. Tit.* de *Jur. patronatus*, tradit eum habere jus patronatus cum ipſo conſtructore, vel etiam eo invito; quaſi ambo ſimul eccleſiam illam fundaverint. Cum ergo hi ſalarium & dotem hanc canonicam præbuerint, iis acquiſitum eſt jus patronatus; nec excludit prior patronatus jus hoc ex nova proveniens liberalitate. Nec hujus argumenti fidem diminuit, quod hi magiſtratus jus patronatus non expreſſe reſervarint in dotatione ipſa; quippe quia novimus per dotationem jus patronatus ipſo jure acquiri ſine ulla reſervatione; *Lambert.* de *Jur. patro. Art.* 5. 10. *Quæſt.* 2. *Part.* 2. & probata fundatione non neceſſarium eſſe probare reſervationem juris patronatus; *Maſcard. Concluſ.* 960. *Num.* 31. Reſervationes enim has neceſſarias eſſe Neoterici quidam tantum tradidere, dum nimium Papali poteſtati adularentur, piſcibus captis eſcam negligentes: Sed cum ex gratitudine patronis debeatur jure illo naturali, in quo omnia antidora fundantur; cumque ſit legibus & canonibus conceſſum, ipſo jure deberi affirmandum eſt: Et quod jure meum eſt, fruſtra reſervatur; nec ad hæredes deſcendunt quæ ex mera gratia, & non ex jure debentur. Sed jus hoc ad hæredes tranſit, non ſolum jure canonico, *Canon. filiis*, 16. *Quæſt.* 7, ſed & noſtro; *Reg. Maj. Lib.* 3. *Cap.* 33. *Num.* 7. Unde optimè *Molinæus*; *Sed tantum abeſt ut patronus ex reſervatione jus patronatus habeat (ut commenti ſunt novi Caniſtæ) ut hoc habeat jure primitivo, & tanquam partem juris & dominii priſtini.* Licet *Hopæus* noſtras reſervationem requirat, recentiores canoniſtas hìc, ut in aliis, nimium ſequutus. Sed quicquid in hoc puncto juris obtineat, clientes mei reſervare non poterant, quia dotationem hanc in ſua poteſtate ſemper retinebant, & ab ipſo momento quo prodiit proviſio, ſe pro patronis ſemper gerebant; atque adeo prioris patroni erat ædem ſacram in initio non communicaſſe, & ni patronatui renunciarent ſe dotationi opponere. Quod ſi feciſſet, vel hunc ex conceſſione obtinuiſſent, vel ſalarium hoc non dotaſſent; & veriſimillimum eſt patronum rectoriæ hoc non fuiſſe recuſaturum, cum hac dotatione minueretur ejus clerici cura; atque adeo quia minus laborioſum, ideo deſiderabilius erat ejus beneficium; quin etiam chriſtianum ducimus, quantum in nobis eſt, uberiori animarum curæ proſpicere, conditorique (ut ait *Innocentius* IV. loco ſupra citato) gratiſſimum eſſe debere, quod alterius beneficio gaudeat eccleſia noſtra.

III. ADEO verum eſt poſteriores donationes in ſocietatem juris patronatus nos admittere, ut hinc profluant alternæ præſentationes in jure canonico toties celebratæ, quibus conceſſum eſt patronis ſociis per vices, ſeu per turnum, ut quidam barbaré loquuntur, parochos præſentare: Quæ medietas patronatus *Innocentio* III. dicitur, *Lib.* 3. *Reg. Epiſt.* 226. conſuetudo ex jure civili orta per l. quoties, 34 de *Uſufruct.* ubi ſervitutes alternatis vicibus ſocialibus dominis permittuntur. Nam ſi primus patronus per acceſſionem ſeriores omnes deglutiret, nec eſſet eorum gratificationi locus, (ille enim ſolus extaret patronus) nec eſſent ullæ intervallatæ præſentationes in gyrum ita circulantes. Quin & hinc etiam fluxit, quod non ſolum ſint alternæ præſentationes: Sed quod ad noſtrum caſum propius accedit, habeat unus ex patronis unius, & alter alterius præſentationem; ideoque in Eccleſiis conventualibus, & apud nos hodie collegiatis, prælatus & præbendæ diſtinctos ſæpe habeant patronos; quod & in univerſitatibus & accademiis accidit, ubi qui accademiam fundavit, non ſemper univerſos præſentat Regentes; ex eo certe, quod qui Eccleſiam aut accademiam fundarit, præbendarum, & regentium non fuerit & idem fundator.

IV. TRITUM eſt illud apud Canonicos, patronum ex fructibus ſui beneficii alendum, ſi prematur inopiâ, ne ſua ſpolietur munificentiâ; *C. Quicunque*, 16. *Quæſt.* 7. Sed ſi ſeriores hæ donationes primo patrono accreſcerent, poſteriores benefactores hoc exuerentur privilegio; nec in his beneficiis huic axiomati locus eſſet: Primus enim hoc petere non poſſit, quia non ab eo fluxit beneficium, & ſic injuſta quoad eum foret alimentaria hæc hypotheca; nec ſecundus, quia non reputaretur patronus, adeoque neuter. Nam hoc privilegium patrono benefactori tantum debitum; nec primo, quia non patrono; nec ſecundo, quia non benefactori debetur. Quod dubium nos nonnihil gravius premit, qui aperto ſtatuto, ſcilicet 1. *Parl.* 21. *Jac.* VI. *Patronis conceſſimus, ut, vacante eccleſia ſine eorum vitio & culpa, fructus viduatæ Eccleſiæ apud nos remaneant.* Quod & in *Gallia* obtinere teſtatur *Molinæus*; & in ſe æquiſſimum eſt, cum patroni ſint œconomi ſui beneficii, & cuſtodiam habeant ſuarum Eccleſiarum cum vacaverint; *Cap.* in quibuſdam 12. ext. de *Pœnis*, *Cap.*

*generali* 13. de *Elect.* in 6. Sed ſi qui dotem aſſignavit, patronus non ſit, ei hoc non concedendum; nec concedendum erit illi qui non dotavit, cum in eo deficiat ratio gratitudinis, unde hoc fluxit privilegium: Si ergo ærarium urbanum debitis exhauriretur; Injuſtumne eſſet bona civitatis haſtæ ſubjici, ipſoſque magiſtratus in carcerem condi, ſalario ab ipſis dotato apud patronum rectoriæ, qui nihil contulit, remanente? Anne juſtius, & gratitudini ſpirituali accommodatius eſſet, ſalarium eo caſu non amplius deberi? & ab ipſis condici condictione, *cauſa datâ, cauſâ non ſequuta?* Cum enim ab ipſis proviſio hæc ob civitatis emolumentum dotata fuiſſet, & ut pietatis ſuæ monumentum eſſet; Quis his deficientibus definire vellet gratitudinem hanc hac ingratitudine obrutam iri? Nec ulla deciſio ad plures & plura ſe extendere poteſt, cum vix ulla ſit civitas apud nos, quæ hac deciſione non ſpoliaretur; quandoquidem ipſis jam familiare ſit ad æmulationem uſque, ſecundarios hoſce miniſtros alere: De quo alacrius conſentiunt cives, quod ſciant ſuos omnibus præferendos, & quod promoti pio in negotiis conſilio, & ſeditionibus compenſendis ſint maxime neceſſarii. Quibus omnibus ſolatiis defraudantur, promotione in extranei poteſtate collocata; ab eo enim promoti contra cives fundantes pro patrono factiones apud ipſos ſæpe alerent. Nec ullis patronis tam favendum eſt, quam his, qui & ipſi patroni & parochiani ſunt; cum ejus prædicatione & cura magis ſemper profecerint, qui ab ipſis in curam hanc eſt ſuffectus: Qua præſumptione victi adeo nuper apud nos ſunt regni ordines, ut, ſpreto jure fundationis, electionem parochi parochianis elargiti ſunt. Et licet ſtatutum hoc jam corruerit, ſupereſt tamen præſumptio cui innitebatur; & ab abrogatis legibus ſæpe arguere licet. Ad contraria argumenta reſpondetur, ſecundum hunc Presbyterum non accedere principali rectoratus beneficio, ſed in diſtinctam erigi dignitatem, ſapereque hanc conjunctionem non acceſſionis, ſed miſtionis ſpeciem; in quo genere acquirendi dominii recipitur, ut ſi mixta ſeparari poſſint, remaneant dominia etiam ſeparata. Nos veritatem in ſpiritualibus, magis quam fictionem ſequimur; *Arch. Cap. un.* de *Vot. in* 6. adeoque fundantis liberalitatem potius, quam acceſſionis fictionem reſpicere debemus. Cumq; Eccleſia hæc non a patrono, ſed ab hiſce magiſtratibus indies reparetur; credendum eſt penes hos eſſe ædificii dominium, penes quos eſt ipſius cura; eſtque licentia hæc in uſum miniſtri hujus parca ſatis ſuæ liberalitatis uſura. Et licet potuerit patronus ab initio ædis ſacræ, uſum cujus patronus erat, non communicaſſe; non tamen inde concludendum ex conceſſa hac licentia, ſecundarios hos benefactores juri patronatus renunciaſſe; & ad ſummum concludendum tantùm erat, Patronum rectoralis Eccleſiæ poſſe adhuc ſecundo huic ingreſſum occludere, at non ſecundum præſentare. Et quoad hoc acquiſitum eſt jus in ea prædicandi præſcriptione legitima, quæ obtinere poteſt in gratiam unius eccleſiaſtici contra alium, licet de laicis hoc dubitari ſoleat; nam privilegiatus contra privilegiatum non utitur privilegio. Aut certe præſentia & patientia patroni haberi debent pro ipſius conſenſu (& ſi expreſſe conceſſiſſet ædis ſacræ uſum, nulla foret difficultas) ubi agitur de bono & commodo Eccleſiæ; nam non ſolùm quoties de commodis agitur, tacens habetur pro conſentiente, ſed etiam ubi tacentis damnum verſatur, ſi materia favorabilis ſit reipublicæ. Nec eſt quod hinc timeat patronus legitimus poſſe jus ſuum alterius intruſione dividi; nam jus ejus ſine aut expreſſo, aut tacito conſenſu auferri nequit, niſi ubi agitur de indubitato Eccleſiæ commodo. Quod ad *Cap.* 3. de *Eccleſ. ædif.* reſpondetur, jus patronatus capellæ illius ſuccurſalis patrono matricis Eccleſiæ eſſe adjudicatum (ut ait gloſſa) jure compenſationis; cum fundata fuiſſet in præjudicium majoris Eccleſiæ: Sed ex noſtra proviſione nullum damnum rectori ortum eſſe, nec ex ejus fructibus creviſſe proviſionem; nam facti ſpecies hæc erat; Villa quædam ita a parœciali Eccleſia diſtabat, ut hyberno tempore prohiberent ſæpe inundationes ne ad Eccleſiam ſuam parœciani ire poſſent; unde ea de re apud ſuum diœceſanum conqueſti ſunt, & ab eo petierunt, ut in villa ſua minorem Eccleſiam ædificarent; de quo conſultus *Alex.* III. mandavit in ea villa ædificari Eccleſiam; quia principalis Eccleſia aliunde multis reditibus abundabat; reſcripſitque parochum principalis Eccleſiæ verum patronum eſſe ſecundariæ illius, quia ex reditibus ejus eſt dotata. Unde arguendum eſt, 1. Patronum principalis Eccleſiæ non eſſe Patronum ſuccurſalis Eccleſiæ, ut ab adverſariis noſtris demonſtrandum erat. 2. Cum hic definitum ſit Parochum principalis Eccleſiæ Patronum eſſe ſuccurſalis, quia ex reditibus ejus minor illa Eccleſia erat dotata, conſequens erit jus Patronatus inferendum eſſe ex dotatione, & non ſequi principalem Patronatum tanquam ejus acceſſorium.

Et licet Rectoris primarii conſenſus requiratur in nova Eccleſia intra limites ejus extruenda, ne vel in hoc tamen Patroni conſenſum requiri invenimus. Nam licet beneficium, cujus ille Patronus eſt, uniri non poſſit alii beneficio ſine ejus conſenſu, non tamen inde conſequitur alium Presbyterum non poſſe adjungi; cum in illo diminuatur ejus Patronatus, in hoc autem ille ſolus ſuum Clericum præſentet. Sed & in priore caſu, etiam renitente Patrono, poteſt Epiſcopus ex juſta cauſa, ſine Rectoris conſenſu, novam Eccleſiam intra fines veteris exſtruere *Cap. ad audientiam in fine de ædifican. & reparand. Eccleſ.* quia (ut notat *Bengæus* de *benefic. cur. haben.*) proprium & ſpeciale Rectoris commodum Eccleſiæ utilitati cedere debet; adeoque jus Patronatus altaris, etiam in Eccleſia patronata, & ſine reſervatione, adjudicatum legimus apud *Panorm. Concil.* 105. Qua ratione apud nos obtinet, ut & ſæpiſſime uniantur Eccleſiæ diverſos Patronos habentes, invitis Patronis, præſentatione tantum iis per vices reſervata: Cur non ergo multo magis hoc concederetur bono Eccleſiæ? Et cur Magiſtratus hujus Urbis ſaluti ſuarum animarum proſpicientes præſentationem Presbyteri ab ipſis dotati non haberent, qua nihil Patrono antiquiori ſubſtractum eſt? Cum ille ſemper unum, ut olim, præſentet; nec ex ejus beneficii reditibus quidpiam in hujus uſum detractum ſit. Quod ut juri Canonico magis congruit, ita & avus hujus actoris verum quondam agnovit, qui per libellum ſupplicem a Magiſtratibus hujus Urbis petiit, ut Capellanum ſuum huic beneficio præſentarent. Qua ſupplicatione jus noſtrum homologavit; quodque olim approbavit defunctus; jam reprobare non poteſt ejus hæres. Nec obſtat quod, poſt tanti & tam turbidi temporis intervallum, autographum perierit, nec probari hoc niſi ex archivis noſtris poſſit; quis enim auderet falſum tale actis inſinuare, in præjudicium Secretarii hujus Regni viventis, & in proximo etiam viventis?

Si ergo, Cancellarie Ampliſſime, Senatores noſtri Canonum tenorem, ſi piam Eccleſiæ gratitudinem, ſi quid conducat aliorum hominum incitamento, ſi loci conſuetudinem & commodum reſpexerint, pro Clientibus meis deciſuros eſſe nullos dubito; ne periiſſe Laicis videatur, quod ipſi in ſacrum uſum contulerunt. Nulla hac pietatis opimior uſura, nullum pulchrius, nullum ſtabilius famæ monumentum.

# ACTIO SEXTA.

PRO

*Davide Melvil*, Filio Domini de *Melvil*,

CONTRA

Comitem de *Rothes*, Illuſtriſſimum *Scotiæ* Cancellarium.

*Num, pluribus gradatim ſubſtitutis, remotior extans tempore delatæ hæreditatis adire poſſit? Anne expectandus ſit hæres poſſibilis, quia proximior?*

ALEXANDER primus *Levini* Comes terras fortitudine acquiſitas, ſubſtitutione juſta, inter ſuos continuit; remotiſſimos agnatos familiæ *Rothuſianæ* præferens. Ejus autem ex filio nepos, qui de terris illis ultimo ſaſitus obiit, eas hæredibus ſuis ex corpore ſuo procreatis reliquit; quibus deficientibus, ſecundo genito Comitis *Rothuſii* Cancellarii noſtri ipſius avunculi; quo etiam deficiente, ſecundo genito Domini de *Melvil*, qui ſororem ejus uxorem duxit; quo deficiente, ſecundo genito Comitis de *Weems*; quibus demum omnibus deficientibus, hæredibus & aſſignatis ſuis quibuſcunque.

Interea temporis, quo mortuus eſt *Alexander Levini* Comes, nullus extabat (nec adhuc extat) filius ex corpore Domini Cancellarii procreatus; ideoque ſecundo genitus Domini de *Melvil* hæreditatem ſui avunculi ex privata deſtinatione petit; cum ille ſolus exiſtat tempore delatæ hæreditatis, qui adire poſſit. Petitioni repugnat D. Cancellarius, quaſi hæreditas ſuo ſecundo genito, quandocunque extituro, debeatur; nec licere ſecundo genito *Melvilli* hæreditatem adire contendit, quam diu prioris ulla ſpes affulſerit. Quæſtio ergo ex hujus ſubſtitutionis formula hæc orta eſt, *Poſſitne ullus hæreditatem adire, antequam conſtet, num Cancellarius ſine ſecundo genito deceſſerit?*

Ego (Judices ampliſſimi) contendo illum hæredem eſſe, qui inter ſubſtitutos extat tempore delatæ hæreditatis; nec expectandum eſſe poſſibilem & imaginarium hunc hæredem, vel potius hæredis umbram. Quam concluſionem hiſce argumentis ſtabilire conabor; Primo, clauſula & deſtinatio hæc (*quibus deficientibus*) ut & omnis ſcriptura, ita eſt interpretanda, ut adaptetur commodo ſcribentis; præſumendum enim, bonum quemque patrem familias ita bona ſua diſpoſuiſſe: Nemo enim ſuum jactare præſumitur; nec quod in commodum noſtrum erat deſtinatum, in noſtrum incommodum detorqueri debet. Sed ſi ſubſtituens deſtinaſſet per clauſulam hanc conferre aditionem hæreditatis ſuæ in expectationem hæredis poſſibilis, & eandem in ejus exiſtentiam differre; familiam ſuam funditus evertiſſet. Quis enim eſt, qui neſciat poſſibilitatem hanc poſſe in 50 annos produci? D. Cancellarii ætas & temperamentum hoc quidem votis noſtris dictitant. Et ſi aditio hæreditatis in longam annorum ſeriem protraheretur, jacente hæreditate, feudum Regi tanquam Domino ſuperiori aperiretur. Dumque eſſet feudum penes Regem, creſcerent uſuræ in triplum ſortis; reditus enim, unde ſolvi debent, Regi ejuſque donatario erunt applicandi. Cumque terra vel feraciſſima æquet tantum valorem proventuum ex terra illa per viginti annos exorientium, inferendum eſt juſta conſequentia, familiam hanc ſubſtitutione hac ære alieno obrutam iri, antequam hæreditatem futurus hæres adire poſſit; futuramque hanc ſubſtitutionem in favorem non hæredum, ſed fiſci conceptam. Durante etiam hac expectatione, nemo familiæ onera & neceſſitates ſublevandas curabit; nemo tutorum rationes inſpiciet; nemo actiones forenſes contra præſcriptionum fatalia, & adverſariorum machinationes defendet; nemo cum creditoribus tranſigere, nemo a debitoribus exigere quidpiam poterit.

II. Ille ſenſus omni ſcripturæ adaptandus eſt, quem proferens ipſe veriſimiliter expreſſiſſet, ſi dubium ſibi fuiſſet enucleatum. Quis autem ſanus hærebit aſſerere, ſubſtituentem noluiſſe Comitatum ſuum hiſce difficultatibus & incommodis exponere? Et ſi quis, dum recitabatur ſubſtitutio, interrogaſſet; viſne, Illuſtriſſime Comes, per verba hæc, (*quibus deficientibus*) Comitatum tuum tantiſper ſine hærede eſſe, dum conſtiterit, an filius D. Cancellario exiturus ſit? An ita ut interim Regi aperiatur? Anne hæres proxime ſubſtitutus hæreditatem adeat, ut æmolumento ſit tuæ familiæ, tuiſque creditoribus? Reſpondiſſetne, ſe velle omnes ſubſtitutos ita ſuccedere, ut nullus ſit hiatus; & ut is præferatur quem Deus, (qui ſolus hæredes facit) hæredem elegerit, quique fato ſuo tempore delatæ hæreditatis exiſtens incertitudinem, una cum hæredibus illis poſſibilibus, excluſerit. Quæ constructio ut omnibus actibus humanis, ita multo magis ſubſtitutionibus aptior eſt. In his enim hoc agitur, ut conſerventur familiæ; ſunt enim ſubſtituti electi magis ut defuncti familiam ſuſtentent, quam ut ipſi ditentur. Et defunctum hunc ſibi propoſuiſſe ſubſtitutionis finem, vel hinc apparebit; quod ſubſtituens expreſſa conditione voluit ſubſtitutos, licet ſaſitos, teneri ſe hæreditatem hanc fiduciariam reſtituturos, ſeu, ut forum noſtrum loquitur, ſe in favorem remotiorum ſubſtitutorum denudaturos, ſi delata ipſis fuerit hæreditas alia antiquioris & ditioris familiæ.

III. Expectatio hæc ſi neceſſaria redderetur, multa abſurda produceret. Fingamus ergo minimum natu ex tribus fratribus, opulentam hæreditatem ſecundo genito nondum nato fratris ſui primogeniti reliquiſſe; quo deficiente, ſecundo ſecundi; eoſque oneraſſe ſolutione dotis filiæ ſuæ *Sejæ*; eſſetne, quæſo, injuſtiſſimum filiam teſtatoris tantiſper indotatam manere, dum ſecundo genitus ex primogenito naſceretur? Nam donatario nec alimentis, nec doti obligato, vitam ex defectu alimenti, & matrimonii ſpem etiam alimentaria amitteret. Quantum etiam fallerentur, qui annuum legatum ſeni avunculo, vel materteræ relinquerent, ſi hæres ſcriptus tali expectatione in ævum incertus foret.

IV. Nec in necem ſolum defuncti, & ex eo deſcendentium, ſed creditorum etiam hoc aſtrueretur. Nam dum trahitur conditio, creditores alii ſorte, qua mercari eſt neceſſe, alii uſuris unde neceſſe eſt vivere, fraudarentur. Nec eſſet parentibus unde liberos educare, nec liberis unde parentes alere poſſent; ſine commercio Reſpublica, ſine impenſis neceſſariis res privata langueret. Quodque omnis iniquitatis caput eſſet, hac deciſione occaſio præberetur defraudandis creditoribus in ſolidum; nam debitor ſuæ decoctionis ſibi conſcius, poterit in futurum dilata aditione efficere, ut feudum Regi cedat; cavendo tamen prius, ut in fiduciarium ſuum emolumenta feudi transferat. Et licet confirmtione a Superiore impetrata, creditor ſe contra wardam, eſchetas, & ipſam læſam Majeſtatem tutari poſſit; nihil tamen ſupererit, quod creditori hoc in caſu præſidio foret. Quæ, & his ſimilia, inhumanitatem hujus ſententiæ ſatis ſuperque demonſtrant.

V. Non ſolum incommoda & abſurda, ſed & dubia infinita & inextricabilia orirentur ex hac hæreditatis dilatione; ex. gr. ſi filius ſororis, alteriuſve mulieris ſubſtitutus fuiſſet, ut in hoc caſu ſubſtitutus eſt filius Comitiſſæ de *Weemiſs*; tunc cum terminus parientium ſit incertus, incertiſſimum proinde eſſet, quando ſubſtitutus ulteriori gradu adire poterit; nec deficere poſſunt hæredes, quamdiu natura deficere non agnoſcitur. Et licet natura parientes intra quinquageſimum annum ut plurimum contineat; ne tamen videatur ſuis limitibus arctari, etiam ultra ſexageſimum annum quibuſdam obſtetricat; nec vult ſibi leges dici, a qua leges ferri convenit.

VI. Repugnaret & hæc naſcituri expectatio legibus ſucceſſionis ex jure communi deſcendentis, ſucceſſioni feudali, ſucceſſioni proviſionali, & qualificatæ, quam nos taliatam appellamus; naturæ feudi, & ſtylo, & formulis, quibus ad ſucceſſionem vocantur noſtri hæredes; nec hanc dilationem & ſuſpenſionem admittit natura dominii.

Quoad ſucceſſionem ex jure communi, ubi ſucceſſio naturæ ductum ſequitur, nullis conditionibus diſtracta; pater filio ſuo ſuccedit, licet poſſit pater plures filios procreare; qui, ſi hæredes naſcituri natos excluderent, excluderent patrem, cum fratres ſemper patri præferantur. Si etiam extet tantum ſoror, illa in ſolidum fratri ſuccedit; licet pater adhuc vivus poſſit defuncto fratrem alterum procreare; qui, ſi exiſteret, ſororem excluderet. In mobilibus etiam bona illa allodialia dividuntur inter tres fratres extantes, licet patre adhuc vivente, fratres alii ſperari poſſint, Ex quibus omnibus apparet, natos, & non naſcituros, communi ſucceſſionis jure præferendos eſſe. Et hiuc etiam argui poteſt, hanc ſeriem inter ſubſtitutos admittendam, ſi nihil in ſubſtitutionis aut taliæ chirographo appareat, quo cogatur judex obliquâ & anomolâ clauſulâ ab ea deflectere: Hîc autem nihil tale allegari poteſt, ergo, &c.

VII. In ſucceſſione taliata, quâ ſubſtituti ordine quo ſubſtituuntur, hæreditatem adeunt, juſtiſſimum eſt natis hæreditatem deferre, nec naſcituros expectare. Subſtitutio enim in jure ad hoc eſt introducta, ut habeat defunctus qui eum repreſentet, & qui bona familiæ adminiſtret. Qui autem non exiſtit, repræſentare non poteſt, cum non entis nullæ ſint qualitates. Et ille ſenſus clauſulæ huic imponendus ex natura ipſius ſubſtitutionis, qui minus ſubſtituentem, ipſumque feudum lædere poſſit: Nec expectandus eſt hæres, cujus expectatio ſubſtituentem ſine ſubſtituto, & feudum ſine domino relinquat. Cumque ſubſtitutio neceſſaria non ſit, niſi ut ex ſubſtitutorum numero non deficiat hæres; incivile eſſet eam adhibere ſubſtitutioni interpretationem, quæ neceſſariò efficeret, ut hæres non reperiretur. Atque adeo apud nos hæres taliæ natus præfertur naſcituro; teſtis ſit *Roxburgi* Comes, qui filio ſuo hæres taliæ extitit, licet filii ejus naſcituri (ſi naſcituris locus fuiſſet) ipſum excluſiſſent. In quo mores noſtri jus civile imitantur; nam ut ait doctiſſ. *Vinnius*, *Ad hoc ut effectum habeat inſtitutio, requiritur ut inſtitutus capax ſit, tempore mortis inſtituentis; nec ratio juris aliud patitur. Et ſi incapax ſit tempore mortis, fruſtra de ejus capacitate quæritur tempore aditionis: Qui capax non eſt tempore mortis, licet poſtea capax fiat, hæreditatem acquirere non poteſt*; L. *Si alienum*, § de *Hæred. inſtit.* Quo teſtimonio obmuteſcere debent quotquot naſcituros invitâ juriſprudentiâ expectant.

VIII. Brevia noſtra, quibus mandat Rex hæredes agnoſci, vel deſerviri (ut nos loquimur) præcipiunt juratis, ut inquirant quis defuncto proximus & legitimus hæres ſit; nunquam autem quis hæres eſſe poſſit. Nec agnoſcit ſtylus noſter formulas illas, quibus creditores debita ſua, pendente tali expectatione, recuperare poſſint; plurimis tamen remediis contra hæredes extantes, & apparentes luculenter inventis. Nec excogitavere unquam juriſperiti noſtri vel hodierni vel aviti, clauſulam ullam, quâ contra caducitatem feudi conſulerent, ne in manus Regis, ratione non introitus, deveniret; quod procul dubio providiſſent, ſi ex hac concepta (*quibus deficientibus*) feudum ratione non introitus Regi cedere poſſit, dum expectatur hæres ille poſſibilis, & naſciturus. Et è contra, nunquam omiſiſſent Advocatus, & miniſtri Regis hujus farinæ emolumenta, ex caducitate exurgentia, fiſco applicare, ſi ex hac interpretatione non introitûs, pendente tali dilatione, debita fuiſſent. Sed licet hæc facti ſpecies ſæpe occurrerit, hoc tamen emolumentum fiſcus nunquam vendicavit.

IX. Repugnat etiam hæc dilatio aditionis naturæ feudi; eſt enim feudum mutuus contractus, quo Superior, ejuſque vaſſallus ita ſibi invicem obligantur, ut alter alteri ſine utriuſque conſenſu obeſſe nequeat; nec poſſit natura feudi privato ullo pacto inverti. Si autem hæc clauſula ita explicaretur, ut adiri non poſſit hæreditas, pendente poſſibilitate hac hæredis futuri; tunc non eſſet domino vaſſallus, qui pro feudo ſervitia debita & conſueta, quorum intuitu feuda ab origine ſunt conceſſa, penderet; nec feudum foriſfacturâ, nec eſchetâ affici poſſet: Nam non eſſet vaſſallus, ex cujus delictis feudum in commiſſum caderet; & loco pinguioris caſualitatis, qua conſolidatur dominium utile cum directo, nihil accreſceret ſuperiori præter nudum introitum, ex quo ante declaratoriam imaginarii tantum reditus, vulgò (*Retour'd Dutys*) deberentur: Imo & his defraudari etiam poſſet a vaſſallo dominus directus, ſi caveret in ſua diſpoſitione vaſſallus, ut fructus hæredi poſſibili & naſcituro reſerventur. Et ut vaſſallus non poteſt uſufructibus, & locationibus perpetuis feudum ſuum tranſmittere; ne his ſuperiorem ſuum eluderet, juſta ejus compendia evitando: Ita nec hac clauſula dilationem hanc introducere poteſt; ne ſit dominus ſine vaſſallo, & dominium ſine emolumento. Nec poterunt ſubvaſſalli hujus hæredis naſcituri, durante hac caducitate, hæreditatem feudalem adire; & a domino ſuo directo agnoſci, ſeu inveſtiri, adeoque imperfecta tantum obtinebunt jura.

X. VERBA hæc (*Quibus deficientibus*) æquiparantur, & ſeſe reſolvunt in clauſulam, *Non extantibus liberis*; ſed hæc clauſula, *Non extantibus*, reſpicit tantum hos, & de his tantum verificatur, qui extant tempore delatæ hæreditatis; nam voces preſentis temporis quales ſunt (*non extantibus*) nec trahunt, nec includunt; *L. Si ita, ff.* de *Annuo legat.* ubi traditur, *præſens tempus ſemper inſpiciendum in legatis, ſi aliud comprehenſum non eſt:* Ad futurum igitur contra ſuam naturam trahi non debent; nam *qualitas adjecta verbo, ſemper intelligitur ſecundum tempus verbi*; Everard. *Conſ.* 5.

XI. IN nulla ſucceſſione dominium poteſt eſſe in pendenti, aut in nubibus, ut loquuntur Practici: Nam ut Philoſophia, ita & Juriſprudentia abhorret a vacuo: Volunt enim Juridici dominos cognoſci, ut ſciant debitores quibus tuto ſolvere; & creditores a quo ſuum repetere poſſint; & ut habeat unumquodque dominum qui id conſervare poſſit: Quod ſancitum volunt interpretes per *L. ult. ff. Com. præd.* Cujus ultima verba hæc ſunt; *Nec enim ſicut viventium, ita & defunctorum actus ſuſpendi receptum eſt. Hæreditas* (inquit *Stockmannus Deciſ.* 26. *Num.* 7.) *non poteſt eſſe in pendenti poſt mortem teſtatoris*; & conſequenter non aliis, quam tunc natis defertur; *L.* 1. § 1. *Sciendum, ff.* de *ſuis & legitim. L. Cum ita,* § *fin.* ff. de *Legat.* 2. § *Proximus, Inſtit.* de *legit agnat. ſucceſ.* Quibus ſuffragantur *Fuſarius*, de *Fideicommiſſ.. Quæſt.* 318. & *Everard. Conſ.* 5. qui expreſſe tradunt; *Cenſeri eum vocatum, qui talis reperitur tempore evenientis conditionis; nec haberi ullam rationem ejus, qui vel non extitit, vel antequam dies fideicommiſſi extitit, extinctus eſt: Nam in relictis omnibus conditionalibus, qualitas requiſita in honorato adeſſe debet tempore evenientis conditionis, non habita ratione ejus quod fuit tempore vocationis.* Hinc enim eſt, quod præſcriptiones ſunt contra juris regulas introductæ, ne dominia ſint in incerto; & hinc hæreditas nec de die, nec in diem datur; ſed vitio temporis ſublato manet inſtitutio; & hinc dicitur continuari poſſeſſionem defuncti & hæredis. At nihil horum firmum eſſet, ſi tantus hiatus per incertitudinem hanc interponeretur; oporteret enim dominium eſſe in pendenti, nec continuari poſſe poſſeſſionem hæredis poſſeſſioni defuncti; ubi hæres non extat, qui poſſeſſionem hanc poſſit continuare. Et ſi defunctorum actus ſuſpendi non poſſunt, ergo nec ſubſtitutio deferri poteſt. Ex quibus omnibus luculenter apparet, quantum pro nobis militet ratio juris, univerſaque ejus ſtructura.

ADVERSARII noſtri, conſenſum hunc juris & incommodorum apud ſe æſtimantes, definitiones has juris communis tanquam ſubtilitates calumniantur; quaſi antiquata hæc ſcholæ juriſprudentia, teſtantium & ſubſtituentium ſacroſanctas deſtinationes invertere non deberet, nec cum iis conferri. Quam abſurdum enim eſſet, aiunt, defuncti voluntates juriſconſultorum ſubtilitatibus ſubmittere, atque ita evertere? Ut qui a defuncto ultimo vocatur loco ad ſucceſſionem, ab hiſce juriſconſultis primum obtineat. Nec uſui fore ordinem nominationis, cum ordo omnis perturbaretur. Quapropter licet vocationis & nominationis gradatio inventa ſit, ut morientes ſciant, qui, & quo ordine hæredes ſibi ſuccedant; nullum tamen, hiſce datis ſubtilitatibus, ſcire poſſe quis ſibi ſit futurus hæres: Et ſæpe eventurum, ut nepos ex filio chariſſimo removeatur a ſucceſſione, ut hæreditatem adeat, qui vix defunctum contingit; quia nepos ille, quem primario reſpiciebat defunctus, fatali & critico momento quo mortuus eſt defunctus, non extitit; adeoque proximus hic ſe, tanquam fulminis ictu, ſpe ſua dejectum cerneret, licet brevi poſt mortem defuncti ſuperveniret; panemque mendicans, opulentam ſuam hæreditatem in manibus remotiſſimi, & vix conſanguinei ſpectaret: Poſſeque evenire ut, nemine ex ſubſtitutis mortis momento exiſtente, hæreditas ad Regem, tanquam ultimum hæredem devolvatur. Quod unicum incommodum omnia noſtra prægravare clamitant; nec incommoda hæc in caſu noſtro eſſe conſideranda, cum ex accidenti oriantur; nihilque in jure familiarius, quam multa indies accidere, quæ ſubſtitutionibus noſtris incommodent, ſed non evertant: Nec ſolvere incommodum argumentum; nam licet incommoda poſſint in dubio ad ſe nos inclinare; nunquam tamen nec leges, nec ultimas voluntates apertas violare poſſe. Hiſce generalibus præmiſſis, argumentis noſtris ſic ſigillatim reſpondent.

AD incommodorum claſſem in quinque argumenta a nobis diſtributam reponunt, poſſe Judices curatorem bonis dare, qui actiones defendat & proſequatur, qui rationes inſpiciat, & negotia adminiſtret. Poſſe etiam creditoribus feudum ipſum, pendente ſucceſſionis incertitudine, adjudicari; & declaratoriis, ſeu actionibus in factum aptis natis, defuncti debitoris bona affici poſſe. Nec æſtimandam eſſe confiſcationem ex hac incertitudine orientem; cum hæc ex accidenti, & fortuito eveniat, & ex eodem fonte juris feudalis cum ſexcentis huic ſimilibus profluat. Nec magis ex hoc lædi creditores, quam a foriſfacturis, eſchetis, recognitionibus, aliiſque ex quibus feudum, quod in hoc caſu pro tempore fiſco cedit, in illis irreparabili lapſu in commiſſum cadit; cumque creditorum gratificatio non impediat damna ex clauſulis de non alienando, aliiſque reſolutivis & irritantibus conditionibus, per quas non proventuum meſſis, ſed & ipſum feudum radicitus abſorbetur; cur hic invertenda eſſet teſtantium voluntas, quæ pro lege ſemper inter ſuos habenda eſt? Præſertim vero, ubi municentia Regia ſeſe ei, quod juſtum & æquum eſt, facile accommodat; poſſeque & hæc omnia pro futuro præcludi, nominatione depoſitarii a teſtatore, cui fructus intermedii ſint conſignandi; foreque pro Vaſſallo depoſitarium, uſque dum Vaſſallum extiterit, ita ut reditus Regi non ſint ceſſuri.

ANALOGIAM ex ſucceſſione ab inteſtato ad ſucceſſionem talliatam & expreſſam infirmam eſſe volunt, ex eo, quod cum leges hæredes per verba de præſenti, & pure ad ſucceſſionem appellent, non ſint expectandi naſcituri, quibus jus ſolummodo exurgit ex nominatione defuncti, qui juris ordinem deſeruit, ut ſibi hæredes eligeret; cuique denominationi tantum detulerint leges, ut expreſſe cautum ſit, *uti quiſque rei ſuæ legaſſit, ita jus eſto*: Et proviſio hominis tollat proviſionem legis, quæ inteſtatis ſubvenit, ſed teſtantibus non imperat & dominatur: Ac proinde conſtet hodie proximum exhæredari, & hæredes ad diem, vel ſub conditione inſtitui. Quod apertius videri licere, *L.* 3. & 69. *ff. de acquir.* & *omitt. hæred.* & *L.* 16. *ff. de Legat.* 1.

ET licet jure *Romano* inſtitutio perſonæ multum arctaretur, receſſiſſe tamen aſſerunt hodierna gentium jura ab illa juris veteris ſubtilitate; relaxando morientibus plenum in ſua bona dominium. Et hic, ut in aliis quamplurimis, mores perduxiſſe leges in ſuam poteſtatem, plus rationem, quam ſcientiam juris colentes. Quod ex *Vinnio* patere *ad* § 9. *Inſt. de hæred. Inſtit.* & Grot. *ad jus Bat. L.* 2. *C.* 18. *Num.* 38. ubi traditur *ſubtilitates has hodie exoleviſſe, licereque morienti ſub conditione hæredem inſtituere*; quo dato dubium nullum eſſe, hæredem poſſe ad diem incertum inſtitui; nam in inſtitutionibus, diem incertum ſemper haberi pro conditione.

HANC naſcituri expectationem non repugnare Juri feudali hodierno contendunt; ex eo, quod licet olim jure pure feudali, feudum in teſtamento nec relinquere, nec inter vivos alienare liceret ſine Superioris, ſeu Domini directi conſenſu; hodie tamen cum non ex Domini liberalitate ſola proficiſcantur feuda, ideo & ſub conditione, & ad diem hæredes extranei inſtitui poſſint; cujus infinita apud nos extare exempla: *ſi v. g.* quis feudum ſuum reſignaret in favorem hæredum ex matrimonio ſuo naſciturorum; quibus deficientibus, in favorem conjugis diutius viventis; valituram proviſionem, & tamen neminem dubitare poſſe, quin ſit hæc ſubſtitutio in diem incertum; nam incertiſſimum eſſe, num ſupererunt hæredes ex eo matrimonio, & uter ex conjugibus prius morietur. Si quis etiam inſtitueret illum ex fratrum filiis hæredem, qui filiam teſtantis duceret in matrimonium, filioſque ex illis procreandos ſubſtitueret; valituram deſtinationem, licet incertum ſit, an ullus, & quis ille ſit, qui filiam teſtantis ducet. Ita ut neceſſe, ſit dominium & ſucceſſionem ex incerto pendere eventu. Ex quibus omnibus concludunt, dominium poſſe ſuſpendi, & eſſe in pendenti; ubi in tabulis teſtatoris expreſſe hoc ita cautum eſt; & regulam illam tantum obtinere in proviſione & inſtitutione legis, non hominis; ut a *Peregrin.* traditum de fidei *comm. pag.* 309. & 310. Nec tamen dominium etiam hic omnino pendere in nubibus, & incertum dici poſſe; quippe hæreditatem jacentem, ſpernente hærede, pro Domino haberi, & ſuſtinere tantiſper perſonam defuncti, donec adiverit naſciturus hæreditatem; quam cum adiverit, retrotrahi tempus aditionis ad mortem defuncti, foreque continuatam poſſeſſionem. Quibus omnibus adductos Senatores noſtros, cum hæc eadem quæſtio coram iis ventilaretur, inter *Bannantinum* de *Corhous* & *Wierum* de *Blackwood*, ejuſque arbitrium in ſe recepiſſent, hæredem naſciturum prætuliſſe ei, qui tempore mortis ſolus tum extabat.

HISCE tamen (*Judices*) non obſtantibus, præferendus eſt ſemper, qui tempore mortis defuncti aditionis capax erat; nec expectandus eſt naſciturus, populari & plebeia tantum Juriſprudentia ſuffultus. Non enim perpetuo licet, cum legum beneque ordinatæ Reipublicæ jactura, ſua diſponere: Nec quilibet efficere poteſt, ne leges in ſuo teſtamento locum habeant; cumque leges ſatis indulgeant juſtæ noſtræ diſpoſitioni, cur erroribus indulgendum? Potuitque *Levini* Comes, vel depoſitarium, vel fiduciarium nominando, naſciturum prætuliſſe; imo & ſi expreſſe caviſſet naſciturum expectandum, non inficias imus eum fuiſſe præferendum.

QUÆ igitur de ſancta morientium voluntate prætenduntur, nobis non obſtant; qui dubiam voluntatem defuncti, prout ipſius intereſt metimur; nam cum inſtituens multa prole auctus, venturamque in annos ſperans, juſte ſuis providens, hos inſtitutos ex longinquo laxe nominavit, vix aliud quam amicitiæ teſſeram erga illos meditabatur; tantum ſibi, ſuæque familiæ conſulens, ut noluiſſe credendus ſit ſuam familiam perdere, expectatione ſecundi a D. Cancellario gignendi, cujus commodo ſatis proſpectum erat, oblata ſuccedendi facultate, modo extitiſſet, cum ipſe moreretur. Qui fatali hoc momento non natus, non plus læditur quam frater, qui fraterna hæreditate privatur per patris ſui aditionem, ex eo quod non extiterat, cum hæreditas eſſet adeunda.

Quod ad Curatorem bonis dandum, non ſatis malis noſtris inde mederetur. Nam ut nulla hujus neceſſitas, nec recurrendum ad remedia extraordinaria, quamdiu extant ordinaria: Ita Curator hic nec ita tranſigere poteſt, nec ita gerere tenetur, nec contra hunc expectandum curret præſcriptio, nec incarcerari pro defuncti debitis poterit. Quibus malis, novis formulis aliter, quam Curatorem bonis dando, mederi erit neceſſe. Incommoda etiam ex confiſcatione ſemper urgent, a contrariis ſecura. Nam nec natura feudi, nec Principis benigitas efficere poſſunt, quin confiſcatio per tot annos defunctum tantopere lædat, ut veſanum ſit credere, eo in ſenſu eſſe ejus verba interpretanda, qui confiſcationem inducat.

Et cur in dubio exponendæ ſunt ſucceſſiones tam duris, nec ſuperandis incommodis? Nec æquandus eſt noſter caſus, in quo incommoda omnia vitare conatus eſt defunctus, foriſfacturæ, recognitioni, aliiſque caſualitatibus ex natura feudi naturaliter & neceſſario orientibus: Nec expreſſæ & apertæ voluntati morientis, in qua naſciturum expectare juſſerunt vel leges, vel defunctus.

Inquiramus ergo in differentias inter ſucceſſionem legalem, & proviſionalem allatas; & in limine inveniemus nihil in proviſionali immutandum: Nam cum ſucceſſio proviſionalis, ſeu talliata, ſit ſpecies ſucceſſionis, retinet omnia, quæ ex generica ſucceſſionis natura profluunt; exceptis hiſce tantum, quæ a lege proviſionis ei ſunt ſuperaddita: Et proviſio hæc duntaxat ſucceſſuros, at non modum ſuccedendi innovavit. Quamobrem optime *Menoch. Concil.* 198. *Num.* 14. *Succeſſio ex teſtamento interpretationem recipit, & regulatur a ſucceſſione ab inteſtato: Ut ſcilicet in dubio vocati in teſtamento, cenſeantur eo ordine & modo vocati, quo ſuccederent ab inteſtato.* 2. Rationes illæ, quæ præſentem hæredem in ſucceſſione legali requirebant, ſcilicet ne deeſſet defuncto, qui negotia ejus gereret; & creditoribus, qui iis defunctum debitorem repræſentaret; æque in hac, atque in illa militant. Imo & enixius familiam curat ſubſtituens, qui, ne deficeret hæres, plures nominavit. 3. Non recedendum a generali legum diſpoſitione, niſi ubi exceptio eſt legitimata a lege aliqua ita diſpenſante: Nulla autem lex allegari poteſt, qua ſubſtitutus nondum natus expectandus eſt; niſi in hiſce caſibus caſui noſtro nullatenus affinibus. 1. Ubi ille, qui naſciturus eſt, extabat tempore mortis defuncti, ſed in utero extabat: De quo cum dici non poſſit deeſſe hæredem; cum poſthumus ubique in jure, ubi de ejus commodo agitur, pro nato ſemper habeatur; conſequens erat & poſthumum expectandum. Itaque *L.* 17. *ff. de vulg. & pupill. ſubſtitut.* cujus verba hæc ſunt, *ſubſtitui liberis is etiam poteſt, qui poſt mortem ejus natus fuerit.* Cui vero ſubſtitutus hæres fuerit, interpretatur gloſſa; *Inſtitui mihi filium meum impuberem hæredem, & poſtea ita dixi, ſi quis mihi natus fuerit poſt mortem dicti impuberis, quem inſtitui, ſit hæres dicto impuberi; & deceſſi, & poſtea deceſſit dictus filius meus impubis. Et ex uxore mea prægnante, exiſtente tempore mortis mèæ, natus eſt mihi poſthumus; certe ille poſthumus habebit hæreditatem defuncti ſui fratris.* Et 16. *ff. de Leg.* 1. aperte de poſthumo ſtatuit. 2. Licet hæreditas ad naſciturum, nec ita capacem, deferri non poſſit; legatum tamen ei relinqui poteſt. Legatarius enim nec defuncti negotia gerere, nec creditoribus ſolvere tenetur. Non igitur requiritur ut extet, & capax ſit, cum hæreditas adiri debet. 3. In fideicommiſſis agnoſco poſſe hæredem fiduciarium in diem nominari, expectarique naſciturum. Nam hæres fideicommiſſarius, cui defunctus hæreditatem credidit, dominium ſuſtinet; & pro hærede habitus impedit quo minus dominium ſit in pendenti, ſitque defunctus ſine hærede. Unde *Perez.* ad hanc quæſtionem, *Liberumne vel pure, vel ſub conditione, vel ex certo die relinquere fideicommiſſum?* Reſpondet, *Liberum hoc eſt teſtatori; & hac in re differentia eſt inter fideicommiſſum & hæreditatem, quia hæc relinqui ex certo tempore nequit. Ratio differentiæ eſt, Quia ex inſtitutione hæredis ad certum, vel ex certo tempore factâ, ſequeretur, quod quis decedere poſſet pro parte teſtatus, & pro parte inteſtatus: In fideicommiſſario autem hoc non eſt metuendum; nam is non eſt hæres, ſed hæredis loco; quæ duo differunt.* Si voluiſſet ergo defunctus naſciturum expectandnm eſſe, potuiſſet, & debuiſſet fideicommiſſarium hæredem interpoſuiſſe, qui hæreditatem, pendente conditione, repræſentaret. Quo remedio etiam caveri poſſunt abſurda omnia ab adverſariis allata; nam qui inſtituere deſtinaret illum ex fratrum filiis, qui filiam teſtantis uxorem duceret, filioſque ex illis procreandos ſubſtituere; poterat fidei amici cujuſdam hæreditatem committere, qui hæreditatem repræſentet, pendente conditione, eumque obligare, ut hæredibus proſpectis hæreditatem reddat; &, ut nos loquimur, in eorum favorem reſignet, quamprimum ipſi adire poterunt. Quo remedio, tanquam ſano & legitimo, ex noſtratibus plurimi nunc utuntur; reſpondetque eventus diſponentium votis. Sed cum non hunc in modum vocaverit defunctus ſucceſſores; ſed verbis tantum (*Quibus deficientibus*) uſus ſit; concludendum eſt ipſum vocatos ordinariâ & legitimâ ſerie invitaſſe. Nec hìc quid facere potuerit, ſed quid fecerit inſpiciendum. Nec dici poteſt dominium in hæreditate jacente, pendente conditione ſubſiſtere; nam hoc dato, fideicommiſſarius non fuiſſet neceſſarius; ſuperfluaque fuiſſent jura a *Vinnio* adducta, Et quia hæreditas jacens defuncti negotia ſine hærede adminiſtrare non poterat; ideo neceſſario requirebant leges hæredem vel directum, vel fideicommiſſarium: Opponiturque hæreditas jacens, in jure noſtro, hæredi & domino; tantum abeſt ut pro domino habeatur. Ad circulum illum vitioſum, quo contendunt adverſarii abſurdum hoc eventurum, quod nunc ſuccedat filius ſecundo-genitus Domini de *Melvil*, inque hæredem deſerviatur; & poſtea, exiſtente ſecundo-genito D. Cancellarii, primus ille hæres de hæreditate dejiciatur; & D. Cancellarii filio iterum ſine liberis decedente, ad hæreditatem redeat *Melvillus*; inque gyrum ita vertatur, ad opprobrium uſque, incerta & fluctuans hæreditas: Huic, inquam, difficultati reſpondetur, ei tantum deberi hæreditatem, qui tempore mortis defuncti extitit; nec amplius vel expectandum, vel locum eſſe naſcituro; nam ſemel hæres ſemper hæres eſt. Nec cum extiterit naſciturus irritandam eſſe priorem aditionem, niſi expreſſe caverit defunctus, fiduciarium hunc primum cedere debere ſubſtituto. Quo caſu, nihil hic plus abſurdi eveniret, quam quotidie in reſignatione fideicommiſſarii evenire ſolet. *Blackwoodii* etiam caſus nobis non officit; ibi enim præſumpta defuncti voluntas in nepotis commodum judices attraxit; qui, ne legibus tenerentur, arbitrium a litigatoribus, & tum nato, non vero naſcituro ſubſtituto, petiere; ſibi ſatis conſcii noſtram preſentem litem, ſecundum legum tenorem, in ejus gratiam dirimendam, qui tempore mortis defuncti per filiam nepos extitit. Ibi ergo hæres natus, hic naſciturus; ibi defuncti per filiam nepos extraneo, hic extraneus per ſororem nepoti litem movebat; ibi de defuncti voluntate conſtabat, hic neutiquam; ibi ſubſtitutorum unus extabat, qui defunctum repræſentaret, & creditoribus ſatisfaceret, hic nullus; ibi ex æquitate, & ab arbitris reſponſum, hic ex legibus, & a judicibus reſpondendum eſt.

# ELENCHUS CONTENTORUM.

## Idea Eloquentiæ forenſis hodiernæ.

### Ex Jure Naturali.

### ACTIO FORENSIS PRIMA.

*QVA* Jure naturali *accuſatur* Infanticida *coram* Vicinis, *qui ſunt apud* Scotos *Judices in quæſtionibus criminalibus ex facto puro orientibus; ubi oratur more* Romano, *ſine Legum vel Doctorum citationibus.*

### DECISIO.

*REA* hæc capite *damnata eſt.*

### Ex Jure Gentium.

### ACTIO SECUNDA.

*NVM* Navis *acquiratur* Jure Gentium & Civili *per proſecutionem, ſine actuali apprehenſione?*

### DECISIO.

*INTERLOQVVTVS eſt* Senatus *teſtes examinandos, num præda hæc navem Regiam aufugere potuerit, antequam de jure reſponderet?*

### Ex Jure Civili.

### ACTIO TERTIA.

*AN* Conatus *puniatur ultimo ſupplicio in* Crimine Aſſaſſinii?

### DECISIO.

*SCELESTVM hunc in* furcam *ſuſpendi juſſerunt Judices Rn.*

## Ex Jure Feudali.

### ACTIO QUARTA.

*NUM*, Subvaſſalo *ob perduellionem damnato, redeat* Feudum *ad* Regem, *ita ut* debita Subvaſſalli *ſolvere non teneatur?*

## Ex Jure Canonico.

### ACTIO QUINTA.

*PAROCHIA* Adjutorum Presbyterum *dotante, num ejus præſentatio* Patrono Rectoris *accreſcat, an vero ratione dotationis ad* Parochiam dotantem *pertineat?*

### DECISIO.

*PRO* Patrono Rectoris *pronunciatum eſt.*

## Ex Jure Municipali.

### ACTIO SEXTA.

*NUM, pluribus gradatim* ſubſtitutis, remotior extans *tempore delatæ hæreditatis adire poſſit? Anne expectandus ſit* hæres poſſibilis, *quia* proximior?

### DECISIO.

*DECREVIT* Senatus *expectandum eſſe* naſciturum, & poſſibilem hæredem.

*OSTENDIT etiam hæc Actio, quantum oranti cauſas* Municipales *proſit* Juris Civilis & Feudalis Scientia.

## *FINIS.*

# CAUSÆ FORENSES.

## Nunquam antehac impreſſæ.

# *SCOTIÆ* REGNUM

## Nunquam *Angliæ* ſubjectum.

HISTORICI quidam *Angli*, Juris periti, Heraldicique ſcriptores vanâ ſæpe traditione orbi erudito obtrudunt *Scotiæ* Reges vaſſallos fuiſſe *Angliæ* regibus, quibus eo nomine HOMAGIUM, ut vocant perſolverent. Quocirca ut ſuum Sceptro *Scotico* ſplendorem reſtituerem impactamque Genti meæ labem ſimul eluerem, omnino ſtatui, nullâ redditâ *Anglis* (quos ob ingenium, animi magnitudinem, eruditionemque magnifacio) injuriâ, contumeliâve harum rerum curioſis oſtendere quam nullo jure *Scotos Angliæ* vaſſallos aliquando quidam eſſe voluerint. Ad hunc me laborem volentem impulit Rhapſodia quædam nupera a *Prinio* quodam, in lucem edita in vindicationem (ut loquitur) dominii Regum *Angliæ*, contra ingratos, perfidos, rebelleſque *Scotiæ* Reges. Sed hanc nobis litem nemo ex doctoribus, moderatioribuſve *Anglis* intentant, iique tantum qui temperamento, non ratione ducti quidvis imprudenter ne dicam, an impudenter ac temere effutiunt. Non equidem negarim Reges *Scotiæ* ob provincias haſce tres, *Northumbriam*, *Cumbriam*, ac *Weſtmariam*, præſtitiſſe Homagium coronæ *Anglicanæ*, quod nec inhonorificum erat nec a Suprema etiam Majeſtate indignum; cum *Henricus Angliæ* Rex octavus, aliique *Angliæ* Reges, *Philippo* aliiſque *Galliæ* Regibus ob poſſeſſas ibidem provincias homagium præſtiterint; ut præſtat hodieque annuum Pontifici *Romano Hiſpaniarum* Rex ob regnum *Neapolitanum*, *Siciliamque* homagium: Itaque ex ſuperiorum Provinciarum poſſeſſione inductum, quoſdam ex craſsâ ignorantia facti in eum errorem induxit, ut ob ipſum *Scotiæ* regnum factum id putarent. Qui autem hæ provinciæ in poteſtatem *Scotorum* venerint, non ſine ſummâ eorundem gloria commemorari poteſt, cum nemo rerum *Britannicarum* peritus neſciat *Scotos* in auxilium primum *Britonum* contra *Romanos*, ac poſtea *Saxonum* contra *Danos*, olim accitos prænominatas obtinuiſſe provincias in præmium laboris, firmiuſque futuræ amicitiæ vinculum. Statuto enim a divo *Eduardo* èdito, confirmatoque a *Gulielmo*, qui *Angliam* ſubegit, (ut ab *Holinſhedo* obſervatum) *Scoti* jure civitatis ab *Anglis* duabus de cauſis donati ſunt; quia Primo, (ut ipſum ſtatutum habet) omnes fermè *Scotiæ* proceres ex *Anglis* conjuges cæperunt, & ipſi rurſus ex *Scotis*; quia Secundo, Simul & in unum contra *Danos*, & *Norvegos* atrociſſime pugnarunt. Quod autem Reges *Scotiæ* nunquam ſe vaſſallorum inſtar ſubmiſerint *Angliæ* regibus ex argumentis inferius proponendis luce clarius meridianâ eluceſcet: Quâ quidem de re non ex legibus *Angliæ*, ſed ex civilibus, ac feudalibus, ſtatui debet, quod nationum omnium jam leges ſint, ac propterea ex his ſolis pronunciari opporteat de diſſidiis nationes inter exortis, utpote quæ a neutra Gente diſſidente conditæ fuerint. Si omnes fundi præſumantur ſervitute liberi, niſi ſervitus ipſa clariſſime demonſtretur, quanto magis Reges regnaque omnia præſumi debent libera, cum ex ipſa rei natura Reges Regnaque omnia a nullo pendeant, & qualitas quæ ineſſe debet, ineſſe præſumatur; jam quo præſumptio validior eſt, eo etiam fortiorem, quâ convellatur, probationem eſſe opportebit. Quamvis autem domeſtica quævis argumenta quovis caſu ob partis ſtudium rejicienda putem, & re ipſa ſint; non alios tamen *Angli* quam ipſos *Anglos*, ſeu hiſtoricos, ſeu cauſidicos, ſeu ſcriptores Heraldicos prænominatæ ſervitutis teſtes adducunt.

II. NON aliâ melius methodo, nec magis ad leges appoſitâ probatur quis vaſſallus quam contractu feudali Superiorem inter atque Vaſſallum, cum feuda omnia ſcripto conſtitui opporteat, nec alio modo probari vaſſalatus poſſit: Nullum tamen feudi contractum oſtendere poſſunt *Angli*, cujuſmodi videre eſt *Pontificem Romanum* inter, Regemque *Hiſpaniæ*, Imperatorem Principeſque *Romani* Imperii, *&c.* Nihil enim dicunt ad rem, cum poſteriores quaſdam vaſſalatus agnitiones pro ſe citant, cum nihil inde concludi poſſit, niſi contractus originalis prius probetur: Quemadmodum inepte quis inferret ex fundi debitis Superiori ſolutis, vi, ignorantiâ, aut errore eum qui ſolvit fore ipſius deinceps Vaſſallum, niſi ex feudo originali id prius conſtiterit, cum enim hoc leges neceſſarium velint, quis cedat *Anglos* cæteris in rebus adeo lynceos, providoſque, hoc quod ambiunt dominium, nullo ſcripto nullove feudali confirmaſſe contractu: Qui ſi unquam extitiſſet, nihil cauſæ ſubeſſet, cur etiamnum non extaret, cum Monumenta ſua, actaque *Angli* publica nulla deperdiderint, extiterunt autem ea, ut certum eſt, apud nos acta publica, vi quorum ſeptentrionales tres *Angliæ* provincias poſſedimus, & eodem tempore apud *Anglos*, quibus jus ſuum in poſſeſſos a ſe in *Gallia* agros oſtenderent; neque hic prætermittendum quidpiam notatu dignum *Eduardum* primum dici voluiſſe Regem, & ſuperiorem Dominum Regni *Scotiæ*, quamdiu *Scotiam* ſibi uſurpavit; cum nullus prior eo *Angliæ* Rex hunc ſibi titulum aſſumpſiſſet, qui haud dubiè aſſumptus fuiſſet, ſi quod *Anglia* jus in eum habuiſſet, imaginarius autem hic titulus, quem vis ſola tuebatur, repreſſa vi deſiit.

III. NULLAM *Angli* adducere in medium rationem poſſunt, *Scotici* vaſſalatus, nec indicare queunt quo tempore *Scoti Anglis* vaſſalli facti ſint; licet enim ex Regibus noſtris, quidam in *Anglia* captivi, vi & minis vaſſallos ſe agnoverint: Hæ tamen invalidæ omnes, quia vi extortæ vaſſalatûs agnitiones, aliaſque ob cauſas, quidquod ipſi *Angliæ* Reges aliorum etiam principum ſe vaſſallos coacti ſunt fateri, ut videbimus ubi objecta ab *Anglis* diluemus.

IV. LIBERA habita eſt *SCOTIA* Monarchia; ejuſque Reges nullius dominio obnoxii, non ab exteris tantum Principibus, præcipuis hac ſuper re judicibus, qui eorum legatos ut ſupremorum Principum admiſerunt; ſed & ab Æcumenicis Conciliis, Rex *SCOTIÆ* prælatus eſt Regibus *Caſtiliæ*, *Hungariæ*, *Poloniæ*, *Navarræ*, *Cipri*, *Bohemiæ*, *Daniæ*. Hunc enim ordinem conſtituit *Julius* II. Anno Quingenteſimo Quarto ſupra Milleſimum. Hunc autem locum occupare non potuiſſet, ſi feudatarius tantum Princeps fuiſſet; quòd liberi omnes Principes feudatariis præferantur (*a*). Quin etiam ſi Rex *SCOTIÆ* vaſſallus fuiſſet Regi *Angliæ*, hoc haud dubiè nomine aliis Regibus Rex *Angliæ* præire debuiſſet, quod Rex tum Regum foret; cum enim *Gallus* juris ſui putat *Hiſpanum* præcedere, quod Rex *Angliæ* vaſſallus fuerit Regi *Galliæ*, ut notat *Chaſſanæus*; quantò magis *Angliæ* Reges præferendæ ipſis erant, quod ſubditum ſibi *SCOTIÆ* ſceptrum objicere potuiſſent; cum ob agros tantum nonnullos homagium Regi *Gallorum* præſtaret *Anglus*.

V. NON Chriſtiani tantum Principes, Conciliaque, ſed Pontifices etiam *Romani*, *SCOTIAM* declararunt Regnum liberum, *Angliæque* minime ſubjectum. 1. Noluit *Honorius* Pontifex teneri *SCOTIÆ* ſubditos appellare ad ullam, extra *SCOTIAM*, curiam, ſalvâ ſolummodo authoritate Sedis Apoſtolicæ. 2. Cum *Edwardus Angliæ* Rex rogaſſet *Innocentium* IV. ne Reges *SCOTIÆ*, ſe inſcio, coronari, aut inungi pateretur; negavit id ſe facturum Pontifex, preſentibuſque procuratoribus parium in Concilio *Lugdunenſi*, declaravit Regnum *SCOTIÆ Angliæ* non ſubeſſe. 3. Petenti eidem *Edwardo*, ut ſibi decimas colligere in *SCOTIA* liceret, cum jus id haberet in terris omnibus ſuæ juriſdictioni ſubjectis; hanc quoque petitionem rejecit Pontifex. 4. *Bonifacius* Papa Octavus, ad *Edwardum Angliæ* Regem, ſcripta epiſtolâ declarat mentem ſuam hoc ſuper negotio, his verbis; *Ad celſitudinem regiam potuit perveniſſe qualiter ab antiquis temporibus, &c. quodque Regnum* SCOTIÆ, *ſicut accepimus a progenitoribus tuis Regni* Angliæ, *Regibus feudale non extitit, nec exiſtet, &c.* Harum literarum exemplar apud me nunc extat. *Ducheſnæus* etiam, in hiſtoria Magnæ *Britanniæ*, Pag. 161. idiomate *Gallico* hæc habet; *Le meſme Pape r'envoya d'autres lettres au Roy d'*Angleterre, *pour ſouſtenir que le Royaume de* Ecoſſe *ne dependoit point d'*Angleterre; *et que contre le droit*

*Divin*

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(*a*) Beſot. Synop. doct. polit. Lib. 20. Cap. 10. P. 5. Con. 19.

*Divin, & la juſtice, il s'en vindiçoit la ſubjection.* Hoc eſt, Idem Papa alias literas miſit ad Regem *Angliæ*; quibus docet Regnum *SCOTIÆ* nunquam fuiſſe Regno *Angliæ* ſubjectum; eumque jus contra humanum ac Divinum, ad obtinendum in illud dominium aſpirare.

VI. Cum jure feudali, & gentium, vaſſallus non poſſit alienare ullam partem feudi, abſque ſuperioris conſenſu, (ſuperior enim abalienatione, debita ſibi ex feudo obſequia deperdit; cum Eccleſiaſtici, in quorum gratiam alienatio fit, ad preces tantum & vota teneantur) quocirca ad quamvis alienationem a vaſſallis factam, requiritur confirmatio ſuperioris: Si ergo *SCOTIÆ* Regnum *Angliæ* fuiſſet feudatarium, alienationum a Regibus ſubditiſque *SCOTIÆ* factarum, confirmationem Pontifices *Romani*, ipſaque monaſteria petiiſſent a Regibus *Angliæ*, quam tamen nunquam petitam ſcimus; licet plures in *SCOTIA* religionis ergò quam in quovis Regno non opulentiore abalienationes factæ fuerint: Sed contrà, aut Pontifex has confirmat abalienationes in *SCOTIA*, ut in aliis Regnis, tanquam per Reges *SCOTIÆ* factas; aut eaſdem confirmant *SCOTIÆ* Reges, ſi ab ipſorum vaſſallis factæ fuerint: Hic autem obſervare operæpretium fuerit, Papam ſuperiores abalienationes firmantem, Regem noſtrum non *Scotorum*, ſed *SCOTIÆ* dixiſſe Regem.

VII. Hanc quoque gentis noſtræ libertatem aliarum etiam nationum hiſtorici luculenter vindicant: *Arniſæus* enim, qui juriſperitorum peritiſſime de quæſtionibus politicis ſcripſit, *Anglorum* in *Scotos* dominium, puram putamque fabulam reputat, dum in hæc verba mentem exprimit; Anglus Scotorum *Regem habebat ſibi fiduciarium, ſive ratione aliquot regionum, ſive ratione ipſius Regni, ut nimis audacter aſſerit* Matth. Steph. *Nam hæc vetuſtate temporis & obſcuritate authorum, ſunt incerta.* *Ducheſnæus*, Pag. 21. de *SCOTIA* diſſerens, diſertis verbis aſſerit, SCOTIÆ *Regem nullum ſub Deo agnoſcere ſuperiorem, utpote ſupremum omni modo Principem, quicquid contra olim inepte* Angli *objecerint. Le Roy le poſſede en toute Soveraintè, ſans recognoiſtre aucun ſuperieur que Dieu; bien que c'eſtoit ancienne pretenſion des* Anglois, *que le Roy* d'Eſcoſſe *eſt vaſſal de leur couronne.*

L. 1. C. 5.

VIII. Non exteri tantum Principes, Concilia œcumenica, Juriſperiti, Hiſtoricique aliarum nationum, liberum *SCOTIÆ* Regnum declararunt; ſed ipſi etiam *Angliæ* Reges hanc *SCOTIÆ* libertatem agnoverunt, ut exemplis mox proponendis eluceſcet: 1. Rex, & magnus *Angliæ* Senatus negotia tractarunt cum *SCOTIÆ* Legatis; at ſuperior nemo cum vaſſallo, ut cum extraneo paciſci, nec vaſſallus legatos ad ſuperiores mittere poteſt: Legatus enim æqualis cenſetur ei ad quem mittitur; illiuſque proinde juriſdictioni minime obnoxius eſt: Hæcque eſt, ut alios prætermittam, opinio *Alberici*, juriſperiti *Anglicani*, ubi de *Legationibus*. L. 2. C. 10 Tractat. Patetque aliunde ex L. 4. L. 16. & Tertio ſupra Quadrageſimum. 2. *Henricus* Rex *Angliæ* bellum illaturus *Simeoni* Comiti *Leiceſtriæ*, ſuppetias petiit ab *Alexandro Scotorum* Rege; & literis manu ſua ſcriptis, & per legatos propalam declaravit, auxilium hoc ſe petere, non ut ſui in *Scotos* dominii argumentum, quod nihil ad hoc juris haberet. 3. Idem Rex *Alexander* invitatus ad coronationem Regis *Edwardi*, cum intereſſe eidem nollet, ne ipſius ſe vaſſallum hinc ſe profiteri videretur; *Edwardus* Rex declaravit id ſe non ex debito, ſed ex gratia tantum petere. 4. Idem Rex *Alexander* homagium præſtiturus in *Anglia* Regi *Edwardo* ob territoria *Penrithiana* & *Tindalia*, in hæc verba proteſtatus eſt; Quod non pro Regno *SCOTIÆ*, ſed pro terris in *Anglia* dictum homagium faciebat: Rexq; iſte *Angliæ* homagium hujuſmodi admiſit. Per quod præſumitur talia fuiſſe, & ſimilia prius facta homagia Regno *Angliæ* per Reges *SCOTIÆ*; nam talia fuiſſe præſumuntur, quale fuit illud declaratum, & expoſitum homagium, cum talia ſint ſubjecta, qualia prædicata admittunt: Quæ quidem ipſa verba ſunt a *Scotis* coram Papa reſpondentibus uſurpata, tum & quatuor priora exempla plenius expoſita ſunt; & ſi res exegiſſet teſtimoniis omni exceptione majoribus, probatum fuiſſet, quod ſcripta ipſa *Edwardus* conſultò abſtuliſſet. *Fordonus* in hiſtoria ſua non impreſſa, varia habet exemplaria literarum ſcriptarum a prænominato Papa *Bonifacio*, aliiſque, quibus de his exemplis conſtare aſſerunt, earumque quaſdam fuſius repetit. *Ducheſnæus*, Pag. 661. cui utpote extraneo, nemo hac in re fidem merito negarit; ipſeque *Matth. Pariſienſis*, hiſtoricus *Anglicus*, non contemnendus, docet, *Richardum* I. cum ad bellum ſanctum profecturus eſſet, declaraſſe nullum ſibi in *SCOTIA* eſſe jus dominii: Quam quidem declarationem *Hovdenus*, alius ejuſdem nationis hiſtoricus, obſervat, cum autem *Matthæus Paris.* de homagio Regi *Angliæ* facto loquitur, cauſam adducit; Territoria ſciz. a Regibus *SCOTIÆ* in *Anglia* poſſeſſa; dum mentem ita exprimit; *Rex* Scotorum Willielmus *fecit homagium Regi* Anglorum Richardo *de jure ſuo in* Anglia. Quo fere modo explicant ſe hiſtorici, ubi hoc de argumento agunt: Fatetur autem *Ducheſnæus*, *Alexandrum* feciſſe homagium *Henrico* III. ob poſſeſſa intra *Anglicanos* limites territoria; non tantum autem negaſſe homagium ob *SCOTIAM*; ſed & *Henricum* provocaſſe ad ſingulare certamen, quod factum ſibi a Rege *SCOTIÆ*, ipſam ob *SCOTIAM* homagium dixiſſet. Homagii exemplar extat etiam nunc *Romæ*, in monumentis veterum *Abbatiarum*, hoc tenore.

“ MEMORANDUM, Anno Gratiæ Milleſimo, Ducenteſimo, Septuageſimo Octavo die A-“ poſtolorum *Simonis & Judæ*; apud *Weſtmonaſterium*, *Alexander* Rex *SCOTIAE* fecit ho-“ magium Domino *Edwardo* Regi *Angliæ*, filio Regis *Henrici*, ſub his verbis; Ego devenio “ hominem veſtrum pro terris, quas de vobis teneo in Regno *Angliæ*, de quibus homagium “ vobis debeo; ſalvo Regno meo. Tunc dixit Epiſcopus *Norvicenſis*, & ſalvum ſit Regi *An-“ gliæ*, ſi jus habuerit ad homagium veſtrum de Regno. Cui Rex ſtatim reſpondet, aperte “ dicens, Ad homagium Regni mei *SCOTIAE* nullus jus habet, niſi ſolus Deus; nec de ullo teneo, niſi de ſolo Deo ”. 4. Extincto ſine prole maſcula *Alexandro*, *Edwardus* I. de matrimonio egit inter *Margaretam Scotiæ*, dictam vulgò, Virginem *Norvegiæ*, filiumque ſuum *Edwardum*; ubi *Scotiæ* libertatem ſæpe agnoſcit: Verba ipſius ſunt; “ Volentes & conce-“ dentes, quod deficientibus prædictis *Edwardo* & *Margareta*, vel eorum altero, abſque li-“ beris extantibus, in omni caſu & eventu, in quo ad proximiores hæredes Regnum prædi-“ ctum debeat de jure reverti, integre habere, abſolute, abſque ulla ſubjectione, revertatur & “ reſtituatur iiſdem ”. Clauſulaque additur, *Nullum alterutri Regnorum damnum inferendum, quin libere habeant ſtatum ſuum.* Quid, quod deputationi a Gubernatoribus *Scotiæ Melroſſiæ* ad hoc matrimonium contrahendum conceſſæ, hæc inſeritur exceptio; *Salvis tamen in omnibus & ſingulis, & per omnia libertate & honore Regni* Scotiæ: Quæ pariter inſerta eſt *Edwardi* ſcripto ad idem negotium tradito; quem *Scoti* literis ſuis ad eum ſcriptis, omnibuſque declarationibus Regem *Angliæ* tantum Dominum *Hiberniæ*, & Ducem *Aquitaniæ*; at nunquam Dominum ſuperiorem *Scotiæ*, niſi bello tranſacto, nominarunt: Unde vaniſſimum priorem hunc titulum nullo ad ipſum jure pertinuiſſe patet.

IX. UT negarunt Reges *Angliæ Scotos* ſibi eſſe Vaſſallos, ita leges quoque, legiſque periti idem declararunt. Cum *Scotos* velint hi extraneos eſſe nec proinde hæreditatem adire poſſe in *Anglia*, niſi jure nativo gentis prius donatos: Patet autem *Alibi-geniturâ* ut vocant, indicari alibi natos non eſſe vaſſallos; jus enim alibi-genituræ *Gallis droit d'aubeyne*, nititur hoc principio juris feudalis, quod feuda concedantur a ſupremis Dominis aut ſuperioribus, eo prævio promiſſo, eoque concilio ut vaſſalli pro re nata ipſorum ad obſequium parati eſſent contra omnes, ipſorumque arcana ſervarent, nec quidquam quod ipſis noxium eſſe poſſet cælarent; unde feudaliſtæ merito inferunt, duobus, pluribuſve Dominis neminem poſſe eſſe vaſſallum ob officiorum contrarietatem, ac diverſa Dominorum arcana, cum mutuis ſe bellis aggredi poſſint; quia autem nativo Domino, principive homines ſerviunt libentius, quam extraneo, extraneis propterea utpote eo nomine ſuſpectis non licet vendere feuda, quæ jure hæreditario obtinent, ne prætio ex Regione emiſſo in eandem abutantur; quod quidem a *Romano* ortum jure videtur, quâ exterorum bona *Romæ* extinctorum fiſco addicebantur, & fiebant caduca. Huic legis feudalis fundamento ratione manifeſtâ ſuffulto conveniunt aliarum nationum conſuetudines, qui eos aliegenas non reputant, quicunque eidem ſubjecti vaſſalatui ſunt; ita enim *Rageavius* p. 67. *aliegenæ ſunt ii, qui ibi naſcuntur, quo ſceptri* Gallici *dominium non ſe extendit.* Vide *Bacquetum de jure alibi-genituræ*, Anno quingenteſimo quinquageſimo ſeptimo, ſupra milleſimum in lucem editum: Atque urbis *Mediolanenſis* conſuetudine alibi-genitura nemini aſcribitur, qui fidem ſolemni juramento aſtrinxerunt, degentque in territoriis *Hiſpanicis*, licet non intra urbem *Mediolanenſem*: Cum igitur *Angli* jus ſucceſſionis, aliave nativa ſubditorum jura nobis non concedant, mirum omnino qua fronte ſubditos ſibi nos haberi velint.

NOTATU quoque dignum, ſi *Scotia Angliæ* feudataria fuiſſet, nobiles noſtros pro ratione antiquitatis non priorem præ aliis locum obtinere potuiſſe, nobiles enim ſuperioris regni, juxta eos qui de præcedentibus ſcribunt, iis præferri debent, qui in Regno vaſſalli degunt.

X. Si *Scotiæ* regnum *Angliæ* feudum fuiſſet, Rex *Angliæ*, ut ſuperior minorennes noſtros principes cuſtodiiſſet, iis uxores ex officio quæſiviſſet, feudumque quamdiu Minor foret princeps, ipſe tenuiſſet, cum lex feudalis, jus hoc propriis feudis incluſum dicat: Hoc autem feudum proprium fuiſſe præſumitur ut omnia feuda præſumuntur, niſi vaſſallus naturam feudi ſuum in emolumentum converſam probet. Nullus tamen *Angliæ* Rex vel ad cuſtodiam, vel ad tutelam juniorum noſtrorum principum aſpiravit unquam, vel ad nominationem Gubernatorum eorundem adhuc Minorum: Sed contra, *Alexander Scotiæ* Rex cum *Margaretam* minorennem adhuc, reliquiſſet, ne cogitavit quidem *Eduardus* hanc ſuæ committi debere cuſtodiæ, ſed enixe rogavit, ut *Eduardo* filio ſuo in matrimonium traderetur, declaravitque ſi nulla hoc ex conjugio proles ſuſciperetur, *Scotiam* futuram ut prius ſemper fuerat, ab omni *Angliæ* dominio liberam; quo ſatis ipſi *Angliæ* Reges ſupremum *Scotiæ* nullique ſubditum imperium indicant: Huc accedit quod ſi *Angliæ* Reges *Scotiæ* ſuperiores fuiſſent, id è legibus alicubi noſtris eluxiſset, cum omnes leges noſtræ *Scotiæ* CORONAM IMPERIALEM ſemper dicant, aut certè *Anglorum* Regum dominium ex monetâ conſtitiſſet, cum hæc aliquo ſuperiorem ſigno indicare ſemper ſoleat. Deinde Reges *Angliæ* ex curiis noſtris avocare potuiſſent eos, qui in *Anglorum* Reges peccaſſent, juxta certum hoc legis feudalis principium: *Qui habet dominium directum, poteſt juriſdictionem ſuam explicare, tam in territorio vaſſalli,* *quam in ſuo*; habet enim Dominus juriſdictionem cumulativam, cum vaſſallo: Reges autem *Angliæ* nullam unquam in *Scotia* juriſdictionem exercuerunt, nec petierunt unquam, ut transfugæ ad nos ob delicta *Anglo* ſibi reſtituerentur: Neque *Scotos* exteris in nationibus in *Anglos* pugnantes, Reges *Angliæ* bello captos, ut rebelles habuere, reoſque læſæ Majeſtatis; quales ſane habiti fuiſſent, ſi *Angli* vaſsalli fuiſsent; ſed contra, hos etiam *lytro*, certoque prætio reddebant *Angli* communi cum reliquis extraneis privilegio.

XI. Cum *Scoti* libertatem ſuam contra *Edwardum* primum *Angliæ* Regem publicò ſcripto vindicare ſtatuiſsent, a *Bonifacio* VIII. Pontifice *Romano* delegatus eſt proceſsus ad *Baldredum*, principem eo tempore juris peritum, qui rationibus hinc inde æquâ lance perpenſis, rem ut erat Pontifici expoſuit, cujus authoritate commotus, reprehendit *Angliæ* Regem acrius, declaravitque *Scotiam* nullo ſenſu *Angliæ* eſſe ſubditam, *Scotiamque* ab *Anglis* contra humana, divinaque jura omnia impetitam, ut *Ducheſnæus* obſervat, *pag. 66.* Literæ hæ ad Regem *Angliæ* ſcriptæ, unà cum ipſo proceſſu, ut vocant, *Baldredi*, adhuc extant in *Fordoni* Chronico: *Angliæ* autem propitia magis, ſi per fas licuiſſet, propitia inquam magis, quam *Scotiæ* eſſe debuiſſet ſententia, tum quod *Anglia* annuam Papæ ſummam, *Petri aſſem* dictam ſolveret, tum quod alia longe a divite *Anglia*, quam à pauperiore *Scotiâ* expectare potuiſſet.

Ex argumentis ab *Anglis* propoſitis ad vindicandos ſibi *Scotos* tanquam vaſſallos, ea primo proponam quibus in priori proceſſu, uſus eſt *Edwardus* primus.

Primo, Itaque dicebant *Angli Brutum* a *Trojanis* ortum ſubjugaſſe *Britanniam*, eam tribus diviſiſſe filiis, quorum natu maximo hiſtoricis *Locrino* (at in proceſſu nominatur *Locuus*) *Logriam* nunc *Angliam* reliquit. *Secundo*, Nomine *Albanacto*, *Albaniam* jam *Scotiam*. *Tertio*, Quem *Cambrum* appellabant, *Cambriam* nunc *Walliam*; ſed addunt ab *Humberto* rege *Hunnorum* occiſum fuiſſe *Albanactum*: Huncque idcirco à *Locrino* fratre natu maximo interfectum, *Albaniamque* hinc *Logriæ*, ſeu *Angliæ* rurſus unitam.

Secundo, A *Donvallo*, *Britonum* Rege, percuſſum eſſe *Staterium Scotiæ* Regem in ipſum rebellem, atque evaſiſſe in totius Inſulæ dominum, huncque *Belino* filio natu majori ſupremum in *Scotiam*, *Angliamque* tradidiſſe imperium, natu vero minori *Brouno* merum tantum in *Scotiam* dominium.

Tertio, *Arthurum*, *Britonum* Regem, ſubjugatam *Scotiam* tranſtuliſſe in *Anguſellum*, eique tanquam ſuperiori gladium præiiſſe geſtantem.

Quarto, *Aldeſtanum*, *Angliæ* Regem, victo *Conſtantino Scotiæ* Monarchâ, oraſſe Deum ut ſupremam ipſius in *Scotiæ* regnum poteſtatem, interventu *ſancti Joannis de Bonlaco* declararet, moxque in rupem prope *Dumbarum* immerſiſſe gladium foramine ipſo ulnæ longitudini exæquato.

Quinto, *Gulielmum*, *Scotiæ* Regem, agnoviſſe ſe Vaſſallum *Gulielmo Angliæ* domitori; *Alexandrum Scotorum* Regem ſubmiſiſſe *Henrico* Tertio, accitumque a Nobilitate *Scotica* *Edwardum*, ut diſſidia *Bruſſium* inter & *Baliolum* componeret.

*Petrus Heylinus* de *Scotia* agens in Geographiâ ſuâ, p. 1289. Reges *Scotiæ* fuiſſe
*Angliæ* regibus vaſſallos, his argumentis probare nititur. *Primo.* “ Ab obſequiis a Regibus *Scotiæ*
“ Regibus *Angliæ* redditis; *Malcolmus* enim Tertius homagium *Gulielmo* prænominato,
“ præſtitit, ut & *Gulielmus* ipſius è ſucceſſoribus *Henrico* Secundo, non ob tres tantum ſeptentrionales
“ *Angliæ* provincias, aut Comitatum *Huntingtoniæ*; ut volunt, ſed ob ipſum etiam
“ *Scotiæ* regnum, ut nihil dicam de *Kennetho* III. qui ceu vaſſallus regem *Edgarum* aſſumpto
“ ipſemet remigio fluvium *Deam* tranſmiſit. *Secundo*, Ab admiſſo *Eduardi* arbitrio ab ipſis
“ *Scotis* quo lis de ſucceſſione *Bruſſium* inter, ac *Baliolum* deciſa eſt: Ut in re plane ſimili
“ *Philippus* pulcher finiit controverſiam de titulo *Arteſiæ* ſceptro *Gallico* feudatariæ, quam
“ tum ſibi vindicabant hinc *Mauda*, inde ipſius nepos *Robertus*, aut quemadmodum *Edwardus*
“ Tertius litem diremit *Joannem* inter Comitem *Montfordiæ*, *Carolumque Bleſenſem* ob ducatum
“ *Britanniæ*. *Tertio*, Ex confeſſione ipſâ Prælatorum, parium, aliorumque *Scotiæ* ſtatutum
“ confirmatâ omnium ſubſcriptionibus, ac ſigillis, in Codice *Ragmani*, quibus non ſuperiorem
“ tantum *Angliæ* regem ob domitas bello provincias, ſed etiam ob regnum agnoſcunt,
“ qui Codex ſubdolè traditus eſt *Scotis* a *Rogero Mortimero Marchiæ* Comite. *Quarto*, Ex tacitâ
“ regum ipſorum confeſſione, dum in moneta, publiciſque inſtrumentis non reges *Scotiæ*
“ ſed *Scotorum* tantum dicuntur, quod ſcilicet (ut inſinuant) hinc alius quiſpiam ſuperior
“ ſummo cum imperio *Scotiæ* Dominus præſit. *Quinto*, Ex judiciis decretiſque curiarum *Angliæ*
“ non florente tantum *Edwardo* Primo, ſed aliquanto poſt: *Gulielmus* enim *Vallas*
“ fortiſſimus tum iſtius gentis miles captus, tandem *Londini* ultimo proditorum ſupplicio affe-

“ ctus eſt; quæ ſententia fuiſſet contra Leges & iniqua, ſi judices eum ut merum captivum habuiſſent, & non ut hominem ſceptro *Anglicano* ſubditum: Idem, inquiunt, eſto judicium de alio *Stoto* ad mortem in *Anglia* damnato, *Simeone Frazillo* nomine, ſub eodem Rege. Ita pariter in negotio Domini *Beaumontii* regnante *Edwardo* Tertio decretum eſt. Objicienti enim alterum teſtium eſſe natione *Scotum*, adeoque non eſſe admittendum; Reſponſum eſt, quod *Scoti* juxta leges *Anglicanas* non eſſent alienigenæ, ſeu extranei; regnante etiam *Elizabetha*, quiſpiam ſtupri accuſatus, cum medietatem linguæ, quod *Scotus* eſſet petiiſſet, hæc ei gratia negata eſt, quod ut *Scotus Angliæ* ſubditus haberetur. Ita pariter cum *Robertus Umframvillus*, Dominus *Rymæ* accitus eſſet ad Parliamentum, tanquam *Robertus* Comes *Anguſiæ* in *Scotia* regnante *Edwardo* Tertio, poſteaque inſtrumento in eum facto vocaretur rurſus *Umframvillus*, nullâ honoris iſtius factâ mentione, illius honorem, judicatum eſt, hoc ſcripto imminutum, quod judices reor, non judicaſſent, ſi eum alienigenam ſecum ipſi reputaſſent. *Sexto*, Ex publico denique inſtrumento territoriorum ac inſignium, ſeu armorum, quod apud me extat conceſſo ab *Edwardo* Primo ultimo Regni anno, *Petro Doagiæ*. a *Stopworth*, in Comitatu *Ceſtriæ* e matris mei prædeceſſoribus, quo aſſeritur prædicta territoria, inſigniaque ipſi fuiſſe collata ab eo rege, quod ſtrenue ſe geſſerit contra infeſtum ſibi hoſtem ac rebellem *Baliolum Scotiæ* Regem, atque *Angliæ* Vaſſallum.

Ut primo ea diluam objecta, quæ ex ſuppoſito *Bruti* in *Britannos* imperio petuntur, ſat fuerit indicaſſe hæc a *Cambdeno* aliiſque doctis *Anglis* ſcriptoribus, ut mera reputari figmenta. Ut autem *Scotia Angliæ* obnoxia, ſeu ſubdita probetur, requiruntur inſtrumenta, actaque, publica, ut prius indicavimus. Hinc etiam diluuntur ea quæ de *Bellino*, ac Rege *Arthuro*. *&c*. aſſeruntur; ſed ut oſtendam quam vane hæc fraudulenterque conficta ſint, ſat fuerit adduxiſſe in medium quidpiam a Docto *Ayleto Sammeſio* ubi de *Britannia* antiqua, p. 159. in hæc verba relatum. “ Huic figmento authoritatem conciliavit Rex *Edwardus* Primus, quod vindicaret ſibi *Scotiam* contra Papam *Bonifacium*, Eccleſiamque *Romanam*, quæ hoc regnum antiquo jure *Petri Patrimonio* Eccleſiæque dominio aſcribere ſolebat. Hiſtoriam *Bruti* a Monachis fere confictam ſatis liquet, maximè ſi propius inſpiciamus alias ejuſdem Epiſtolæ partes a *Prinio* in actis publicis citatæ, ac præſertim miraculum regis *Adelſtani*, qui in perpetuam rei memoriam, ut ſuum in *Scotiæ* regnum jus aſſereret, rupem non procul a *Dumbaro* oppido ad ulnæ longitudinem gladio transfixit.

Homagium autem a *Malcolmo* Rege, *Gulielmo Angliæ* domitori omnino negatur unquam factum; cum contra, prorſus tum noſtri, tum exteri hiſtorici aſſerant, *Gulielmum Angliæ* domitorem, ſuſcepta in *Scotiam* expeditione compulſum ad pacem *Scotiæ* tum utilem tum honorificum; cum alias inter conditiones hæc una eſſet, Ut *Gulielmus Anglos* Nobiles, ad aſylum in *Scotiam* ex *Anglia* profugos, priſtinis honoribus ac opibus reſtitueret: Quis igitur ſibi merito perſuadeat, ſubmiſiſſe *Malcolmum* ſe Regi, quem ad *Anglos* etiam transfugas in gratiam iterum admittendos coegerat, quique turbis domeſticis undique diſtrahebatur; quo tempore unita ſub bellicoſo Principe *Scotia* floreret; ut neceſſe non ſit hic repetere quod ſuperius probavi, ſi *Scotia* ſub vaſſallatu *Angliæ* fuiſſet, hunc, juxta communem conſuetudinem, ſcripto ſolenni fuiſſe confirmandum.

Jam *Gulielmi* homagium *Henrico* II. factum diuturni carceris ſqualor extorſit, nullum proinde fuit, cum qui illud præſtitit ſui tum juris non eſſet; legibus enim omnium nationum conſtat, nullos captivorum contractus eſſe validos; ac hunc maxime, cum contractus ejuſmodi a Rege factus etiam ſui juris, invalidus futurus eſſet. Quicunque enim Rex Regnum ſuum abalienarit, aut alteri manciparit; ſecundum quoſdam, omni ſuo ad Regnum jure excidit, ejuſq; ſolium ſucceſſori tribuendum, qui prædeceſſoris pactis non tenetur. Si quis enim hujuſmodi actus validus foret, *Anglia* Imperii feudum hodieque fuiſſet, cum *Richardus* I. *Anglorum* Rex, *Henrico* Imperatori ob *Angliam* homagium feciſſet: *Johanneſque* ipſius frater Papæ obtuliſſet, & idem *Murmelio Saraceno*. Quod ſpectat ad *Edgarum*, *Deam* flumen remigente *Kennetho* Rege *Scotiæ* tranſmiſſum; quamvis res ita ſe haberet, quod negamus, cum nihil ex Chronologia hac ſuper re diſcamus, patet ex dictis quid reſpondendum.

Celebre exemplum *Balioli* homagium præſtantis, nihil ad rem facit, cum *Robertus Bruſſius* homagium Regi *Edwardo* nunquam præſtiterit; malueritque privatus vivere ſine corona, quam ipſius eſſe vaſſallus: *Joannes Baliolus* a nobilitate merito rejectus eſt; quod natali ſolo ambitionem ſuam prætulerit: Miſeruntque *Scoti* legatos ad Regem *Edwardum*, qui ore declararunt, factum a *Baliolo* homagium revocari a ſe, atque priſtinam ita libertatem aſſeruerunt. Hocque homagium in cauſa fuit cur *Baliolus* Regno exciderit; adeo eum hæc ignavia nationi inviſum reddiderat, quem gens ipſa tanta ſeveritate non puniiſſet‘ ſi quid reipſa juris in *Scotiam Anglis* fuiſſet. Sed jam quamvis *Baliolus* Rex legitimus fuiſſet (ut reipſa non erat, cum jus *Bruſſii* ſecundum leges prius foret) ipſe tamen Regnum *Anglo* ſubjicere non potuiſſet; cum juxta legem feudalem unus ſuperior alio ſubjicere nequit; ex conſtitutione *Conradi*, Lib. 2. Feud, Tit. 34. § 1. quamvis autem aliqui velint ejuſmodi ſuperioritatis alienationibus, ſuo excidere jure ſuperiorem; omnes tamen concedunt alienationem eſſe nullam & irritam; *D. D.* in Cap. *Imperialem,* § Præterea de prohibitione alien. per *Frederic. Curt.* P. 16. N. 3. & latiſſime *Baſenth.* Cap. 9. Concluſ. 62.

Quod autem de conſenſu Parliamenti *Scotici* ſubjungitur, rem ſe ita habere omnino negatur; nullius enim Parliamenti a *Baliolo* convocati mentio fit; cum reliquorum omnium apud nos Parliamentorum acta extent. *Priniuſque,* licet ediderit quicquid hac ſuper re *Angli* poſſiderant, nullum ejuſmodi decreti Parliamentarii exemplar ſupponere auſus eſt: Si autem quod ejuſmodi fuiſſet decretum, peculiari haud dubie curâ conſervatum fuiſſet; hoc autem Parliamentum, ac ſtatutum, etiam ex hiſtoricis exteris fictitium quid eſſe, patet. Nec quis ſanæ mentis crediderit nobilitatem *Scoticam* vaſſallatum, ob quem *Baliolum* rejeciſſent, confirmaturam in libero Parliamento; ſed quamvis ſimilæ Parliamentum, ut reipſa nunquam extitit, aliquando extitiſſet; pauci ſibi ſæpe nomen Parliamenti, nulla ſibi a populo collata poteſtate, interdum aſſumunt. An enim *Anglia* eſt adhuc Papæ ſubdita, quod monachus Regi *Joanni* perſuaſerit ut ſceptrum ipſi ſubmitteret: An *Luſitania* liberum Regnum non habetur, licet, conſenſu gentis vi extorto, *Luſitani* ſemel ſe *Hiſpanis* ſubmiſerunt? An *Cromwelliana* Parliamenta jus *Cromwellio* tribuerunt? Quicquod noſtro in caſu jus præſcriptio non ſupplevit; pauciores enim intra annos quam præſcriptio requirat, priſtinæ ſe libertati reſtituerunt *Scoti,* ſub invictiſſimo, celeberrimo, fortiſſimoque Rege, *Roberto Bruſſio*; qui ea bellicæ fortitudinis miracula edidit, quibus humano generi manifeſtum fieret, quanto Deus exercituum odio, avaritiam, feritatemque Regis *Edwardi* I. proſecutus fuerit. Ut autem ulterius oſtendam quantum illud etiam ſeculum ab *Angliæ* ſervitute abhorruerit, exemplar literarum adhuc extantium ſubjungam, ſub ſigillis totius Nobilitatis, ad Papam *Joannem,* Anno 1320.

“ SANCTISSIMO Patri in *Chriſto,* ac Domino Domino *Joanni,* Divinâ Providentiâ, Sacro-ſanctæ *Romanæ,* & univerſalis Eccleſiæ Summo Pontifici; Filii ſui hnmiles & devoti; *Duncanus* Comes de *Fife, Thomas Randolphus* Comes *Moraviæ,* Dominus *Manniæ* & *Vallis Annandiæ, Patricius* de *Dumbar* Comes *Marchiæ, Maliſius* Comes de *Strathern, Malcolmus* Comes de *Levenox, Willielmus* Comes de *Roſs, Magnus* Comes *Cathaniæ* & *Orcadiæ,* & *Willielmus* Comes *Sutherlandiæ, Walterus* Seneſcallus *Scotiæ, Willielmus* de *Soules* Buttelarius *Scotiæ, Jacobus* Dominus de *Douglaſs, Rogerus* de *Moubray, David* Dominus de *Brechin, David* de *Graham, Ingelramus* de *Umfreville, Joannes* de *Menteith* Cuſtos Comitatus de *Menteith, Alexander Frazer, Gilbertus* de *Haia* Conſtabularius *Scotiæ, Robertus* de *Keith* Mariſcallus *Scotiæ, Henricus* de *Sancto-claro, Joannes* de *Graham, David* de *Lindſay, Willielmus Oliphant, Patricius* de *Graham, Joannes de Fenton, Willielmus* de *Abernethie, David* de *Weymes, Willielmus* de *Monte-fixo, Ferguſius* de *Ardroſan, Euſtachius* de *Maxwel, Willielmus* de *Ramſay, Willielmus* de *Monte-alto, Alanus* de *Moravia, Dovenaldus Campbell, Joannes Camburn, Reginaldus* le *Chen, Alexander* de *Seton, Andræas* de *Leſcelyne,* & *Alexander* de *Straton*; cæterique Barones, & Libere-tenentes, ac tota Communitas Regni *Scotiæ,* omnimodam Reverentiam filialem, cum devotis pedum oſculis Beatorum. Scimus, ſanctiſſime Pater & Domine, & ex antiquorum geſtis & libris colligimus, quod inter cæteras nationes egregias, Noſtra ſciz. *Scotorum* natio, multis præconiis fuerit inſignata: Quæ de majori *Schythia* per mare *Tirenum,* & Columnas *Herculis* tranſiens, & in *Hiſpania,* inter ferociſſimos, per multa temporum curricula, reſidens, a nullis quantumcunque barbaricis poterat alicubi ſubjugari; indeque veniens poſt mille & ducentos annos, a tranſitu Populi *Iſraelitici,* ſibi ſedes in Occidente quas nunc obtinet, expulſis *Britonibus,* & *Pictis* omnino deletis, licet per *Norvegienſes, Danos,* & *Anglos* ſæpius impugnata fuerit, multis ſibi victoriis, & laboribus quamplurimis adquiſivit; ipſaſque ab omni ſervitute liberas, ut Priſcorum teſtantur hiſtoriæ, ſemper tenuit: In quorum regno, centum & tredecem Reges de ipſorum regali proſapia, nullo alienigena interveniente, regnaverunt. Quorum nobilitates & merita, licet ex aliis non clarerent, ſatis tamen patenter effulgent; ex eo quod Rex regum Dominus *Jeſus Chriſtus,* poſt Paſſionem, & Reſurrectionem, ipſos in ultimis Terræ finibus conſtitutos, quaſi primos, ad ſuam fidem ſanctiſſimam convocavit: Nec eos per quemlibet in dicta fide confirmari voluit, ſed per ſuum primum Apoſtolum, quamvis ordine ſecundum vel tertium, Sanctum *Andræam,* meritiſſimum Beati *Petri* Germanum; quem ſemper ipſis præeſſe voluit ut Patronum. Hæc autem Sanctiſſimi Patres & Prædeceſſores veſtri ſolicita mente penſantes, ipſum Regnum & Populum, ut Beati *Petri* Germani peculium multis favoribus, & privilegiis quamplurimis muniverunt. Itaque Gens noſtra ſub ipſorum protectione, liber hactenus deguit & quieta; donec ille Princeps magnificus, Rex *Anglorum Edwardus,* Pater iſtius qui nunc eſt, Regnum noſtrum Acephalum, Populumque nullius mali aut doli conſcium, nec bellis aut inſultibus tunc aſſuetum, ſub amici & confederati ſpecie, innumerabiliter infeſtavit: Cujus Injurias, Cædes & Violentias, Prædationes, Incendia, Prælatorum incarcerationes, Monaſteriorum combuſtiones, Religioſorum ſpoliationes & occiſiones, alia quoque enormia, quæ in dicto Populo exercuit; nulli parcens ætati aut ſexui, Religioni aut Ordini, nullus ſcriberet, nec ad plenum intelligeret, niſi quem experientia informaret, A quibus malis innumeris,

“ ctus eſt; quæ ſententia fuiſſet contra Leges & iniqua, ſi judices eum ut merum captivum habuiſſent, & non ut hominem ſceptro *Anglicano* ſubditum: Idem, inquiunt, eſto judicium de alio *Scoto* ad mortem in *Anglia* damnato, *Simeone Frazillo* nomine, ſub eodem Rege. Ita pariter in negotio Domini *Beaumontii* regnante *Edwardo* Tertio decretum eſt. Objicienti enim alterum teſtium eſſe natione *Scotum*, adeoque non eſſe admittendum; Reſponſum eſt, quod *Scoti* juxta leges *Anglicanas* non eſſent alienigenæ, ſeu extranei; regnante etiam *Elizabetha*, quiſpiam ſtupri accuſatus, cum medietatem linguæ, quod *Scotus* eſſet petiiſſet, hæc ei gratia negata eſt, quod ut *Scotus Angliæ* ſubditus haberetur. Ita pariter cum *Robertus Vmframvillus*, Dominus *Rymæ* accitus eſſet ad Parliamentum, tanquam *Robertus* Comes *Anguſiæ* in *Scotia* regnante *Edwardo* Tertio, poſteaque inſtrumento in eum facto vocaretur rurſus *Vmframvillus*, nullâ honoris iſtius factâ mentione, illius honorem, judicatum eſt, hoc ſcripto imminutum, quod judices reor, non judicaſſent, ſi eum alienigenam ſecum ipſi reputaſſent. *Sexto*, Ex publico denique inſtrumento territoriorum ac inſignium, ſeu armorum, quod apud me extat conceſſo ab *Edwardo* Primo ultimo Regni anno, *Petro Doagiæ*. a *Stopworth*, in Comitatu *Ceſtriæ* e matris mei prædeceſſoribus, quo aſſeritur prædicta territoria, inſigniaque ipſi fuiſſe collata ab eo rege, quod ſtrenue ſe geſſerit contra infeſtum ſibi hoſtem ac rebellem *Baliolum Scotiæ* Regem, atque *Angliæ* Vaſſallum.

Ut primo ea diluam objecta, quæ ex ſuppoſito *Bruti* in *Britannos* imperio petuntur, ſat fuerit indicaſſe hæc a *Cambdeno* aliiſque doctis *Anglis* ſcriptoribus, ut mera reputari figmenta. Ut autem *Scotia Angliæ* obnoxia, ſeu ſubdita probetur, requiruntur inſtrumenta, actaque, publica, ut prius indicavimus. Hinc etiam diluuntur ea quæ de *Bellino*, ac Rege *Arthuro*. *&c.* aſſeruntur; ſed ut oſtendam quam vane hæc fraudulenterque conficta ſint, ſat fuerit ad duxiſſe in medium quidpiam a Docto *Ayleto Sammeſio* ubi de *Britannia* antiqua, p. 159. in hæc verba relatum. “ Huic figmento authoritatem conciliavit Rex *Edwardus* Primus, quod vindicaret ſibi *Scotiam* contra Papam *Bonifacium*, Eccleſiamque *Romanam*, quæ hoc regnum antiquo jure *Petri Patrimonio* Eccleſiæque dominio aſcribere ſolebat. Hiſtoriam *Bruti* a Monachis fere confictam ſatis liquet, maximè ſi propius inſpiciamus alias ejuſdem Epiſtolæ partes a *Prinio* in actis publicis citatæ, ac præſertim miraculum regis *Adelſtani*, qui in perpetuam rei memoriam, ut ſuum in *Scotiæ* regnum jus aſſereret, rupem non procul a *Dumbaro* oppido ad ulnæ longitudinem gladio transfixit.

Homagium autem a *Malcolmo* Rege, *Gulielmo Angliæ* domitori omnino negatur unquam factum; cum contra, prorſus tum noſtri, tum exteri hiſtorici aſſerant, *Gulielmum Angliæ* domitorem, ſuſcepta in *Scotiam* expeditione compulſum ad pacem *Scotiæ* tum utilem tum honorificum; cum alias inter conditiones hæc una eſſet, Ut *Gulielmus Anglos* Nobiles, ad aſylum in *Scotiam* ex *Anglia* profugos, priſtinis honoribus ac opibus reſtitueret: Quis igitur ſibi merito perſuadeat, ſubmiſiſſe *Malcolmum* ſe Regi, quem ad *Anglos* etiam transfugas in gratiam iterum admittendos coegerat, quique turbis domeſticis undique diſtrahebatur; quo tempore unita ſub bellicoſo Principe *Scotia* floreret; ut neceſſe non ſit hic repetere quod ſuperius probavi, ſi *Scotia* ſub vaſſallatu *Angliæ* fuiſſet, hunc, juxta communem conſuetudinem, ſcripto ſolenni fuiſſe confirmandum.

Jam *Gulielmi* homagium *Henrico* II. factum diuturni carceris ſqualor extorſit, nullum proinde fuit, cum qui illud præſtitit ſui tum juris non eſſet; legibus enim omnium nationum conſtat, nullos captivorum contractus eſſe validos; ac hunc maxime, cum contractus ejuſmodi a Rege factus etiam ſui juris, invalidus futurus eſſet. Quicunque enim Rex Regnum ſuum abalienarit, aut alteri manciparit; ſecundum quoſdam, omni ſuo ad Regnum jure excidit, ejuſq; ſolium ſucceſſori tribuendum, qui prædeceſſoris pactis non tenetur. Si quis enim hujuſmodi actus validus foret, *Anglia* Imperii feudum hodieque fuiſſet, cum *Richardus* I. *Anglorum* Rex, *Henrico* Imperatori ob *Angliam* homagium feciſſet: *Johanneſque* ipſius frater Papæ obtuliſſet, & idem *Murmelio Saraceno*. Quod ſpectat ad *Edgarum*, *Deam* flumen remigente *Kennetho* Rege *Scotiæ* tranſmiſſum; quamvis res ita ſe haberet, quod negamus, cum nihil ex Chronologia hac ſuper re diſcamus, patet ex dictis quid reſpondendum.

Celebre exemplum *Balioli* homagium præſtantis, nihil ad rem facit, cum *Robertus Bruſſius* homagium Regi *Edwardo* nunquam præſtiterit; malueritque privatus vivere ſine corona, quam ipſius eſſe vaſſallus: *Joannes Baliolus* a nobilitate merito rejectus eſt; quod natali ſolo ambitionem ſuam prætulerit: Miſeruntque *Scoti* legatos ad Regem *Edwardum*, qui ore declararunt, factum a *Baliolo* homagium revocari a ſe, atque priſtinam ita libertatem aſſeruerunt. Hocque homagium in cauſa fuit cur *Baliolus* Regno exciderit; adeo eum hæc ignavia nationi inviſum reddiderat, quem gens ipſa tanta ſeveritate non puniiſſet‘ ſi quid reipſa juris in *Scotiam Anglis* fuiſſet. Sed jam quamvis *Baliolus* Rex legitimus fuiſſet (ut reipſa non erat, cum jus *Bruſſii* ſecundum leges prius foret) ipſe tamen Regnum *Anglo* ſubjicere non potuiſſet; cum juxta legem feudalem unus ſuperior alio ſubjicere nequit; ex conſtitutione *Conradi*, Lib. 2. Feud, Tit. 34. § 1. quamvis autem aliqui velint ejuſmodi ſuperioritatis alienationibus, ſuo excidere jure ſuperiorem; omnes tamen concedunt alienationem eſſe nullam & irritam; *D. D.* in Cap. *Imperialem*, § Præterea de prohibitione alien. per *Frederic. Curt.* P. 16. N. 3. & latiſſime *Roſenth.* Cap. 9. Concluſ. 62.

Quod autem de conſenſu Parliamenti *Scotici* ſubjungitur, rem ſe ita habere omnino negatur; nullius enim Parliamenti a *Baliolo* convocati mentio fit; cum reliquorum omnium apud nos Parliamentorum acta extent. *Priniuſque*, licet ediderit quicquid hac ſuper re *Angli* poſſiderant, nullum ejuſmodi decreti Parliamentarii exemplar ſupponere auſus eſt: Si autem quod ejuſmodi fuiſſet decretum, peculiari haud dubie curâ conſervatum fuiſſet; hoc autem Parliamentum, ac ſtatutum, etiam ex hiſtoricis exteris fictitium quid eſſe, patet. Nec quis ſanæ mentis crediderit nobilitatem *Scoticam* vaſſallatum, ob quem *Baliolum* rejeciſſent, confirmaturam in libero Parliamento; ſed quamvis ſimilæ Parliamentum, ut reipſa nunquam extitit, aliquando extitiſſet; pauci ſibi ſæpe nomen Parliamenti, nulla ſibi a populo collata poteſtate, interdum aſſumunt. An enim *Anglia* eſt adhuc Papæ ſubdita, quod monachus Regi *Joanni* perſuaſerit ut ſceptrum ipſi ſubmitteret: An *Luſitania* liberum Regnum non habetur, licet, conſenſu gentis vi extorto, *Luſitani* ſemel ſe *Hiſpanis* ſubmiſerunt? An *Cromwelliana* Parliamenta jus *Cromwellio* tribuerunt? Quicquod noſtro in caſu jus præſcriptio non ſupplevit; pauciores enim intra annos quam præſcriptio requirat, priſtinæ ſe libertati reſtituerunt *Scoti*, ſub invictiſſimo, celeberrimo, fortiſſimoque Rege, *Roberto Bruſſio*; qui ea bellicæ fortitudinis miracula edidit, quibus humano generi manifeſtum fieret, quanto Deus exercituum odio, avaritiam, feritatemque Regis *Edwardi* I. proſecutus fuerit. Ut autem ulterius oſtendam quantum illud etiam ſeculum ab *Angliæ* ſervitute abhorruerit, exemplar literarum adhuc extantium ſubjungam, ſub ſigillis totius Nobilitatis, ad Papam *Joannem*, Anno 1320.

“ SANCTISSIMO Patri in *Chriſto*, ac Domino Domino *Joanni*, Divinâ Providentiâ,
“ Sacro-ſanctæ *Romanæ*, & univerſalis Eccleſiæ Summo Pontifici; Filii ſui hnmiles &
“ devoti; *Duncanus* Comes de *Fiſe*, *Thomas Randolphus* Comes *Moraviæ*, Dominus
“ *Manniæ* & *Vallis Annandiæ*, *Patricius* de *Dumbar* Comes *Marchiæ*, *Maliſius* Comes
“ de *Strathern*, *Malcolmus* Comes de *Levenox*, *Willielmus* Comes de *Roſs*, *Magnus* Comes
“ *Cathaniæ* & *Orcadiæ*, & *Willielmus* Comes *Sutherlandiæ*, *Walterus* Seneſcallus *Scotiæ*,
“ *Willielmus* de *Soules* Buttelarius *Scotiæ*, *Jacobus* Dominus de *Douglaſs*, *Rogerus* de *Moubray*,
“ *David* Dominus de *Brechin*, *David* de *Graham*, *Ingelramus* de *Umfreville*, *Joannes* de
“ *Menteith* Cuſtos Comitatus de *Menteith*, *Alexander Frazer*, *Gilbertus* de *Haia* Conſtabularius
“ *Scotiæ*, *Robertus* de *Keith* Mariſcallus *Scotiæ*, *Henricus* de *Sancto-claro*, *Joannes*
“ de *Graham*, *David* de *Lindſay*, *Willielmus Oliphant*, *Patricius* de *Graham*, *Joannes de*
“ *Fenton*, *Willielmus* de *Abernethie*, *David* de *Weymes*, *Willielmus* de *Monte-fixo*, *Ferguſius*
“ de *Ardroſan*, *Euſtachius* de *Maxwel*, *Willielmus* de *Ramſay*, *Willielmus* de *Monte-alto*,
“ *Alanus* de *Moravia*, *Dovenaldus Campbell*, *Joannes Camburn*, *Reginaldus* le *Chen*, *Alexander*
“ de *Seton*, *Andræas* de *Leſcelyne*, & *Alexander* de *Straton*; cæterique Barones, &
“ Libere-tenentes, ac tota Communitas Regni *Scotiæ*, omnimodam Reverentiam filialem,
“ cum devotis pedum oſculis Beatorum. Scimus, ſanctiſſime Pater & Domine, & ex antiquorum
“ geſtis & libris colligimus, quod inter cæteras nationes egregias, Noſtra ſciz. *Scotorum*
“ natio, multis præconiis fuerit inſignata: Quæ de majori *Schythia* per mare *Tirenum*, &
“ Columnas *Herculis* tranſiens, & in *Hiſpania*, inter ferociſſimos, per multa temporum curricula,
“ reſidens, a nullis quantumcunque barbaricis poterat alicubi ſubjugari; indeque veniens
“ poſt mille & ducentos annos, a tranſitu Populi *Iſraelitici*, ſibi ſedes in Occidente quas nunc
“ obtinet, expulſis *Britonibus*, & *Pictis* omnino deletis, licet per *Norvegienſes*, *Danos*, &
“ *Anglos* ſæpius impugnata fuerit, multis ſibi victoriis, & laboribus quamplurimis adquiſivit;
“ ipſaſque ab omni ſervitute liberas, ut Priſcorum teſtantur hiſtoriæ, ſemper tenuit: In quorum
“ regno, centum & tredecem Reges de ipſorum regali proſapia, nullo alienigena interveniente,
“ regnaverunt. Quorum nobilitates & merita, licet ex aliis non clarerent, ſatis tamen
“ patenter effulgent; ex eo quod Rex regum Dominus *Jeſus Chriſtus*, poſt Paſſionem,
“ & Reſurrectionem, ipſos in ultimis Terræ finibus conſtitutos, quaſi primos, ad ſuam fidem
“ ſanctiſſimam convocavit: Nec eos per quemlibet in dicta fide confirmari voluit, ſed per
“ ſuum primum Apoſtolum, quamvis ordine ſecundum vel tertium, Sanctum *Andræam*, meritiſſimum
“ Beati *Petri* Germanum; quem ſemper ipſis præeſſe voluit ut Patronum. Hæc
“ autem Sanctiſſimi Patres & Prædeceſſores veſtri ſolicita mente penſantes, ipſum Regnum
“ & Populum, ut Beati *Petri* Germani peculium multis favoribus, & privilegiis quamplurimis
“ muniverunt. Itaque Gens noſtra ſub ipſorum protectione, liber hactenus deguit & quieta;
“ donec ille Princeps magnificus, Rex *Anglorum Edwardus*, Pater iſtius qui nunc eſt, Regnum
“ noſtrum Acephalum, Populumque nullius mali aut doli conſcium, nec bellis aut inſultibus
“ tunc aſſuetum, ſub amici & confederati ſpecie, innumerabiliter infeſtavit: Cujus Injurias,
“ Cædes & Violentias, Prædationes, Incendia, Prælatorum incarcerationes, Monaſteriorum
“ combuſtiones, Religioſorum ſpoliationes & occiſiones, alia quoque enormia, quæ in
“ dicto Populo exercuit; nulli parcens ætati aut ſexui, Religioni aut Ordini, nullus ſcriberet,
“ nec ad plenum intelligeret, niſi quem experientia informaret, A quibus malis innumeris,

“ ipſo juvante qui poſt vulnera medetur & ſanat, liberati ſumus per Sereniſſimum Principem, Regem & Dominum noſtrum, Dominum *Robertum*, qui pro Populo & hæreditate ſuis, de manibus inimicorum liberandis, quaſi alter *Maccabeus*, aut *Joſue*, labores & tædia, inedias & pericula, læto ſuſtinuit animo: Quem etiam Divina diſpoſitio, & juxta leges & conſuetudines noſtras, quas uſque ad mortem ſuſtinere volumus; juris ſucceſſio, & debitus noſtrorum conſenſus & aſſenſus, noſtrum fecerunt Principem atque Regem. Cui, tanquam illi per quem ſalus in Populo facta eſt, pro noſtra libertate tuenda, tam jure quam meritis tenemur, & volumus in omnibus adherere: Quem, ſi ab inceptis deſiſtet, Regi *Anglorum*, aut *Anglicis* nos, aut Regnum noſtrum volens ſubjicere, tanquam inimicum noſtrum, & ſui noſtriq; juris ſubverſorem, ſtatim expellere niteremur; & alium Regem noſtrum, qui ad defenſionem noſtram ſufficiet, faciemus: Quia quamdiu centum viri remanſerint, nunquam *Anglorum* dominio aliquatenus volumus ſubjugari: Non enim propter gloriam, divitias, aut honores pugnamus; ſed propter libertatem ſolummodo, quam nemo bonus niſi ſimul cum vita amittet. Hinc eſt, Reverende Pater ac Domine, quod Sanctitatem Veſtram, cum omni precum inſtantia, genu flexis, cordibus exoramus, quatenus ſincero corde, menteque pia recenſentes, quod apud eum cujus vices in terris geritis, non ſit pondus, & pondus, nec diſtinctio *Judei* & *Græci*, *Scoti* aut *Anglici*; tribulationes & anguſtias nobis & Eccleſiæ Dei illatas ab *Anglicis*, paternis oculis intuentes; Regem *Anglorum*, cui ſufficere debet quod poſſidet; cum olim *Anglia* ſeptem aut pluribus ſolebat ſufficere Regibus, monere & exhortare dignemini, ut nos *Scotos* in exili degentes *Scotia*, ultra quam habitatio non eſt, nihilq; niſi noſtrum cupientes in pace dimittat: Cui, pro noſtra procuranda quiete, quicquid poſſumus, ad ſtatum noſtrum reſpectu habito, hoc facere volumus cum effectu. Veſtra enim intereſt, Sancte Pater, hoc facere, qui Paganorum feritatem, Chriſtianorum culpis exigentibus, in Chriſtianos ſævientem aſpicitis, & Chriſtianorum terminos arctari indies: Quare ne quid Veſtræ Sanctitatis memoriæ derogat; & ſi, quod abſit, Eccleſia in aliqua ſui parte veſtris temporibus patiatur eclipſin aut ſcandalum, vos videritis. Exhortet igitur Chriſtianos Principes, qui non cauſam ut cauſam ponentes, ſe fingunt in ſubſidium Terræ Sanctæ propter guerras quas habent cum proximis, ire non poſſe: Cujus impedimenti cauſa eſt verior, quod in minoribus proximis debellandis, utilitas propior, & reſiſtentia debilior æſtimantur: Sic quam læto corde dictus Dominus Rex noſter, & nos, ſi Rex *Anglorum* nos in pace dimittet, illuc iremus, qui nil ignorat, ſatis novit; quod *Chriſti* Vicario, totique Chriſtianitati oſtendimus & teſtamur. Quibus ſi Sanctitas Veſtra, *Anglorum* relatibus nimis credula, fidem ſinceram non adhibeat, aut ipſis in noſtram confuſionem favere non deſinat; corporum excidia, animarum exitia, & cætera quæ ſequuntur incommoda, quæ ipſi in nobis, & nos in ipſis fecerimus, Vobis ab Altiſſimo credimus imputanda. Ex quo ſumus, & erimus, in his quæ tenemur, tanquam obedientiæ filii, Vobis, tanquam Ipſius Vicario, in omnibus complacere; Ipſique, tanquam Summo Regi & Judici, cauſam noſtram tuendam committimus; cogitatum noſtrum jactantes in ipſo, ſperanteſque finem, quod in nobis virtutem faciet, & ad nihilum rediget hoſtes noſtros. Serenitatem & Sanctitatem Veſtram conſervet Altiſſimus Eccleſiæ ſuæ Sanctæ per tempora diuturna. Datum apud Monaſterium de *Aberbrothock*, in *Scotia*, Sexto Die *Aprilis*, Anno Gratiæ, Milleſimo, Trecenteſimo, Viceſimo: Anno verò Regni Regis noſtri ſupradicti, Quinto-decimo. ” *Vbi Regem ſe ſuum rejecturos aſſerunt, ſi* Angliæ *ſeſe ſubmittere vellet:* Quod non ita accipiendum, ut Poteſtas eligendi Regis in Nobilitate reſidere exiſtimanda ſit; ſed quod edocti forent ſecundum juris peritos, jure Regni in perpetuum excidere Reges, ſi Regnum alienarent, aut ſubditos alteri manciparent: Ut autem errori forte orituro ex lectione hujus epiſtolæ, circa numerum Regum noſtrorum, obviam eatur, obſervandum, hujus ſcriptores more noſtro annumeraſſe Regibus noſtris, eos de regia familia qui pro tempore Proreges forent.

HINC pariter diluuntur quæ in codice *Ragmani* objiciuntur: Nec habenda eorum ratio qui in ſervitutem conſenſerint; cum *Duglaſſius*, *Grahamius*, *Vallas*, aliique innumeri fortiter, per breve etiam id tempus, repugnarint, Patriæque Privilegia, ſuo in Patriam zelo, fideque conſervarint: Lege enim conſtat, in re pari potiorem eſſe conditionem prohibentis; & in re communi, neminem dominorum jure quicquam facere poſſe invito altero; *L.* 28. commun. divid.

QUOD autem dicunt Reges noſtros, *Scotorum* Reges, non *Scotiæ* vocatos; hoc nomine ridendi omnino ſunt, cum ex ſcriptoribus noſtris manifeſtum ſit, regnante *Davide* Virgine, Regem noſtrum *Scotiæ* Regem eſſe dictum: Pariter *Gulielmum*, in libro *Abbatiæ Aberbrothenſis*, Regem *Scotiæ* nuncupatum, & uxorem Reginam *Scotiæ*: Notum pariter eſt a *Joanne Angliæ* Rege, ad petitionem *Willielmi* Regis *Scotiæ*, conceſſam eſſe facultatem Monachis *Aberbrothidæ*, tranſportandi mobilia per *Angliam*, nullo ſoluto pretio: Eundem confert ubique titulum *Matthæus Pariſienſis*, ac Papa *Innocentius* Tertius; *Leg. Canon. C.* 4. *Decr.* de *Immunit. Eccleſ.* ita reſcriptum inſcribitur; ILLUSTRI REGI *SCOTIÆ*, qui haud dubie erat *Willielmus* eo tempore regnans: Præterea ex hoc argumento a *Scotiæ* appellatione ducto, nihil inferri poteſt, cum feudatarii etiam Reges non Populorum, ſed Regnorum ipſorum Reges dicantur; Reges putà *Siciliæ*, *Neapoleos*, &c. Inepte igitur, nec concluſione legitima quis principes noſtros feudatarios dixerit, quod reges ſe *Scotorum* non *Scotiæ* dixerint. Ipſi enim *Angliæ* Reges ſæpe in Hiſtoria *Matth. Pariſ. Anglorum* dicuntur Reges; maxime ubi *Joannis* & *Henrici* III. Regum geſta deſcribuntur.

In negotiis *Edwardum* Primum inter ac *Scotiæ* Gubernatores tranſactis, *Margareta* ab ipſo *Angliæ* rege, Regina ac Domina *Scotiæ* dicitur: In tabulis etiam antenuptialibus, *Henricum* ſeptimum inter (in gratiam filiæ reginæ *Margaretæ* ac *Jacobum* quartum) rex noſter eodem in ſcripto interdum appellatur rex *Scotorum*, interdum rex *Scotiæ*; Contractus porro ad matrimonium abſolvendum ita inſcribitur, COMMISSIO REGIS PRO MATRIMONIO, in eoque rex *Scotiæ* ubique dicitur *Chariſſimus Frater*, (quæ quidem appellatio feudatario principi a ſuperiore nunquam tribuitur) *Scotique* dicuntur ſubditi regis *Scotiæ* non *Angliæ*, ut dici opportuiſſet, ſi rex noſter feudatarius tantum princeps fuiſſet. Ut autem reges noſtros, *Scotiæ* reges vocatos probemus perſæpe, contra *Heylinum*, non alio egemus argumento, quam inſtrumento, cujus ipſemet mentionem facit, conceſſo ab *Edwardo* rege *Petro Dodgeo*, in quo ipſemet fatetur *Baliolum Scotiæ* regem fuiſſe appellatum. Atque hinc omnino patet *Heylinum* non falſa tantum ſæpe; ſed & incohærentia loqui; ſed quamvis hoc quod falſum oſtendimus, verum reipſâ foret, nihil ad rem inde quis intulerit, cum licet *Gothi, Pictique* liberi forent, reges nihilominus *Pictorum, Gothorumque* dicti phraſi victricibus nationibus communi, cujuſmodi *Scoti* erant, quorum principes, dum varias ſe in *Colonias* ad imperium conſtituendum dividerent, a populo potius nondum certis in ſedibus ſtabilito, quam a regione appellationem derivabant. Cum autem homines ſint vaſſalli non agri, aut territoria, concludamus juxta modum loquendi feudaliſtarum, ex eo quod reges noſtri *Scotorum* reges dicantur, *Scotos* non fuiſſe *Angliæ* vaſſallos, aut ſubvaſſallos, aut valvaſſores.

Argumentum a Deciſionibus *Anglicis* ductum nihil probat; cum enim armorum vi ad vaſſallatum compellere nos *Angli* non potuerint, ſuis nos Parliamenta *Anglicana*, judiceſque ſententiis vaſſallos certe nunquam fecerint: Quidquod domeſtica in re tanti momenti teſtimonia nemo admiſerit: Quæ tamen ipſa noſtram nationem non raro oſtendunt liberam: Commemorabo in exemplum hic tantum *Mariam* reginam contra quam litem capitalem intentarunt *Angli* non vaſſallam, ſed ut obnoxiam tamen juriſdictioni *Anglicanæ* ratione delicti. Verba *Zouch.* de judicio inter gentes *p.* 2. § 6. quibus res tota liquet, hæc ſunt.

“ Erant boni rerum æſtimatores, qui aſperius cum illa actum affirmabant, eo quod fuerit princeps libera, & abſoluta, in quam ſolius Dei ſit imperium, quod in majeſtatem peccare non poſſet, cui ſubdita non fuerit, quod par in parem non habeat poteſtatem, unde judicium imperatoris in *Robertum Siciliæ* regem irritum pronunciatum eſt, quia imperio ejus non eſſet ſubditus: Alii aliter cenſebant illam ſcilicet ſubditam eſſe, etſi non originariam, tamen temporariam; quia duo abſoluti principes quoad authoritatem in uno regno eſſe non poſſunt, & parem in parem habere poteſtatem, quoties paris judicio ſe ſubmiſerit, vel expreſſe verbis, vel tacitè contrahendo, vel delinquendo intra paris ſcilicet juriſdictionem, & Papam ſententiam imperatoris in *Robertum Siculum* reſcidiſſe, quod factum in territorio imperiali non fuerit, ſed Papali, denique nullum magnum extare exemplum, quod non aliquid de iniquo habeat.

Jam ex lite contra Epiſcopum *Roſſenſem* intentata, quemadmodum ab exteris juris peritis, ac *Cambdeno* refertur. omnino liquet cum eo actum non ut *Angliæ* ſubdito ratione originis, ſed tantum ratione delicti: Author juris maritimi, P. 457. ubi de *Angliæ* in *Hiberniam* juriſdictione egiſſet, hæc de *Scotia* addit: *Sed in* Scotia *aliter ſe res habet, illud enim regnum abſolutum eſt, non ut* Hibernia *quæ* Angliæ *annexa eſt vi armorum, ac bello, cum* Scotia *coaluerit* Angliæ, *fœdere, non bello, & quamvis ſub uno principe unitæ ſint*, Scotia, Angliaque, *diſtinctæ tamen ſunt, diverſaſque prorſus habent leges; quare nihil* Angli *in* Scotia *niſi promiſſu, nec* Scoti *in* Anglia *poſſunt*. Nec reſponſionem meretur ab injuſtâ, violentaque morte magnanimi *Vallæ* ductum argumentum, cum lata in hominem bello captum ſententia contra nationum omnium leges immanitatis non juſtitiæ partus ſit: Cum enim *Angli* inducias cum *Scotis* paciſcerentur, captivos redimerent, cæteraque quæ juſtum bellum comitantur præſtarent, apertè docuerunt, hoc ſe, aliiſque id genus crudelitatis exemplis rationi præripuiſſe facem vehementia paſſionis, odiique in hoſtilem gentem; occurrit hic loci obſervandum, licet agendum non ſit cum vaſſallis, ut extraneis, reperiri tamen in hiſtoriarum monumentis, integras nationes nativo gentis cujuſpiam jure donatas, omnium Privilegiorum factas fuiſſe participes, qui tamen populi, nec vaſſalli habiti eſſent, nec ſubditi; ita *Pelopidis* omnia *Perſarum* privilegia *Artaxerxes* tribuit, quod magna *Perſis* obſequia præſtitiſſent, ut obſervat *Plutarchus* in vita *Pelopidæ*, atque ita *Athenienſes* ſua communicarunt privilegia *Rhodiis*, ac *Latini Romanis*, ut teſtatur *Livius, L.* 25, Nos quoque privilegiorum *Anglicæ* gentis, factos fuiſſe participes ab *Anglis* patet ex Statuto Divi *Edwardi*, adhuc extante in libro inſcripto Χραιονομια a *Willielmo Lamberto*, Anno 1568 Edito, confirmatoque a *Willielmo Angliæ* Domitore, ac annumerato bonis illius legibus.

### PRO

# Comite *Tweddaliæ*,

### CONTRA

# Comitem *Lawderiæ*.

## *NUM pater ex ſua obligatione, filiæ debitor, ſi dotem poſtea pro ea promiſerit, præſumendus ſit non novam liberalitatem adjeciſſe, ſed a priori nexu ſe liberaſſe ?*

CUM Juriſprudentia ſit vera, non fucata & ſimulata Philoſophia, naturam imitari, non expugnare debet; hinc fluit, quòd licèt jura fictionibus aliquando utantur, non debent tamen legum illæ preſtigiæ, & larvæ veritatis, naturalia jura, quibus inſerviunt, corrumpere. Adoptans hâc ratione major debet eſſe adoptato; † & ſi quis confeſſus ſit, illum eſſe filium, ex confeſſione tantummodo obligatur, ſi ætas ejus patiatur illum ſuum filium eſſe. * Non defecere tamen juriſconſulti, qui dictata ſua, naturæ anteponunt, gigantum inſtar, cœlo bellum inferentes, dum quaſdam præſumptiones, invitâ naturâ cudunt, aliaſque bono publico natas, malè applicant, inter quos primas obtinent, qui præſumptionem illam, *Debitor non præſumitur donare*, in filiorum præjudicium, extendere ſunt auſi; naturæ leges evertentes, dum affectum paternum, in ipſo patris ſinu extinguere nituntur; quibus cum *Cleopatrâ* reſpondendum, quæ cum de parricidio ſui fratris accuſaretur fratrem fuiſſe, ſæpe repetebat, nihil addens. Sed ne novam orandi methodum inſolenter introduxiſſe videar, noſtri facti ſpeciem, more majorum, ita aperio.

† L. 40. § 1. ff. de adopt.

* L. 13. ff. de interrog. in jur. fac.

*LAWDERIÆ* Comes, qui poſtea ducis titulo a rege inſignitus eſt, unam ex duabus hæredibus Comitis *Humii* uxorem duxit, quibus nuptiis multum ditatus, ſe chirographo filiæ ſuæ unicæ, ex ea natæ, in decem millia librarum *Angliæ*, obſtrinxit; eamque in omnibus ſuis terris inveſtivit, & ſummo ſtudio D. de *Teſter Tweddaliæ* Comitis primogenito, ſummæ ſpei adoleſcenti, in matrimonium collocavit, 5000 lib. *Ang.* tabulis ante nuptialibus in dotem ſocero promittens, nullâ factâ prioris obligationis mentione; ſeque alias 7000 ſolvere aſtringens in eventum redemptionis: Terris autem uxoris ſuaſu a filia redemptis, & fratri ceſſis, Comes *Tweddaliæ*, filiæ illius ſocer, ejuſque ceſſionarius, debitum illud cheirographarium ab hærede defuncti ducis petit.

PRO fratre, nunc obligati hærede, excipitur, Patrem, Ducem *Lawderiæ*, poſtquam debitor extitit, filiam, actoris & ceſſionarii filio, in matrimonium collocaſſe, eique duodecem millia librarum *Angl.* in dotem promiſiſſe: Et ita ſe a priori debito liberaſſe, per celebrem & ſalubrem juris regulam, *Debitor non præſumitur donare quamdiu eſt debitor*: Nil enim prius habent homines in intentione, quam ſe ab omni nexu liberare; eſtque libertas in omni caſu favorabilis; nec ſuum quis præſumitur ſpargere: Et ſi quis centum debens, ſimpliciter centum leget ſuo creditori; præſumitur compenſandi animo legaſſe. Æquitati etiam maxime conſentaneum eſt, ut cum Pater ſe tantum obligaverit filiæ, ad hoc, ut duci poſſit; tunc eum ab hoc nexu liberari, cum dotem promiſerat quum duceretur; & ideo promiſſio hæc dotis, in tabulis antenuptialibus, potius vera ſolutio, quam præſumpta dici debet. Sæpe etiam idem apud noſtros judicatum invenitur: Nam non ſolum obligationi a Patre conceſſæ, ſatisfactum credidit Senatus ex eo, quod eam poſtea dotaſſet, priore debito in dotem non imputato: Sed cum Pater, tanquam Adminiſtrator ſuæ filiæ, legatum ei relictum recepiſſet, ipſamque poſtea dotaſſet, voluit Senatus dotem hanc, in debitum illud nomine legati recepti imputandum; nec maritum, dotem ſimul & legatum petere poſſe. Addunt etiam præſumptionem, hoc in caſu, fortiorem, quod dos ſit in ſe ampla, ſitque hæreditas fratri delata, debitis multum exhauſta, & quaſi ſubmerſa. Opponunt etiam actori filiam, ex conſenſu mariti, quidquid a Patre debebatur, biennio poſt contractas nuptias, remiſiſſe.

QUIBUS argumentis pro filia, ejuſque ceſſionario, opponitur, axioma illud *Debitor non præſumitur donare*, nec inter regulas juris civilis, nec canonici relatum, paucis caſibus recipi, & ubi recipitur multis arctari fallentiis; ita ut plures habeat exceptiones quam exempla: *Nihil enim tam naturale eſt, quam unumquodque eodem modo diſſolvi quo colligatum eſt*; quamobrem, cum Pater expreſſe chirographo filiæ ſuæ eſſet debitor, debitum hoc non niſi alio chirographo tolli potuit. Quis enim credat, debitorem ullum tam ſupinè negligentem, ut ſe non liberaret, cum liberare potuit; & ſibi imputandum, qui apertius ſe non explicuit; quod precipue obtinet in debito adeo gravi, & tanti momenti, ut nullus ſit tam mentis inops, qui ejus non recordaretur; preſertim in tabulis hiſce antenuptialibus, ubi minima quæque ad amuſſim ſunt definita; & in quibus clauſulâ ſatis nota utimur in noſtro ſtilo, cum filias familias priora debita remittere volumus; ſuccurrunt jura minoribus, atque furioſis; quia omnino neſciunt quid faciunt; & Prodigis, quia nec modum, nec finem impenſarum habentes, vix a furioſis abſunt: Sed majori, ſcienti, & prudenti, nunquam ſuccurritur, nec creditur eum aliter contrahere, vel diſtrahere voluiſſe, quàm contraxit, vel diſtraxit. Quod ſi in omnibus, multo magis concedendum in homine occulatiſſimo, regni ſecretario, & in negotio ſolenni, per integras menſes agitato, & vexato; & juriſperitis plurimis, dum hæc, agerentur, circumdato, & inſtructo. In legibus interpretandis, caſus omiſſus habetur pro omiſſo: concludunt enim juris interpretes, legiſlatorem, quia alia homogenea expreſſit, materiamque contraverſam ſub conſpectu habuit, voluiſſe omnia aut exprimere, aut pro non expreſſis habere. Cur ergo eadem paritate rationis non concludendum, prius hoc debitum, in dotem imputare non voluiſſe, cum hoc expreſſe non fecerit? Retorquendum ergo ſic eſt argumentum, Aut Pater, cum dotem, tabulis ante nuptialibus, promiſit, prioris debiti recordatus eſt, aut non; ſi recordatus eſt, & tamen non imputavit, concludendum neceſſario, eum ſe liberare non voluiſſe: Nihil enim fortius preſumendum, quam unumquemque ſibi, in quantum voluit conſuluiſſe; ſed ſi pater, prioris hujus debiti non eſt recordatus; quomodo argui poteſt, eum imputaſſe; & dotem in ſolutum tantum dediſſe, cujus voluntatis nullum inveniri veſtigium poteſt: Hoc enim eſſet, eum hoc voluiſſe, quod velle non poterat: Quia ex conceſſis neſciebat, aut quod idem eſt, non recordabatur, quod eum voluiſſe preſumunt: Non relinquendum eſt arbitrio judicis, noſtra debita, vel augere, vel minuere, prout illi viſum fuerit: Hoc enim eſſet omnia in judicis manu ponere, dominium noſtrum in eum transferre, illique pro arbitrio, licere filias noſtras dotare, vel non. *Illi certe robur, & æs triplex, circa pectus erat*, qui primus præſumptiunculam hanc, naturæ & legibus oppoſuit. Cur quæſo, toties in tabulis hiſce, reperitur dotis promiſſio, ſi dotem non conſtituere, ſed debitum prius contractum ſolvere voluit pater; qui, ſi aperte, & manifeſte declaraſſet, ſe velle prius debitum ſolvere, ut potuit, & debuit ſi voluiſſet, nec ſocer, nec maritus acquieviſſent: Hoc enim fuiſſet, uxorem non ducere, ſed ſpoliare.

COMMENSURANTUR dotibus donationes propter nuptias; unius ſoceri liberalitas alterius liberalitate provocatur: Fraus autem fieret, propter nuptias donanti, uſum fructumque tum doti tum debito reſpondentem largienti; ſi poſt contractum perfectum liceret, præſumptione tacitâ, dotem non ſolum diminuere, ſed delere. Et ſi Pater dum inter vivos fuiſſet, hoc contra generum excepiſſet, replicatione doli mali, & pacti conventi eum ſummoviſſet ſocer; multo ergo magis non audiendus eſt frater, qui præſumptam tantum voluntatem ex dubiis colligit conjecturis.

II. QUICQUID vi hujus præſumptionis argui poteſt, id inter eaſdem perſonas, inter quas fieri poteſt debiti & crediti præſumpta contributio, nec ullum jus tertii vertitur, tantum locum habet: Quomodo igitur hoc extendi poteſt ad caſum noſtrum, in quo prius debitum ſuæ filiæ tantum debebatur; dos autem his tabulis pro dimidia parte ſocero eſt promiſſa, & pro dimidia parte marito: Nam cum hæc præſumptio in compenſationem quandam ſe reſolvat, ideo non aliter ac compenſatio opponi debet: Sed hæc inter eaſdem perſonas opponi tantum poteſt, ergo & illa: Hic etiam ſumma cura notandum, filiam hanc unicam in omnibus terris Patris ſui fuiſſe infeodatam, cum nuberet, & cum Patre ſuo, tanquam feudi dominam, pro dote ſe ſocero & marito obligaſſe: Qui ergo fieri poteſt, ut illa ſe in ſuam necem ſolviſſe præſumeretur?

Requiritur ad minimum, ad hanc præſumptionem fundandam, ut alter ſit debitor, alter creditor; nemo enim ſibi ſolvere poteſt: Hinc autem extingui volunt debitum filiæ per ipſam dotem a filia ſocero promiſſam; quam incongrua hæc fictio, & in quam tenues auras evaneſcit? Si Pater in pecunia numerata dotem ſolviſſet, forſan eo caſu primam obligationem diſſolviſſe præſumi poterat; ſed contrahendo in tabulis antenuptialibus ſummam, non filiæ, ſed ſocero ſolvendam, priorem non ſolviſſe, ſed ſecundum contraxiſſe omnino dicendus eſt: *Qui enim contrahit, non diſtrahit:* Quod & cum inter extraneos obtineat, inter quos ſecunda obligatio a Prima non liberat, licet ſummæ conveniant, & æquentur; cur non & hoc inter Parentem & filiam, multo magis obtinere debet.

III. PRESUMPTIO hæc non tenet in dote a Patre promiſſa; ille enim ex officio, & amore paterno dotem promiſiſſe intelligitur; & ceſſat præſumptio illa, ceditque fortiori; nam licet extraneus debitor ſibi potius conſulere vult quam creditori; non tamen hic credendum velle Patrem fratri potius quam filiæ unicæ conſuluiſſe: Repugnat huic applicationi natura, eademq; affectio quæ præſumptionem illam generaliter dictat, eam in hac relatione abominatur. Volunt leges hæreditatem univerſam, ex tacito Parentis voto, in filiam devolvi; cum jure civili concurrat jus ſanguinis: In contrarium tamen nititur hæc præſumptio, nec ſinere vult partem deferri, ubi utroque illo jure deferendum eſt univerſum Patrimonium. Liberos noſtros non ſolum plus quam fratres, ſed & plus quam noſmet ipſos, ſpectamus & curamus; ut illi quieſcant, ſudamus; ut dominentur, vigilamus; ut illi laute, nos calamitoſe vivimus: Et ut omnia uno verbo complectar, magis liberorum ſumus ſervi, quam Parentes. Sed ſi ab experientia, ipſorum fatuorum ſcientia, ad juriſprudentiam, rectæ rationis culmen, aſcendere libet, ibi videbitur, omnia pro liberis, ſed non conrra præſumi. Actio *quod metus cauſa,* non ſolum ad ea reſcindenda, Parenti datur, quæ ipſe ob metum ſibi illatum geſſit; ſed & ad ea reſcindenda, quæ ne liberi læderentur dedit: Nam ut ait *Paulus,* L. 8. § ult. *Quod metus cauſa, nihil intereſt, in ſe quis veritus ſit, an in liberis ſuis, cum pro affectu Parentes magis in liberis terreantur.* Inde optime colligit gloſſa, præſumendum eſſe Patres magis liberos quam ſe diligere: Et ubi hæres filio alimenta a Patre præſtita ſolvere noluit: Reſponſum eſt, Præſumendum fuiſſe Patrem, ex paterna pietate aluiſſe. Sed ne judices naturam hic defererent, conſtitutum eſt, in ipſa facti noſtri ſpecie, a *Juſtiniano, L.* 7. *C.* de *Dotis promiſſione,* quod ſi Pater adminiſtrator bonorum filiæ ſuæ, pro ea dotem promiſerit, eum cenſendum dotem hanc, ex ſuis, & non ex filiæ bonis promiſiſſe, ſi locuples fuerit; ſi autem inops, ex filiæ bonis: Verba legis ſunt; “ Si Pater dotem pro filia ſimpliciter dederit, vel pro filio ante nuptias donationem fecerit, habeat autem filius, vel in poteſtate conſtitutus, vel forte emancipatus, res maternas, vel alio modo tales quæ acquiſitionem effugiunt, quarum uſus fructus ſolus apud Patrem remanet, vel quocunque modo poterat quaſdam actiones contra Patrem habere; dubitabatur apud veteres, utrumne videretur Pater, ex ipſo debito dotis, vel ante nuptias donationis feciſſe promiſſionem, vel dationem, ut ſeſe ab ejuſmmodi nexu liberaret; An debitum remaneret in ſua natura; liberalitas autem paterna, dotem, vel ante nuptias donationem, dare ſuggeſſiſſet: Utramque igitur dubitationem certo fini tradentes, ſancimus, Si quidem nihil addendum exiſtimaverit, ſed ſimpliciter dotem, vel ante nuptias donationem, dederit, vel promiſerit, ex ſua liberalitate hoc feciſſe intelligi, debito in ſua figura remanente. *Neque enim leges incognitæ ſunt, quibus cautum eſt omnino paternum eſſe officium, dotem, vel ante nuptias donationem, pro ſua dare progenie.* Liberalitas itaque talis, remanet vera, & irrevocabilis; ut puro nomine Liberalitas, & debitum ſuam ſequatur fortunam.” *Baldi* ſummarium hujus legis ita ſe habet; *Pater ſimpliciter dotando filiam, non exprimendo de quo patrimonio, videtur dotaſſe de proprio patrimonio ipſius patris: Si vero expreſſerit, quod dotabat de proprio patrimonio, & filiæ; tunc ſi eſt ſolvendo, intelligitur dotaſſe de proprio; ſi vero non eſt ſolvendo, intelligitur dotaſſe de patrimonio filiæ.* Hoc dicit iſta lex ſingularis, & unica, & una de quinquaginta deciſionibus *Juſtiniani.* Ex hac etiam lege colligi poteſt, quod ſi Pater dixerit, ſe dotem dare ex ſuis & filiæ bonis, cenſebitur promiſiſſe de ſuis; cum potuerit apertis verbis concipere; declarando quantum ex ſuis, & quantum ex filiæ bonis conſtituerit: Ergo a fortiori, ſi Pater tantum dotem promiſerit, relatione ad bona filiæ non habita; ſequetur eum ex ſuo, & non ex filiæ patrimonio, dotaſſe. Et quia inops tantum prius debitum ſolviſſe præſumitur, ſequitur Ducem *Lawderiæ,* Patrem locupletiſſimum, ingentem rem, & unicam tantum filiam habentem, non voluiſſe, dum dotem daret, debitum extinguere: Nec eſt hoc ullo caſu dotem dare, ſed ſe liberare; & exceptio ſemper firmat regulam in caſibus non exceptis. Cujus deciſionis variæ afferuntur rationes: *Juſtinianus* enim rationem hujus præſumptionis in eo ponit, quod paternum ſit officium dotare filiam; quod introductum eſt per *L.* 19. *ff.* de *ritu nuptiarum. Alciatus* autem, *Præſumptione* 26. *Num.* 6. ait hoc inductum ob ſanguinis conjunctionem, & affectionem Patris erga filiam; & ideo in hac lege appellatur Patris liberalitas. Mihi autem videtur hæc jungi poſſe: Certiſſimum enim eſt, præſumptionem hanc juris & de jure, appellari a *Johanne Andræa,* in *Additionibus* ad *Specul.* Tit. de *Præſump.* § *Species*; & ideo præferenda eſt præſumptioni ab adverſariis adductæ; quæ præſumptio tantum hominis, & ne vel juris dici poteſt; & tam prævalet noſtra (ut a *Mynſingero* notatur) quod in dubio Pater ſemper cenſeatur, de bonis ſuis dotem promittere; adeo ut ſi promittat in dotem filiæ mille aureos ex bonis paternis & maternis, teneatur de ſuis exſolvere, & integra bona materna filiæ aſſervare; cum Patrem ipſa officii ratio, & legis neceſſitas, tum in filiam affectio, ad dotandum impellat; *Cent*. 6. *Obſ*. 85. & adeo extenditur hæc præſumptio, ut locum etiam obtineat, quando Pater poſt ipſam dotis promiſſionem, aut ſolutionem proteſtatus eſt, ſe omnino de bonis filiæ id egiſſe; ut reſpondent *Angelus*, Conſilio 209. *Menochius*, 370. *L*. 4. ea ratione moti, quod ex præcedenti actu promiſſionis acquiſitum ſit jus filiæ, quod ſcilicet præſumatur de ſuo promiſiſſe: Unde poſt jus quæſitum, fruſtra Pater proteſtaretur; multo magis ergo hoc obtinere debet, ubi nil unquam a Patre vel ſuſurratum eſt, per totum ejus vitæ curriculum, quo præſumi poterat ſe dotem hanc in ſolutionem prioris debiti promiſiſſe.

SANCTISSIMA hæc *Juſtiniani* conſtitutio, deciſionibus etiam noſtris ſæpius approbata eſt, ſed præcipue illa inter *Marriæ* Comitem, & Dominum de *Cardroſs*, 20. *Feb.* 1639. in qua deciſum eſt, terras Primogenito ex ſecundis nuptiis conceſſas, non in ſolutionem prioris obligationis datas, ſed hanc liberalitatem priori proviſioni adjectam; quia has in ſolutum datas non expreſſit Pater, licet ipſa diſpoſitio nunquam filio tradita fuerat, ſed a tertio per actionem, *ad exhibendum* recuperata, ipſaſque terras, per multos poſt diſpoſitionem annos poſſediſſet Pater, imo & extraneo vendidiſſet.

NEC argumenti, ex lege hac deducti, aciem retundit; quod illa tantum definiat caſum, in quo, non ex ſua obligatione, ſed ex bonis maternis, pater ante dotem conſtitutam, filiæ debitor eſſet; qui a noſtro multum diſtat, in quo, pater a ſua tantum liberalitate, ſe, vera ſolutione, per dotis promiſſionem liberavit: Nam ratio deciſionis in hac lege, fundatur in patris erga filiam affectione: Unde bene deduci poteſt, patrem non per ignorantiam, non per incuriam, ſed ex amore & liberalitate, dotem, in ſolutionem prioris debiti, non imputaſſe; in quo æque filiæ erat debitor, ac ſi ex bonis maternis debitor fuiſſet: Materna etenim bona, non *taxativè*, ſed *demonſtrativè*, hoc in caſu ſunt accipienda, & exempli gratia, non reſtringendi animo ea in lege ponuntur; Nam addit lex ipſa, verba hæc, *Vel quocunque modo poterat actiones quaſdam contra patrem habere*, (& quis inficias ire poteſt, filiam hanc, ex chirographo, actionem habuiſſe contra patrem) ſed queſtio hic non eſt de debiti origine, verum utrum pater, novam ex officio & amore paterno, adjecerit liberalitatem, & definit generaliter Imperator noſter, eum, hoc, ex ſua liberalitate, feciſſe intelligi; *debito in ſua figura remanente.* Caſus, hac in lege, generaliter proponitur, an ex ſuis, an ex filiæ bonis dotavit, & quod prior hæc obligatio, in bonis filiæ fuerat, negari nequit; preſertim, cum Pater in chirographo hoc noſtro, ſe ex amore, & cauſis oneroſis, debitorem filiæ ſuæ fuiſſe apertè fateatur. Et ut infra demonſtrabitur, patrem, ex bonis maternis, debitorem fuiſſe, pluſquam probabile eſt; & ipſa hæc probabilitas, patris taciturnitati, verbiſque chirographi prædicti juncta, ſatis pro filiâ probat: Ubi tantum agitur, quæ fuerat patris intentio, in dotis conſtitutione, ſine ullâ ejus, in prius debitum, imputatione repertâ.

QUARTO, Præſumptioni, *debitor non præſumitur donare*, etiam reſpondetur, eam contrariis præſumptionibus tolli poſſe, licet dicta lege non tolleretur, eamque ideo nullo modo obtinere, ubi pater, non ſolum antea ſe obligaverat filiis, ſed & ubi probabile eſt, eum ſe ex cauſa oneroſa obligaſſe; licet hujus manifeſta probatio jam perierit: Poſt receptam etenim obligationem, mater, hujus obligationis fundamenta, apud ſe retinere, non erat obſtricta, ſed ſatis ſuperque conſtat, Ducem *Lawderiæ*, filiæ hujus patrem, viginti mill. lib. *Ang*. ex parte matris, matrimonio illo locupletatum fuiſſe, quod ex ipſius epiſtolis, matri ſcriptis, adhuc conſtat; ſi ergo 5000, nomine & dotis, & debiti filiæ, duntaxat ſolverit; ſequetur manifeſtè, filiam, illius matrimonii, ne vel ſuum a patre conſequutam fuiſſe, licet nihil juſtius, quam patrem, eo magis ad filiam dotandam, ex ſuo lauto & amplo patrimonio obligatum, quo ex parte ipſius matris ditatus eſt.

PONDERANDA ergo ſunt vobis (*Judices doctiſſimi*) abſurda hæc duo, *viz.* Ducem *Lawderiæ*, nil voluiſſe filiæ ſuæ, in dotem dare, eumque potius voluiſſe dimidium maternæ dotis, apud ſe retinere, & eum potius voluiſſe fratrem quam filiam ditare, licet & hoc paternæ affectioni, & illud chriſtianæ juſtitiæ, multum repugnet. Addendæ & hæ præſumptiones, *viz.* quod cum ipſe *Lawderiæ* dux, adeo, tum temporis, filiam amaverat, ut ipſam in univerſo ſuo patrimonio inveſtiverit, & adeo ipſe tunc locuples eſſet, ut apud nos *Cræſus* alter crederetur, cumque regis benevolentiam ita ex aſſe poſſidebat, ut quicquid optare, illud ſperare potuerit, quomodo ergo præſumi poteſt, patrem filiæ unicæ amantiſſimum, erga omnes liberalem, & tunc locupletiſſimum, voluiſſe tamen, erga filiam marito multum a ſe exoptato, collocatam, illiberalem, injuſtum, & ingratum ſe manifeſtare? Et licet jam hæreditas fratri delata, multum ſit labefactata, hoc tamen unice imputandum, male ſanæ tranſactioni, inter ipſum comitem, qui hæc objicit, & Duciſſam *Lawderiæ* verè novercam, initæ; quâ pluſquam ſemiſſem hæreditatis, in eam tranſtulit, ut ejus artibus a moriente, & delirante patre, ſemiſſem alteram ſibi obtineret.

QUOMODO ergo fieri poteſt (*Judices juſtiſſimi*) ut quod in filiæ damnum tranſactum eſt, juſtæ huic liti a ſe motæ jam opponi poſſit? Ad deciſiones etiam ab adverſario allatas reſpondetur, utraſque tantum obtinuiſſe, ubi præſumptio inter eaſdem perſonas verſabatur: Illo enim caſu, locum non habet noſtra præſumptio: Nam ut ait *Menochius* L. 3. *Præſumpt.* 15. *Num.* 32. locum non habet, quando pater promittit dotem, non genero, ſed ipſimet filiæ: Hoc enim caſu, præſumitur promiſiſſe etiam ex bonis, ad ipſum, & filiam pertinentibus, utpote ex dote maternâ; & ita etiam declarat *Hier. Gabr.* ind. conſ. 156. Num 15. unde juſte deduci poteſt, præſumptionem nobis objectam non obtinere, ubi dos promiſſa eſt genero, & ſocero, non autem filiæ ut in noſtro caſu. Prima etiam ex iſtis deciſionibus, obtinuit tantum, in caſu, ubi pater in eandem ſummam, & in prima obligatione, & in ſubſequente dotis conſtitutione ſe obligavit; quæ æqualitas, compenſationis præſumptionem multum ubique adjuvat; primaque obligatio, illo in caſu, expreſſe tulit patrem, ſummam illam filiæ conceſſiſſe, ut elocaretur, & ita filiâ elocata, evanuit & adimpleta eſt: In noſtro autem, nulla hujus mentio, ſed e contra, patrem ex obligatione conſtat ſeſe, ex cauſâ oneroſâ obligâſſe; poſterior autem deciſio, pro fundamento habuit, dotem promiſſam amplam ſatis fuiſſe, ut & patris liberalitatem, & adventitium legati debitum, in ſe contineret, & complecteretur; erat illa filia una ex pluribus liberis, ita ut, quicquid ab ea petebatur, filio vero hæredi detrahendum erat: In noſtro autem caſu, nec conueniunt ſummæ inter ſe compenſandæ, nec quod a filia unica petitur, tanta eſt ſumma, ut a patre tum dum dotem diceret, divite, & tam ex materna hæreditate locupletato, juſte ſperari non poterat. Expendite (*Judices æquiſſimi*) præſumptiones has, ex una & altera parte allatas; præſumptiones noſtræ, originem & ortum ſuum naturæ, illorum autem præſumptiones, juriſconſultorum ſubtilitati debent, unica tantum eſt illis præſumptio, eaque tantum *præſumptio hominis*; pro nobis plurimæ, *præſumptiones* etiam *juris, & de jure* junctæ, hæ pro filiâ adducuntur, illæ, pro fratre tantum; atque ita illas homines, has Deum fabricaſſe credendum eſt.

RENUNCIATIONI filiæ, cum, conſenſu mariti, reſpondetur, patrem adeo tum dilexiſſe filiam, ut eam in omnibus ſuis terris inveſtiverit, & quia alium hæredem ſperabat, (æque enim tum filiam amabat, & a fratre abhorrebat) ex more pactum adjecit, quo ſibi licere voluit, ſe poſſe terras redimere, per ſolutionem ſeptem millium lib. *Ang.* quæ poſtea ſuaſu novercæ, filiæ ſolvit, egitque lite ſolenni, ut terris renuntiaret; renunciatio ergo hæc cum nihil in ſe de priori hoc debito contineat, ad illud extendi non debet, & cum in geminatis tranſactionibus, tum per tabulas nuptiales, tum per hanc renunciationem, pater nihil de ſuâ, ab hoc debito, liberatione dixerit, manifeſtè concludendum, eum hoc non voluiſſe; nec poſſunt generalia verba ultra ſcopum, & id quod tum temporis agebatur, detorqueri, tunc autem temporis, tantum agebatur, ut terris filia, & gener renunciarent, nec ulterius renunciare tenebantur, cum nihil nec in lite, nec in ſententiâ, cui hôc in caſu paruere, aliud quidpiam ultra renunciationem peteretur. Pro filia etiam urgeri poteſt, non poſſe hanc ſummam ſeptem millium librarum, in ſolutum prioris debiti datam præſumi: Quia hoc ſeparatæ cauſæ aſcribi poteſt, & debet; & iniquiſſimum eſſet, iiſdem hiſce nummis, & terras ab ea auferre, & antiquius illud debitum præſumptione tollere; eodem ære, duo diſtincta & ſeparata ſolvendo debita. Agnoſco renunciationem aliam a marito, & filiâ impetratam, generalia hæc verba continere, viz. *filiam omne illud patri remiſiſſe, & accepto tuliſſe*, quod ei, vel per legitimam, vel tanquam filiæ ex bonis paternis, patris morte, ad ipſam deſcendere, vel pertinere poterat; ſed hujus nominis, nec ullius, meminit renunciatio, & quid hoc ad chirographum, ſeu nomen debitoris, quod ſub horum neutro cadere poteſt: In propria enim & ſtrictiore bonorum appellatione, non veniunt nomina debitorum, *L.* 15. § 2. & 3. *ff. de re judicata.* Voet. *de mobilibus & immobilibus*, *p.* 11. Fert prima obligatio diſertis verbis, patrem, eam ex amore paterno, aliiſque cauſis oneroſis, conceſſiſſe: Nec enim per mortem patris, in ipſam devolvitur, cum ante ejus mortem, ei deberetur. Et quis adeo craſſus, vel injuſtus invenietur, qui tali apochâ, patrem liberatum diceret, a ſolutione pecuniæ, patri a filia creditæ; nec ergo a debito hoc chirographario liberabitur, cum creditum eo inducatur, induatque mutui naturam.

ERUDITIONEM veſtram ſatis novi non ignorare receptam apud juriſconſultos regulam, qua traditur *renunciationes ſtrictiſſime interpretandas*; & hinc renunciatio ſervitutis unius non porrigitur ad alias; *L.* 21. *ff.* de *ſerv. præd. urb.* nec renunciatio unius contractus porrigitur ad alium; *L.* 21. *Cod.* ad *Sectum vellei.* Cujus regulæ duæ aſſignantur rationes; Prima, quia renunciationes ſunt odioſæ, maxime hæreditatum; & proinde non extendendæ ſunt, ſed coanguſtandæ; *L.* 19. *Digeſt. de liberis & poſthumis:* Secundo, quia nemo jus ſuum temere dimittere & projicere cenſetur; *L.* 25. *pr. verſ. fin: vero, ff.* de *Probat.* Ex quibus concludunt doctores, renunciationes nunquam porrigi ad non cogitata, neque ad ignorata, neque ad jus poſtea acquiſitum, vel ad id quod ex nova cauſa acquiritur. De quibus omnnibus late *Giphanius*, de *Renunciationibus*, *Cap.* 9.

Sciens præterii commentum illud adverſariorum, quo vobis imponere nituntur (*Judices clariſſimi*) chirographum hoc, nunquam a Patre filiæ ſuæ traditum fuiſſe, ſed apud Matrem, quod idem ac ſi apud ipſum fuiſſet, retentum: Unde Patri curæ non fuiſſe, ſe aperte ab eo liberare, cum ſeſe nunquam obligatum crederet. Sed cum chirographum hoc ſit archivis publicis inſinuatum, (quod nos *Regiſtrationem* appellamus) evaneſcit argumentum; inſinuatio enim ſupponit in jure noſtro, mandatum debitoris: In noſtro etiam caſu lis eſt mota nomine filiæ, contra fiſcum, ad ſummam ſibi debitam recuperandam, non ſolum vivente Patre, & dum *Cromwelius* univerſa ejus bona, ob fidem Regi ſuo ſervatam, in ærarium redigit; ſed & lis hæc diu ante initas nuptias mota eſt, claruitque debitum variis illa tempeſtate queſtionibus ex eo ortis. Unde non ſolum apparet chirographum hoc traditum fuiſſe; ſed & adeo Patri innotuiſſe, & impreſſum, ut ejus memoriam fugere non poterat, dum conderet inſtrumentum illud nuptiale, cum tam tenacis eſſet memoriæ, ut claſſicos omnes, hiſtoriaſque ſui temporis ad miraculum uſque ſempet retineret, totque haberet apud ſe infauſtos monitores, filiæ damnis ſemper invigilantes.

Pro filia ergo, optimæque ſpei ex filia nepotibus, proque naturæ dictatis, hominum cordibus Dei digito inſcriptis; pro jure, tum ſanguinis, tum patriæ, ſucceſſionem in eo deferentibus, contra ineptas juriſconſultorum argutias, ſubtilitateſque male applicatas, ex Parentis & legum voto, hoc in caſu (*Judices clariſſimi*) pro ſuis reſpondendum.

### PRO

# *Alexandro Calandriæ* Comite,

### CONTRA

## Dominum *Joannem Hamilton* Ducis *Hamiltonii* filium.

*NUM Hærede in feudo ea lege inſtituto, ne feudum ei conceſſum alienet, feudum illud, ſine cauſa oneroſa & neceſſaria, alienare poſſit? & num talis alienatio actione* Pauliana *revocari poſſit a ſubſtituto, nulla adjecta in contractu clauſula irritante?* 2do. *Num talis contractus generali apocha diſſolvi poſſit, nulla ſpeciali ejus facta mentione?* 3tio. *Num alienatio hæc, licet quoad ipſum feudum ſit revocata, ſubſiſtere tamen poſſit, in quantum feudum illud melioratum eſt ab inſtituto? Et num ut fructus quotannis diſſipare, ita & alienare poterit inſtitutus?*

*JACOBVS Calandriæ* Comes feudum, & Comitatum ſuum, *Alexandro* fratris filio, & hæredibus maſculis ex corpore ejus legitimè procreandis ceſſit; quibus deficientibus, *Alexandrum* Comitis *Limnuchi* filium, fratris pronepotem, & hæredes maſculos ex corpore ejus procreandos nepoti ſubſtituit. Nepote autem ex patrui conſilio *Margaritam* Ducis *Hamiltonii* filiam uxorem ducente, in inſtrumento antenuptiali cautum eſt, *Ne quid in ſubſtitutorum fraudem fieret*, ſeque obligavit *nil facturum, quo ſubſtituti exhæredari poſſent*; alioque etiam contractu Anno 1668 inito, ſe omnia præſtiturum ſtipulatus eſt quibus prædia illa in familia inſtituentis, & apud ſubſtitutos remanerent. Spreto tamen hoc pacto, Nepos inſtitutus prædia hæc ſibi per fidei-commiſſum relicta, & lege hâc gravata, Domino *Joanni Hamilton*, extraneo prorſus, ingrato animo, alienavit; alienationis cujus revocationem *Alexander* Pronepos actione *Paulianâ* proſecutus eſt, eâ ratione, quod cum licet inſtitutus ea obligatione & inſtituenti & ſubſtitutis debitor eſſet: illi, ne ejus memoria deleretur; & his, ne eos juſtâ ſucceſſione fraudaret; in fraudem tamen & illius & horum, terras extraneo, nullâ neceſſitate eum impellente, voluntariè & gratuito alienaverat. Patruus faſtiditum elegit, eſurientem aluit; inopem divitiis, contemptum honoribus auxit. In quorum retributionem ille patrui gloriam obfuſcare, datam fidem fallere, agnatos fraudare enixè conatus eſt. Clientem meum, quem extranei hæredem adoptaſſent, ille ut extraneis conſuleret exhæredavit: Adultæ ejus virtuti, Regi & Patriæ hactenus probatæ, puerilitatem adhuc ambiguam, uxore potius quam ratione ductus, ingratus prætulit. Quis ergo hiſtrio larvam, quis orator fucum huic caſui inveniet? Et quis judex familiæ ſuæ diuturnitatem juſtè exoptans, fragilem eam & morbidam deciſione contra nos lata reddet? Licet enim natura ætatem noſtri corporis intra arctiſſimos paucorum annorum limites compreſſerit, ita ut naſcentes moriamur, pendeatque ab origine finis; benignum tamen jus civile ſubſtitutionibus hiſce familias noſtras in quandam æternitatis ſpeciem produxit:

*———Multoſque per annos,*
*Stat fortuna domus, & avi numerantur avorum.*

Inſurgunt tamen qui huic juveni patrocinantur, non veris ſed veri-ſimilibus hiſce argumentis.

PRIMO, Includit omne dominium in ſe congenitum & inſeparabile diſponendi jus, & ab ipſis juris civilis incunabulis dictabant *duodecim tabulæ, unumquemque rei ſuæ arbitrum,* & *uti quiſque legaſſit, rei ſuæ ita jus eſto.* Nihil enim ergo tam naturæ dominii contrarium, quam non poſſe alienare. Paralyſin hanc non patiuntur jura noſtra; & utilitas, quæ mater eſt boni & æqui, poſtulat ne ea pacta valeant, quæ commercium omnino & ſine cauſa impediunt. Ita enim jura nobis non ſubvenirent, ſed nos circumvenirent; nos non protegerent, ſed proderent. Quis enim aliquem Dominio veſtitum videns, cum eo contrahere ambigeret? Et quis vel Juriſconſultos vel archivos in omni negotio conſulere poteſt? Paratiorem requirit commercium circulationem; Nec has patitur moras premens & dura neceſſitas. Cum ergo patruus in nepotem dominium tranſtulerit, tranſtulit etiam alienandi facultatem; & annexum hoc de non alienando pactum pro imperfecto tantum & immaturo propoſito habendum; nec a nepote, jam Domino, acta reſolvit, ſed perſonalem tantum contra eum actionem parit.

SECUNDO, Ubi inſtituentes contractus, hoc in caſu, diſſolvere & irritos reddere volunt, in nudis pacti de non alienando finibus non ſiſtunt, ſed ulterius procedentes, clauſulas adjiciunt, quas vocamus *irritantes* & *reſolutivas*, quibus providetur, quicquid contra pactum hoc fiet, pro infecto haberi, & in nihilum reſolvi. Quæ cautela, toties, & tam fervidè a juriſconſultis inculcata, inepta & ſupervacua foret, ſi nudum pactum ſine hujus ope & auxilio eundem ſortiretur effectum.

TERTIO, Alienationem hanc jure civili non prohibitam, apparet ex *L.* 61. *ff. de pactis*, ubi traditur neminem paſciſcendo efficere poſſe, *ne ſibi locum ſuum dedicare liceat*, aut *ne ſibi in ſuo ſepelire mortuum liceat*, aut *ne vicino invito prædium alienet*, Et induunt potius hæ prohibitiones naturam conſilii quam legis, ut ex *L.* 38. § 4. *ff. de legat.* 3. Julius Agrippa, *Primi-pilaris ſuo teſtamento cavit, ne ullo modo reliquias ejus & prædium ſuburbanum aut domum majorem hæres ejus pignoraret, aut ullo modo alienaret. Filia ejus hæres ſcripta, hæredem reliquit filiam ſuam, neptem Primi-pilaris, quæ eaſdem res diu poſſedit, & decedens extraneos inſtituit hæredes. Quæſitum eſt an ea prædia extraneus hæres haberet? An verò ad* Juliam *dominam, quæ habuit patruum majorem* Julium Agrippam, *pertinerent?* Reſpondi, *cum hoc nudum præceptum eſſet, nil proponi contra voluntatem defuncti factum, quo minus ad hæredes pertinerent. Idem probant etiam ex* § 5. *ejuſdem legis. Quindecim libertis, quos nominaverat, prædiolum cum taberna legaverat, & adjecerat hæc verba*, ſibique eos habere, poſſidere volo, eâ lege & conditione, ne quis eorum partem ſuam vendere, donare, aliudve quid facere alii velit. Quod ſi adverſus ea quid factum erit, tum eas portiones prædiumve cum taberna ad rempublicam, *Tuſculanorum* pertinere volo. *Quidam ex his libertis vendiderunt partes ſuas duobus collibertis ſuis ex eodem corpore: Emptores autem defuncti* Cajum Sejum *extraneum hæredem reliquerunt. Quæſitum eſt partes, quæ venerunt, utrum ad* Cajum Sejum *an ad ſuperſtites Collibertos ſuos, qui partes ſuas non vendiderunt, pertinerent?* Item, *Quæſiit an partes venditæ ad Rempublicam* Tuſculanorum *pertinerent? Reſpondi, Secundum quæ proponerentur ad* Câjum Sejum *pertinere. Non pertinere* Claudius: *Quia non poſſidentis perſona, qui nunc extraneus eſt, reſpicienda eſt, ſed emptorum, qui ſecundum voluntatem defunctæ ex illis fuerunt quibus permiſerat teſtatrix venundari, nec conditio extitit dati fidei-commiſſi* Tuſculanis.

QUARTO, Cum prohibitio hæc de non alienando ſit contra naturam Dominii, adjectam illam ad minimum ſtrictiſſimè interpretari decet, & ideo cum verba pacti obligent tantum ad non exhæredandum ſubſtitutos, hæc prohibitio a gravando terras illas ſummâ quadam pecuniæ, ut in hac facti ſpecie, arcere non debet. Poteſt enim nihilominus ſubſtitutus hæres fieri, &, ut nos loquimur, in hæredem deſerviri. Non ergo exhæredatus eſt ſubſtitutus, quod hoc pacto tantum fugiendum erat.

Quinto, Licet obligatio hæc ſubſiſtere de jure poſſit, non tamen poterat hic actor jus in extraneum tranſlatum actione *Paulianâ* reſcindere. Ille enim tanquam ſubſtitutus, & hæres *Talliæ*, ſuccedere ſolummodo poteſt. Sed hæres eſt in jure, fictione quadam legitimâ, una & eadem perſona cum defuncto; ergo factum anteceſſoris ſui, cui hæres eſt, præſtare cogitur, improbare vero & reſcindere ipſi non permittitur.

Sexto, Quamvis ipſam hæreditatem nec alienare, nec onerare liceret, fructus tamen procul omni dubio hæredi, licet uſu fructuario, quotannis cedebant; eos itaque ad minimum ut conſumere, ſpargere, & perdere poterat; ita & quantum hi annui reditus valebant, poterat nepos hæreditatem gravare; nec inde patrimonium diminutum dici poterat, nec fraudem ſubſtitutis factam; cum nil horum, quod ad eos deſcendere poterat, in extraneum hunc ſit collatum.

Septimo, Cum quotidie emergerent debita, tum patrui amore, tum legibus coactus, debita illa, gravia licet, in ſe ultro ſuſcepit; quoad hæc ergo, non hæres fiduciarius, ſed debitor dici poterat. Et in quantum hæc aſſurgere poterant, liberum ei erat hæreditatem pro eorum ſolutione onerare, nec poterat alienatio quoad hæc reſcindi, tanquam in fraudem creditorum facta. Quod enim creditoribus ſolutum eſt, iis nocere non poterat, nec deferenda erat huic actori hæreditas, ſine debitorum hæreditariorum onere, eratque & ex ejus & ex horum re ea ſolvi.

Octavo, Omnia hæc pacta prohibitoria generali apochâ ſunt remiſſa; liberavitque nepotem patruus a duro & incongruo hoc jugo, poſtquam obſervaſſet debita inopinata quotidie emergentia, quæ ſolvi a nepote non poterant, ſine libera hæreditatis adminiſtratione. Et experientia edoctus, quam frugi eſſet nepos, quantum hac frugalitate auctum eſſet patrimonium, & quam quotidie imminueretur hæreditas, cujus ſpe adductus erat nepos ita ſe obſtringere, juſtum ratus eſt ipſe patruus liberam adminiſtrationem nepoti concedere, & cum patrimonio obligationem minuere.

Ut ſtatum hujus converſiæ (*Judices doctiſſimi*) ab omni liberem cavillatione, ſcire conveniet inſtituentem potuiſſe terras ſuas hæredibus ſuis reliquiſſe, nullo adjecto pacto de non alienando; quo caſu, inſtitutus, non obſtante ſubſtitutione, abſolutum Dominium nactus hæreditatem liberè alienare & perdere poterat, & in tantum ſubſtitutus ſuccederet, quantum apud inſtitutum remanſit.

Secundo, Si inſtituens non ſolum debita voluntaria, ſed & neceſſaria excludere ſibi propoſuiſſet, tunc non ſolum pacto de non alienando, ſed etiam clauſulâ irritante & annullante providiſſet ne hæredi hæreditatem ullo debito vel gratuito, vel oneroſo gravare liceret. Quod ſi contra fecerit hæres, debita ita contracta nulla forent. Æquus autem his inſtituens, auream tenens mediocritatem, ſibi & juſtis creditoribus æque conſulens, pactum adjecit, & (quod fortius eſt) exegit de non alienando, ne inſtitutus quid in ſuæ familiæ necem patrimoniique diſpendium faceret. Sed ne pactum hoc in necem juſti crediti verteretur, clauſulas non adjecit irritantes, hæredem non a juſtè ſed a ſtultè & ingratè contrahendo ſummâ æquitate inhibens. Cumque ergo hæres hic, in fraudem hujus obligationis, hæreditatem fidei ſuæ commiſſam voluntariè & gratuitò alienarit, alienationem hanc reſcindendam eſſe actione *Paulianâ* his rationibus conſtabit.

Primo, Fundamento tum a jure naturæ, gentium, & ab ipſis adverſariis petito liquet, *quem libet rei ſuæ eſſe arbitrum, L. 21. C. mandat*. Atque ita ei licere, ut alienare vel non, ita & alienationem quibus voluerit afficere conditionibus; nec aliter jus deferri, niſi in quantum alienans voluerit. Sed in noſtro caſu non aliter tranſtulit dominium patruus, quam ea lege, ne ſcilicet inſtitutus ſubſtitutos fraudaret. *Abſurdum enim*, lex ait, *ut quis rem, quam in ſuis bonis pure non poſſedit, poſſit liberè aliis transferre, aut eam hypothecæ pignoriſve nexu obligare*. L. ſi creditor § quæritur ff. de *diſtract. pig.*

Secundo, Omnia pacta ita interpretanda, ut aliquid operentur. Obligatio autem hæc aut alienationem prohibebit, aut eluſoria prorſus erit; & aut hunc aut nullum pariet effectum. Et cum extra omnem controverſiæ aleam ſit inſtitutum ipſum hoc pacto obligatum, ex eoque contra eum actionem proditam; neceſſario ſequitur pactum hoc efficax, nec inutile eſſe.

Tertio, Injuſtum & inhumanum eſſet, domino vero non licere ita ſua diſponere, ut & ſuam memoriam ſuſtinere, & agnatos ſuos ditare poſſet; cum hiſce nil prius homines habeant in votis. Hoc verò aut non licebit, aut actione hac licebit; Nam ſi pactum hoc in ſe ſit infirmum, alia lege nobis non eſt conſultum, nec nobis aliam ad hanc metam monſtravere leges viam, niſi adjiciendo clauſulam irritantem in creditorum necem. Et quid iniquius, quid crudelius ſtatui poteſt, quam ita de rebus gratuito ceſſis ſententiam ferre, ut in poſterum liceat ei, in quem hæreditatem noſtram devolvimus, eà lege ne in extraneos tranſferatur, bona noſtra ſudore, ſanguine & vigiliis parta, non ſolum in extraneos ſed & in noſtros & familiæ inimicos transferre poſſe; ita ut dum ſubſtituti a nobis electi fame conficiuntur, hi bonis a nobis conceſſis luxuriari in noſtro poſſint conſpectu.

Quarto, Pacta pro legibus inter contrahentes habentur; cnm ergo vel leges, vel judices prohibere poſſint dominii tranſlationem, ita ut quicquid, ſpreto eorum mandato, factum fuerit, pro nullo ſit habendum; cur, & a fortiori, vero domino non licebit juſtò pacto alienationem prohibere, & in traditione rei ſuæ eam legem, quam voluerit, adjicere?

Quinto, Licet bona fides permitteret contra pacta alienationem in extraneos transferre, quid tamen pro Ducis *Hamiltonii* filio proferri poteſt? Cum ipſius pater non ſolum teſtis ſcriptus ſit in tabulis antenuptialibus, in quibus hæc continentur pacta; ſed & executio in iis contentorum ſit ejus fidei & induſtriæ commiſſa. Ut ergo pater alienationis incapax erat, & exceptio doli mali ei opponi poterat; ita & filio, qui dum cum eo in familia eſſet, contra fidem tabularum antenuptialium, acquirere non poterat. Pro quo facit, *L. ult.* § *ult. ff. de legat.* 2. *Vbi alienationem reſcindendam*, reſpondit, *Juriſconſultus, ex eo quod poſt apertas tabulas, in quibus adjiciebatur pactum illud de non alienando, rem non alienandam emiſſet pacti gnarus.*

Sexto, Conſulamus Jus Civile *Romanorum*, tum ut noſtram firmemus ſententiam, tum ad diluenda adverſariorum argumenta: Pro cujus clariore intellectu ſciendum, nil frequentius apud *Romanos* fuiſſe, quam innatum hoc deſiderium, ne bona extra ipſorum familiam alienarentur. Illi tamen ut hoc aſſequerentur, & ut voluntas teſtantium in morientium ſolatium obſervaretur, materiam hanc hiſce illuminarunt poſitionibus; Aut enim Prohibitio hæc alienationis exprimebat cauſam, propter quam Prohibitio illa eſt facta, vel perſonam cujus reſpectu eſt introducta, aut non; ſi non exprimebat, tunc Prohibitionem indefinite factam nullius eſſe momenti judicabant *Romani*, quaſi nudum tantum eſſet conſilium, vel præceptum. Si autem liberis, aut poſteris, aut hæredibus conſulentes, hoc feciſſent, tunc ſervandum eſſe pactum; L. 114. § 14. & 15. *ff.* de *Legat.* 1. cujus hæc ſunt verba; *Divi* Severus, & Antoninus *reſcripſerunt, eos qui teſtamento vetant quid alienari, nec cauſam exprimunt, propter quam id fieri velint; niſi invenitur perſona, cujus reſpectu hoc a teſtatore diſpoſitum eſt, nullius eſſe momenti ſcripturam, quaſi nudum præceptum reliquerint; quia talem legem teſtamento non poſſunt dicere. Quod ſi liberis, aut poſteris, aut libertis, aut hæredibus, aut aliis quibuſdam perſonis conſulentes, ejuſmodi voluntatem ſignificarent, eam ſervandam eſſe.* Eadem etiam deciſio reperitur in L. 77. § 27. *ff.* de *Legat.* 2. L. 38. *ff.* de *Legat.* 3. *per totum.* Et non poſſe hæredem ea lege inſtitutum, ob cauſam voluntariam alienare, conſtat ex L. 69. § 1. *ff.* de *Legat.* 2. *Prædium quod nomine familiæ relinquitur, ſi non voluntaria facta alienatio ſit, ſed bona hæredis væneant, Tamdiu emptor retinere debet, quamdiu debitor haberet, bonis non venditis; poſt mortem ejus non habiturus, qnod exterus hæres præſtare cogeretur*; § fratre, *ead. L. fratre hærede inſtituto petit, ne domus alienaretur, ſed ut in familia relinqueretur; ſi non paruerit hæres voluntati, ſed alienaverit, vel extero inſtituto deceſſerit, omnes fideicommiſſum petent qui in familia fuerint.* Et hoc caſu non ſolum competit actio pro intereſſe; ſed & reſcindendam eſſe alienationem apparet, per L. 1, *Cod. Communia*, de *Legat.* qua jus vetus, tribuens tantum actionem perſonalem contra alienantem juſtiſſime correctum eſt. Cum enim ſcopus legum eſſet, rem ipſam familiæ reſervare, ſi non tribuiſſent actionem in rem, nunquam ſatis conſuluiſſent familiæ, nec intentionem obſervaſſent inſtituentis. Nam ſæpiſſime alienantes contra pactum adjectum, ad intereſſe ſolvendum non ſatis eſſent idonei; nec ſi idonei eſſent, hoc intentioni alienantis ſatisfaceret, qui antiqua familiæ prædia apud ſuos retineri, & non pacto hoc valorem recuperare, enixe deſtinavit. Quas concluſiones ex his legibus etiam collegit doctiſſimus *Sandæus*, tractatu de *prohibita rerum alienatione*, *Capite* 4. Et *Peregrinus*, de *fideicommiſſis*, *Articulo* 14. Et hoc ſequutum fuiſſe Senatum *Pariſienſem* tradunt *Anneus Robertus*, de *Rebus judicatis*, *Cap.* 14. & *Luetus*, Tit. de *Subſtitutionibus*. Et licet jure civili diſtinctio quædam adhibita ſit, hoc in caſu, inter ultimas voluntates, & contractus inter vivos; quoniam nullius intereſſe putabant, pactnm de non alienando obſervari in contractibus inter vivos, in quibus familiæ & memoriæ ſuæ non conſulebant ut plurimum *Romani*; & pacta hæc in contractibus inter vivos auferre credebant liberam teſtandi facultatem: Hanc tamen diſtinctionem, hodie ſublatam jure gentium, tradit *Luetus*, *Pag.* 1140. Sapiuntque reverà contractus noſtri *taliæ* naturam ultimarum voluntatum apud *Romanos*; nam cum inſtitutio hæredis ſit caput & fundamentum teſtamenti, ſitque teſtamentum nihil aliud ex ſua definitione, quam *voluntatis noſtræ juſta ſententia de eo, quod quis poſt mortem ſuam fieri velit:* Et cum contractus hi ſubſtitutiones, conditioneſque ſubſtitutionum deſignent, æquum eſt, ut teſtamentariis regulis menſurentur: ſine hærede mori dedecori erat apud *Romanos*; & hinc nihil apud illos licebat, quod liberam teſtandi facultatem auferret. Huic autem malo apud nos medetur contractibus hodie antenuptialibus, aliiſque apud omnes peræque gentes contractibus inter vivos, quibus hæreditates deferuntur hæredibus. Claudenda ergo eſt hæc materia eleganti illa lege, 6. *Cod.* de *pactis inter emptorem & venditorem.* Ubi etiam pacta hæc in contractibus inter vivos obſervanda eſſe traditur, ſi hoc contrahentium interſit: cujus verba ſunt; *Cum te fundum tuum, certæ rei contemplatione inter vos habita, exiguo pretio in alium tranſtuliſſe commemores; poterit ea res tibi fraudi non eſſe, quando non impleta promiſſi fide, dominii tui jus in ſuam cauſam reverti conveniat:* Cujus ſummarium ita collegit *Baldus*, *ſi non ſervetur ſubſtantiale pactum, reſcinditur quidquid actum eſt:* At ſi hoc obtinet, etiam ubi pacto gravatus pretium ſolvit; multo magis obſervari debet, ubi quis ſe obligavit gratuito, & ubi hujus pacti contemplatione hæres eſt electus.

Septimo, Si analogiam noſtri juris ſpectemus, idem obtinet; nam ſi quis ſe alium hæredem inſtituere obligaverit, tenebitur contractum hunc *taliæ*, ut nos loquimur, ſemel perficere; & licet ab eo jam perfecto recedere poſſit, hoc ideo judicatum, ut noſtri obſervant, quia obligatus eſt ſolummodo *taliam* perficere, at non perfectam obſervare. Sed eâdem paritate rationis, ubi pacta ſervare (ut hìc) tenetur, ab eo recedere non eſt ipſi indulgendum: Et apud nos etiam, ſi Pater ſe obligaverit terras omnes pendente matrimonio partas, liberis illius matrimonii proviſurum, & conſervaturum, non poteſt terras illas, in fraudem iſtius obligationis, extraneis gratuito, & ultro alienare: Prout deciſum invenimus 16. *Junii*, 1676, 10 *Julii*, 1677. Et ſi judex inhibere poterit, ne quis alienationem acceptet in fraudem talis pacti & ſtipulationis, (ut fatentur adverſarii) concludendum eſt, pactum illud ſua naturâ ad hoc eſſe validum. Promulgatio enim hujus inhibitionis vim obligationi non addit, ſed malam fidem alienationem acceptantibus ſolummodo inurit.

Hisce poſitis argumentis, ita diluenda ſunt adverſariorum commenta: Primum enim illud a natura dominii deſumptum pro nobis ſolummodo militat; nam ſi dominus ea, quâ lege voluit, alienare poterat; cumque hoc in caſu alienaverit Patruus, qui pure dominus erat, ea lege ne inſtitutus alienaret, manifeſte ſequitur, inſtitutum cum hoc tantum moderamine dominum eſſe, ne alienare ipſi liceat; atque ita dominium in nepotem tranſlatum, non purum, ſed limitatum: Nec omnem dominum alienare poſſe, ex dominii apparet definitione, quæ ita ſe habet; *Dominium eſt jus fruendi, alienandi, niſi quis pacto, vel lege probibeatur*. Habuit ergo hoc dominium nepos pacto diminutum, quod tranſgredi non poterat; multumque ab inſtituentis propoſito, ſeu conſilio, diſtat obligatio ab inſtituto exacta; hæc enim non ſolum ab inſtituente adjecta eſt, ſed ab inſtituto ſibi innexa. Inſtituens hic non ſolum hæredi conſilium impertitur, ſed ei vinculum & neceſſitatem imponit.

Secundo argumento reſpondetur, clauſulas illas irritantes & reſolutivas tunc tantum neceſſarias, dum ab iis diſſolvendi ſunt contractus oneroſi, qui jure ſubſiſtere poſſunt: Contractus autem lucrativi, & gratuiti, jure civili, actione *Pauliana*, & noſtro ſtatuto contra *Banciruptores*, reſcinduntur. Neceſſe ergo non habuit inſtituens contra ea providere, quæ lege hactenus erant irritata. Et licet clauſulæ irritantes neceſſariæ forent, ubi ſe nil præſtiturum obligavit inſtitutus; ridiculum eſſet ea requirere, ubi ille ad hæc ſe obligavit. Et hoc ſenſu legendus eſt *Faber*, Decad. 39. R. 10. & *Gomez.* locis citatis. Ad ea enim ad quæ me obligavi teneor, nullâ licet adjectâ clauſulâ irritante.

Ad Tertium, & leges ex jure civili depromptas reſpondetur, Legem illam 61. de *pactis*, non de teſtamentis, ſed de contractibus ſcriptam fuiſſe, in quibus pacta de non alienando non obligaſſe traditum eſt; quia teſtamenti factionem impediebant, nec interfuit ipſius pacta exigentis ea obſervari; nec erat pactum illud interpoſitum in ipſa venditione ab initio, ut notat *Faber*, ad eam legem; nam ipſa *L.* 48. eod. t. ait, *Quodcunque pactum in traditionibus ſit, id valere manifeſtum eſſe.* Et lex illa 38. *ff.* de *Legat.* 3. non de pacto, ſed de conſilio loquitur; § etiam 15. *Libertis*, *L.* 36. eodem Tit. loquitur tantum de ſubſtitutione pacta, 15. *Libertis*, ea lege, ne quis eorum partem ſuam venderet, vel donaret extraneo; 13. autem ex 15. partes ſuas duobus ex ipſorum numero vendiderunt; quæ venditio valida pronunciata eſt, licet illi partes omnes extraneo hæredi reliquerint; nam cum dominium legitime ſemel in duos illos traſlatum ſit, ex tacita voluntate defuncti; nec ut ſemper in eorum familia remaneret prædium, cautum ſit, nec prohibitio in ſubſtitutorum gratiam introducta, ut in noſtro caſu; nihil impediebat, quo minus id quod duorum ſemel factum eſt, ab iis vel alienari, vel relinqui poſſit. In noſtro autem caſu, cum nepos expreſſe ſe obligaverit, prædia quæ ea lege acceperat, in præjudicium ſubſtitutorum non alienaturum; conſequens eſt eum non poſſe alienare gratuito & voluntarie, contra fidem & pacti adjecti, & obligationis præſtitæ.

QUARTO, & Quinto argumento reſpondetur, Inſtitutum non ſolum obligatum fuiſſe ſubſtitutos non exhæredare, ſed ſe eorum ſucceſſioni non noſciturum; & ita nec in totum, nec pro parte, voluntaria & gratuita alienatione, iis damnum inferre poterat. Ille autem fines omnes tranſgreſſus, tantâ ſummâ prædia ſibi relicta oneravit, ut & omnem ſuccedendi ſpem exhauſerit; & cum in jure, verba ſemper cum effectu ſint accipienda, quod directe non fit, nec per ambages fieri licitum eſt: Et licet hæres una & eadem ſit perſona cum defuncto; ſi tamen hæres, vel pacto, vel lege prohibitus fuerit hæredum ſuorum ſucceſſioni nocere, eo caſu, aliam a defuncto induit perſonam; aliàs enim inane redderetur remedium in hæredum gratiam introductum: Et ita jure civili, quærela inofficioſi teſtamenti hæredibus injuſte exhæredatis conceditur; hujus & ſpecies quædam apud nos eſt reductio, & reſciſſio illa alienationis immobilium, a *clinico* morbo ſontico correpto, in præjudicium hæredum ſuorum factæ.

SEXTO reſpondetur, non ſolum prædia ipſa inſtitutum non potuiſſe alienare, ſed nec ea onerare ad annuorum fructuum valorem, licet hos ſpargere & perdere potuerit: Nam cum hæres eſſet inſtitutus, ut ſubſtitutis relicta tranſmitteret, & hæreditatem in defuncti gratiam adminiſtraret; conſequens eſt eum etiam gravatum ea omnia præſtare, quæ & defuncto & ſubſtitutis commoda forent; nihil tamen incommodius excogitari poterat, quam *εμπονηματα* & fructus ex hæreditate perceptos in alios transferre, debitaque hæreditaria non ſolvere, quibus fructus illi ante omnia erant applicandi; quod non ſolum cum vera hæredis notione & idea, ſed nec cum defuncti intentione conſiliari poteſt: Et licet defunctus amicè ei permiſerit ex fructibus vivere, ut ſuum decebat hæredem; incivile tamen eſt eum ex hoc in extraneos fructum alienare poſſe, memoriam defuncti fœdâ & nequâ maculans parcimoniâ. Videmus etiam multa nos perdere poſſe, quæ in ſucceſſorum necem gratuito non poſſumus alienare. Pater enim patrimonium ſuum, dum in vivis eſt, alienare poteſt; non tamen in teſtamento, legitimam liberis debitam in teſtamento imminuere; licet eo quaſi prætextu, quod & totam hæreditatem exhaurire poterit. Nec poteſt maritus eodem prætextu ſucceſſionem uxoris in quotam lege ei annexam impedire: Nec Pater agonizans poteſt hæreditatem alienare ad valorem fructuum quibus hæreditatem auxit. Fruſtra etiam conceſſiſſent benignæ leges fideicommiſſariis facultatem, hæreditatem debitis neceſſariis tantum onerare, ſi & his ſine neceſſitate exinanire licuiſſet.

QUÆ omnia militant etiam contra Septimum argumentum, quo contenditur, debita ab inſtituto ex peculio ſuo adventitio ſoluta, a ſubſtituto præſtanda; cum enim ille tanquam hæres hic ſolverit, cum eſſet una & eadem cum inſtituente, qui debitor erat, perſona, eá ut debitor ipſe ſolvit, & ita debita confuſione ſunt ſublata; non enim poterat eſſe & debitor, & creditor; & quod ſemel extinctum eſt, reviviſcere non poteſt. Et dato quod hoc liceret, feneſtram multis aperiret fraudibus; nam hæres inſtitutus apochas, aliaque inſtrumenta hæreditaria abſtrahere poteſt, aliaque a creditoribus obtinere, quibus debita a ſe, & non ab inſtituente ſoluta probare poteſt: Et cum meliorationes ſint tantum hæreditatis acceſſoriæ, non debent ab ipſius hæreditatis ratione ſeparari. Abſit a vobis, *Júdices æquiſſimi*, nequitiam ingratorum inſtitutorum alere, & remunerare: Et cum ſatis ſuperque notum ſit hunc inſtitutum, ne vel in obulum aliunde ſucceſſiſſe, vel obulum ullum virtute ſua paraſſe; non ſuſtinendus eſt dum imaginario quodam peculio injuſtam hanc alienationem colorare nititur.

QUONIAM autem obligationem in contractu *Anno* 1668, in ſubſidium noſtrum vocavimus, eamque ſtrictiorem pactis antenuptialibus credunt adverſarii, ejus exiſtentiam negant cujus efficaciam redarguere non poſſunt: Et hinc tenorem clauſulæ hujus, non probato ipſius inſtrumenti tenore integro, nos non poſſe probare contendunt. Nam inſtrumentum ipſum (inquiunt) ſi productum foret, alias forſan in ſe detegeret articulas, quibus hæc noſtra vel infirmaretur, vel explicaretur; & ſi hoc liceret, inſtrumenta ipſa ſæpe ſæpius deſtruerentur ab iis quibus unum ejus faveret membrum. Sed licet ipſæ tabulæ antenuptiales exhibeant clauſulam noſtram ſatis luculenter & ample; ejus tamen repetitione in contractu Anno 1668, tantum uſi ſumus, ut geminatum contra nepotem teſtimonium vobis appareret; at licet clauſulæ hujus in nullo poſteriore inſtrumento expreſſa fuiſſet mentio; de defuncti tamen mente ex ipſis tabulis antenuptialibus abunde conſtare ex ſupradictis manifeſtum eſt; dum minima quæque exactè referre caviſſet inſtituens; Nec ulla cauſa efferri poteſt, cur ab hac recedere voluiſſet; Aut cur contractus hic jam ſit a nepote abſtractus, in cujus poteſtatem redacta ſunt morte patrui omnia inſtrumenta hæreditaria.

SED *Octavo*, Non licebat patruo, & nepoti, jus per contractus hos ſubſtitutis quæſitum, iis inſciis, nec conſentientibus diſſolvere, & auferre; quod & rationi maximè eſt congruum. *Nam quod meum eſt ſine facto meo a me auferri nequit*; propoſitaque queſtione, an emptor & venditor, poſt contractum conſenſu perfectum ei renunciare ab eove recedere poſſint, in prejudicium conſanguineorum, quibus competit jus retractus? Reſpondent, Uno ore omnes doctores non poſſe eos recedere nec penitentiæ locum eſſe, ſi contractus ſit per traditionem conſummatus, ut teſtantur *Tiraquillus, Lib.* 1. *de retractu*, § 1. *Gl.* 2. Chriſtinæus *ad L. Mechlin. Tit.* 11. *Act.* 3. *Deciſ.* 70. Unde cum in noſtro caſu contractus ſit traditione conſummatus ſubſtitutique ſaſiti, ſine eorum conſenſu jus iis acquiſitum mutuo patrui & nepotis contrahentium conſenſu, auferri nou poterat. Quis enim ſanus crederet filios ex eo matrimonio natos, hac clauſulâ lædi potuiſſe? Et iniquiſſimum fuiſſet Duci *Hamiltonio* hoc allegare, cum eſſet ejus, ne quid damni hi haberent, providere: nec ergo Clienti meo officere poterat hæc apocha; eadem enim eſt in jure ratio ſubſtitutorum, & iiſdem verbis his & illi cautum eſt.

EPILOGO caruiſſet prolixa nimis hæc oratio, ſi multitudinis hujus inundans frequentia mihi non ſuggereret, eam non ex ſola curioſitate hic concurrere, ſed quia in ea nullus eſt qui ſuam non agi cauſam credat; me in plateis hodie ut toto ingenio orarem turmatim ſupplices orabant, hic ſe Judicem, ille ſe Advocatum hoc in caſu exoptans; & dum orarem vota pro me, vultu teſte, faciebant; adverſariorum autem advocatis orantibus ſe quaſi vulneratos monſtrabant; uniuntur hic gentis univerſæ vota; nec, ut moris eſt, *in contraria ſtudia incertum ſcinditur vulgus.*

# DEFENSIO
## Secreti Concilii
### CORAM
# REGE.

EAM ego Imperatoribus omnibus, eorumque ſubditis mentem optarem (*Rex Sereniſſime*) ut illi Prærogativas ſuas juſto arctiores, hi eas æquo ampliores crederent; neutri autem in veneranda hæc Imperii arcana anxia curioſitate inquirerent; illumque pro Conſiliario, Regibus eligendum, qui apud Reges ſuos pro Populo abſente, & apud Populum pro Rege etiam inſcio, operam ſuam elocare ſtuderet. Sed quoniam hæc ſæculo noſtro adverſa noſtra fata negavere; proximum eſt, ut tuam venerer juſtitiam, qui omnium Imperatorum primus ſubditos tuos de tuæ poteſtatis finibus diſſerentes, non ſolum amicâ patientâ audias, ſed ut in hos inquirerent, nunc benigne invites: Mihique tanquam medio injungeres, ut Majeſtati tuæ exponam quid, criminibus Secreto tuo Concilio exprobratis, ſine fuco reſponderi poſſit.

QUO munere ut fideliter fungar, tibi nimium compertum eſſe novi Conciliarios tuos accuſatos, quod in pace compoſita, & tranquilla, exercitum ex *barbaris montium incolis* conſcripſerint; & his totius tui Regui plagam fertiliſſimam, juxtà & amœniſſimam invaſerint, corruperint, ſpoliaverint: Quod everſo jure dominii, & proprietatis, apud nos noſtris legibus ſtabilitæ, milites a colonis hoſpitia, & ſtativa gratuita exegerint; & non pro Regni ſtipendiariis, ſed invaſoribus ubique ſe geſſerint. Concilium etiam tuum de vi & tyrranndie poſtulant, quod ſubditos chirographa ſignare coegerant, quibus ſub pœnis graviſſimis ſe ad impoſſibilia aſtringerent; quo factum eſſe aiunt, ut mariti pro uxoribus, Patres pro filiis, heri pro ſervis, & domini pro colonis puniantur.

Antequam ad hæc diluenda deſcendam, (*Æquiſſime Princeps*) præſentem tui regni habitudinem, & conſtitutionem, tibi apud exteros nunc degenti, paucis aperire conabor.

Faces nuperæ & altæ rebellionis vix extinctæ ſunt, latent enim adhuc noſtris in viſceribus & hi, & hæc quæ rebellionem illam accenderunt, & nutriverunt; nec a morbo noſtro adhuc revaluimus. Hiſce mali moris, & magnis morbis medendis, nihil non experti ſunt & tui regni Ordines, & tui Conſiliarii, utcunque averſantium pertinaciâ victi; veteribus enim illis, & horrendis malis ad terrorem uſque repullulantibus, legibus conculcatis, legumque miniſtris trucidatis, cæſis ſacerdotibus, & ſacerdotio pro crimine habito; *Zelotæ* hi maledicta evomunt, aſſaſſinia minantur, bella denunciant; & ad hæc exequenda parati, arma clam emunt, fœdera inter ſe ineunt; & ſæpius armati a tuis, favente numine, diſſipati ſunt.

Quo ſchemate perluſtrato, viſum eſt tuis, gangrenam hanc circumcirca ſerpentem, quæ ſanari non poterat, radicitus evellere. In quem finem, quia æquum non erat, milites regionum innocentium impenſis alere; & quia *Regni Ordines*, ſeu *Parliamentum* convocare, per ingruens & imminens periculum non licebat; rogavit Senatus plagæ iſtius occidentalis Proceres feudorumque dominos, aptis & congruentibus remediis, malis hiſce a ſuis perpetratis opportune mederi. Cum autem Senatui renunciatum eſſet tetricum hoc venenum, tam longe lateq; graſſatum, ut ſine abjuratione *Epiſcopatus* evelli non poſſet; juſſit Senatus unumquemque, ut Reſpublica a ſuis ſalva foret, chirographo ſe obligare, qua obligatione ad impoſſibile non tenebantur, cum ſuos vel puniendo, vel in judicium delatos, quantum in ſe eſſet, ſiſtendo, eo nexu liberarentur. Et ut hæc omnia præſtarentur, quia paucitati militum ſtipendiariorum, contra tot, tamque rabidos fidendum non erat; *Zelotarum* numero indies in conventiculis armato, tuos decies ad minimum ſuperante, accerſiti ſunt, quos iſti ob fidelitatem *Barbaros* appellant; qui, ne peſtis hæc ad ſeſe penetraret, ſeipſos ex antiqua fide obtulere, ad jura Majeſtatis apud Occidentales iſtos ſtabilienda: Senatus-conſulto etiam cautum eſt, innnocentibus inter hos rependendum ex recuſantium mulctis, quicquid ipſi vel amitterent, vel erogarent.

Ex hac facti ſpecie duo mihi conſideranda ſeſe offerunt. 1*mum*. Quid poſſit Rex tali in caſu ad ſuos compeſcendos? Ideoque num tuum Concilium, regali tua munitum authoritate, quod in hoc caſu fecit, te abſente, facere potuerit? *Alterum*, An licet hoc facere potuerit, etiam tuo mandato; num tamen prudenter, & tanquam viri boni ſe geſſerint, tuam exercendo Prærogativam, rebus ita ſe habentibus? Quod ad Primum; De tuo jure hic procedit controverſia; nam Concilium tuum tuo mandato exercitum hunc conſcripſit, alique juſſit. Et ego in finibus hiſce inter te tuoſque ſubditos regundis, vix aliam legem ex qua illuminari poſſim video, quam quod penes te ſit Reipublicæ regimen, nobis autem res noſtra ſalva fieri debeat. Tua eſt poteſtas regia, regnique moderamen; noſtrum rei noſtræ familiaris arbitrium; tuum eſt jus regni, noſtrum eſt jus proprietatis, ita ut nec nos Reipublicæ niſi ad hoc a te ſpecialiter rogati, nos immiſcere debeamus; nec tu rerum noſtrarum proprietatem, nobis inconſultis, invadere debeas.

Sed cum jus privatum ſemper cedat juri publico, hoc omni ineſt regimini, vel *Monarchico*, vel *Ariſtocratico*, vel *Democratico*, ut qui rerum ſummæ præſunt, omnibus iis uti poſſint remediis, quæ reipublicæ jacturam avertere valeant; & ita intelligendi ſunt juriſconſulti, dum aſſerunt *Majeſtatem omnium rerum dominam eſſe*; *omniaque poſita eſſe in poteſtate Principis*; *& tantum Principis eſſe, quantum omnium.* Ita & interpretanda eſt lex illa vetuſtiſſima apud *Boetium* noſtrum *L.* 12. *Nemo feudum, agrum, prædium, aliâ quam regis authoritate poſſideto:* Et hic eſt ſenſus, 2. C. 18. P. *Jac.* VI. quo *Reges noſtri ſummi, & abſoluti in Regni Comitiis renunciati ſunt.* Quæ omnia ita vera ſunt, quatenus in concordiam redigi poteſt jus publicum Majeſtatis cum privatorum dominio & proprietate. Aliud enim eſt dominium *Juriſdictionis*, quod in imperio & juriſdictione conſiſtit: Aliud *Proprietatis*, quod dominium rerum infert. Cum tu ergo nobis a Deo Rex datus ſis, tibi omne illud competere fatendum eſt, quod naturaliter, & neceſſario Regi tribui debet; *nam quod ineſſe debet, ineſſe præſumitur*. Sed omnibus Regibus hoc tribui videmus; *Ubi Rex, ibi poteſtas*, inquit *Salomon:* Nec ulla de Rege notio formari poteſt, ſi urgente neceſſitate rempublicam capeſſere non poſſit, ut quod bono publico convenit, exercere queat. Et hinc eſt, quod licet nos rerum noſtrarum ſimus proprietarii; habeas tu tamen ob bonum publicum, tale etiam in bona noſtra jus & dominium, ut & hæc ſaluti publicæ accommodare poſſis. Quod a doctiſſimo *Grotio Jus ſupereminentis dominii* apto ſatis vocabulo dicitur; quodque ſummis omnibus imperiis, cum Regibus, tum Rebuſpublicis competere, multis probat argumentis; & ita tu ad extruenda propugnacula, & foſſas ampliandas, ædificia noſtra, quantumvis chara & ſumptuoſa, tuo deſtruere imperio, hortoſque noſtros in publicos uſus transferre: Tu bellum indicere potes; Tu fœdus inire ſine Ordinum ſuffragio; licet ex hac denunciatione, & ex his fœderibus omnis noſtra pendeat tranquillitas; multumque ex his noſtrum imminui poſſit dominium. Sed prægravat boni publici æſtimatio; *habet enim aliquid ex iniquo omne ſummum imperium, quod contra ſingulos utilitate publica rependitur.*

Nec privatorum dominium plus hac conceſſione diminuitur, quam facultate magiſtro navis a jure tributa, merces ejus navi impoſitas in iratum mare projiciendi, ubi ſævit tempeſtas, navem aliàs abſorptura; vel magiſtratui ædes privatas ad cohibendum flammarum progreſſum, demoliendi. Et eadem eſt cum illa ſecuritatis ratione, quæ hominibus, dum ſui juris eſſent, perſuaſit, ut libertate illa depoſita, Regibus (cum ſatius uni eſſe legitimos ſubditos, quam omnium paratam prædam ducerent) Republicâ, ſummam rerum demandarent

Erantne noſtri Proavi rerum ſuarum domini ante Parliamenta noſtris cognita? (ſub *Kennetho* enim Tertio, hæc primùm innotuere) Quomodo ergo Regibus tum fas erat exercitus conſcribere, conſcriptos quoquòverſus ducere? Nullum tunc erat Principi ærarium, nulla igitur militibus ſtipendia; itaque neceſſe erat in Regis arbitrio fuiſſe, unde, & quomodo exercitus alerentur. Et ſtatuto 6. Parl. 13. *Jam.* II. cautum etiam eſt, poſtquam Parliamenta uſu veniſſent, *Ut ſi apud Regem, ejuſque Conſilium deferatur rebellio, poſſit ille omnia pro pace neceſſaria exequi:* In quorum omnium executione pollicentur omnes Barones unâ voce, *ſe Regi opem laturos ſuis corporibus & bonis, quoties hoc Conſilio Regis neceſſarium viſum fuerit.* Quibus ſtatuti verbis apparet Regem, ejuſque Conſiliarios, judices hiſce in caſibus vel conſtitutos, vel agnitos; ſubditoſque ad impenſas ab iis impoſitas teneri. Non igitur jure ſolùm, ſed & conſenſu ad hæc tenemur. Nec juſtum fuiſſet, nec providum, remedia hæc in Ordinum Conventum differri; cum illi niſi ſub Quadraginta dierum citatione convocari non poſſint; at perduelliones apud nos torrentium inſtar, omnia vel ſubitò evertunt, vel ipſæ ſubito effluunt: Et ſi hoc non ita pridem obſervatum fuiſſet, rebelles, ſummâ rerum potiti, dominium univerſum, de cujus effectu nos ſcrupuloſius diſputamus, penitus evertiſſent; ut & evertêre *ſeditioſa* illa Regni *Comitia*, ſub Patre tuo habita: In ſeditionibus enim popularibus, Comitia ipſa ſæpe cum Plebe errant, vel Plebem errare faciunt; quo caſu, Regi, ex hac ſententia, neceſſariò fato ſuo cadendum eſſet.

Agnosco Regiam hanc Prærogativam in tyrannidem excurrere poſſe; ſed *nihil ex omni parte beatum eſt*; & hoc conferendum incommodum cum his quæ ex *Anarchia*, & bello civili neceſſariò oriuntur; Illud paucos opprimere, Hæc verò univerſos corrumpere fatendum eſt. Et ſi hoc ipſis concedas, proximùm erit, ut Tu, jure crimina remittendi, judices nominandi, bellum indicendi, plurimiſque aliis priveris Prærogativis, cum & his abuti poſſis. Quo etiam argumento, everſa eſt & ipſa ſub Patre Tuo Monarchia; ſed nos hanc dominandi libidinem, explendæque avaritiæ cupiditatem in reformatoribus plus quam in Regibus noſtris experti, non conceſſimus, ſed declaravimus, hiſce omnibus non obſtantibus, hæc iis tanquam Regibus, & jure regio nunc eſſe, & olim propria fuiſſe: & ſi hæc, cur non & hoc jam in dubium tam fervide revocatum, vix video.

Secundum mihi fundamentum erit, Quod ſtatuto 251. Parl. 15. *Jac.* VI. agnoverint Comitia *Reges noſtros ſummos eſſe, eorumque Prærogativas tam amplas, & liberas, quam quæ ab ullo alio poſſidentur Rege, aut Principe.* Cum ergo negari non poſſit, quin Reges *Galliarum*, & *Hiſpaniarum* hæc omnia faciant; cur non & Reges noſtri, qui his, conceſſione apertâ, a nobis hoc in ſtatuto æquiparantur? quod uſque adeo omnibus innotuit juriſconſultis, ut & *Lanſius*, qui de *Lege Regia* ex profeſſo limatè ſcripſit, ex hujus ſtatuti fide, Regum noſtrorum imperium non ſolum abſolutum dixerit, ſed & *Galliarum* & *Hiſpaniarum* imperio plene exæquaverit.

Tertium erit, Quod ſtatuto Primo, Parl. 18. *Jac.* VI. *Illa omnia Regibus in futurum propria, & pro Prærogativis fore conſtitutum eſt, quæ ab ipſorum prædeceſſoribus poſſeſſa, & quæ illi olim exercuere.* Eſtque in rei veritate Poſſeſſio optimus juris interpres; quis autem inficias ibit, hanc in compeſcenda ſeditione methodum ſemper fuiſſe receptam? Qui enim ex noſtris Regibus, *Moraviâ*, *Gallovidiâ*, vel *Cathaneſiâ* commotis, Comitia indixere; & dum ibi commorarentur hoſpitia perſolvere? Et quod ex vetere conſuetudine, & ex ſtatut 5. *Rob.* I. objiciunt, *hos qui ad exercitum Regis veniebant, inſtructos ſemper veniſſe victualibus & denariis ad ſuam ſuſtentationem:* Hoc de horum ſuſtentatione tantum ſtatutum, dum per amicas regiones tranſeunt, non autem dum inter inimicos morantur: Jubet enim ſtatutum, ut nihil capiant ſine viſu *Ballivorum*, aut proximorum vicinorum per loca quæ tranſeunt. Iniquiſſimum enim fuiſſet, ſubditos fideles, & pro bono publico ſua deſerentes, & ſe periculis objicientes, ex ſuo, & non ex ſeditioſorum Patrimonio alendos.

Sed quis mortalium unquam audivit, iis commeatus perſolutos fuiſſe, qui conſcribendo exercitui ſuis criminibus cauſam præbuere? Unde & reſponſionem petimus argumento a Statuito 5. *Ca.* I. adducto, in quo agnoſcunt ordines tibi licere exercitum conſcribere, modo tuis impenſis ſtipendiatus fuerit: Nam quæ te ſtringunt leges, ut illæ quæ te ſolvunt, ex bono & æquo, & Reipublicæ ſalute ſunt metiendæ; uti etiam quæ ſubditis favent ex æquo & bono, & ſalute Regis ſunt menſurandæ; ubi ergo inſtat periculum, & noſtrum vertitur emolumentum, ea tibi licere debent, quæ & nos in Republicâ pro noſtrâ erogaſſemus ſalute: Eſtque Rex in ſubitaneis hiſce in ſtatu Monarchico, loco optimatum in ſtatu

Ariſtocratico, & Plebis, in Democratico, qui & ipſi etiam in liberâ Republicâ, imminente periculo, *dictatores* ſine appellatione creabant; quoniam in rebus arduis & periclitantibus ex unius arbitrio remedia peti ſolent.

Pro fundamento jam apud multos poſitum novi hoc non licere Regi, quia ſpeciali ſtatuto hoc ei conceſſum non eſt; egereque aiunt hoc Parliamenti authoritate; ſed cum Reipublicæ cura antiquitus penes Reges eſſet, hoc inter alia iis olim licuiſſe, nemo eſt qui inficias ibit. Probandum ergo adverſariis noſtris, quando, & quâ conceſſione Reges noſtri poteſtatem hanc exuerint: Nam alias ſtatutum requirent, ut Regi negativa in comitiis, & nominatio Judicum in tribunalibus competat.

Nec me movet quod ſtatuto ſpeciali, & ex conſenſu Parliamenti cautum ſit, familiarum *montanarum* duces pro damno a ſuis dato ſatiſdare debere, nam non ſolum multa ſtatutis ſancita ſunt, quæ Regali poteſtate ſtipulari poterant, ſed & illis ſtatutis introductum eſt, duces hoc damnum repenſuros etiam ubi damnum datum avertere non poterant; Nam etſi in eorum territoriis præda per duodecem horas tantum remanſerit, ad damnum tamen reſarciendum ſtatuto illo tenentur, & hoc ſtatuto tantum (quod eſt populi communis ſponſio & conſenſus) introduci poterat.

Sed hiſce ſepoſitis, cur Conſiliarios tuos accuſant hi, qui & ipſi pro hoſtibus habendi erant? Nam qui armati ſe congregant ſine permiſſu Principis, tales Reipublicæ perduelles ubique habentur. Nec a reatu, aut reatus pœnâ excuſat religionis color; Regnique noſtri ordines præteritorum memores *Statuto* 5. *P.* 1. A te, *Rex auguſtiſſime*, convocati decrevere omnem armatorum convocationem injuſſu principis, quolibet prætextu fucatam, pœnâ *leſæ Majeſtatis* plectendam, & merito; nam ſub hoc velo facilè omnis ſeditio, & rebellio tuta foret; & qui defectionem meditabuntur, ſemper prædicatorem ſe audire fingent; quicquid enim noſtro ſæculo libidine, quicquid fraude, quicquid ſcelere peccatum eſt, ex hoc uno ſacrario ortum eſſe novimus.

Sed Regiones haſce conventicula illa campeſtria, non ſolum indies & apertè frequentaſſe (quæ & ipſa rebellionis comitia a ſtatutis noſtris licet inermia dicuntur,) ſed & ad hæc armatos turmatim acceſſiſſe, quis eſt tam perfrictæ frontis qui negare poſſit? Et Deus noſtri miſertus, quaſi fraudes has detegere deſignaſſet, paſſus eſt hos poſt hoc indictum a te colloquium, in exercitum ſe congregare, & nefandis edictis quicquid leges voluerunt, vel ſocietas requirit, funditus evertere.

Nec quia quidam ex hiſce regionibus perduellibus ſe oppoſuere, concludendum methodum hanc plane fuiſſe injuſtam, cum Reipublicæ ſalus generaliora deſiderans remedia prævalentem præcipue æſtimet factionem, nec admittat belli ratio exactam hanc proportionem geometricam; quoad tamen licuit, horum ſaluti proviſum a tuis eſt *Senatus-conſulto*, quo cautum eſt, ex nocentium mulctis innocentibus perſolvenda eſſe ſua damna: Et ſibi imputent harum terrarum domini, quod factionem adhuc pubeſcentem non oppreſſerint, pro quâ jam adulta hæc ſunt perpeſſi. Sed rationi magis conſentaneum videretur hos, qui ad hoſtes reprimendos venerant, grato animo fuiſſe ab innocentibus alendos; ut & illi ſolent, qui ad extinguendas flammas prædia noſtra vaſtantes amicam adhibent operam: præſertim ubi ipſos, ut fatentur, ſua mala ſuperabant. Si verò ſub obtentu auxilii hoſpites ipſi vel vicini oppreſſi ſint, patebat facilis, ad exercitus tui ducem aditus, patet & adhuc ad Judices; hæc igitur non tibi, nec tuis ſunt imputanda.

Quod ad chirographariam illam tyrannidem Conſiliariis tuis objectam; illi pro ſe reſpondent non ſolum licere, ſed omnium gentium jure incumbere Magiſtratibus, ſtipulationibus, aut ſatiſdationibus cavere, ne quid detrimenti capiat Reſpublica; & cum *Prætor Romanus*, hoc exigere potuerit, & ex noſtris infimi poſſint ad privati cujuſpiam indemnitatem id minus ad Reipublicæ ſecuritatem ſupremo Regni Concilio licere, omnem fidem ex ſuperat.

Hæc eſt explicatio juriſdictionis neceſſariæ, quâ illi ſolum arctari poſſunt, quos merito ſuſpectos habet Reſpublica; nec rationabile mihi videtur hoc fieri non poſſe niſi ex ordinum conſenſu; cum quæ juriſdictionis ſunt, ad hos non pertineant, & Regii ſit officii hæc exſequi, ſine quibus nec ille ſecurus, nec nos diu tuti erimus. Tot enim quotidiè artes & doloſa machinamenta rempublicam turbant, cruciant, & exagitant, ut medicis noſtris potius quam Regi, Regnique medicis remedia dictare poſſimus. Sed nec hic defuit ſtatutum; nam Parl. 2. *Jac.* II. *Sancitum eſt, Præfectum cujuſque provinciæ, ubi prima illuxerit rebellionis ſuſpitio, debere provinciam ſuam armare, & ſuſpectos ſatiſdatione idonea cohibere.* Et licet mariti pro uxoribus, patres pro filiis, & domini pro ſervis & colonis teneantur; hæc tamen recipiunt interpretationem reſtrictivam a jure communi; nec in amplius tenentur, quam ut pro poſſe ſuo in ſuos animadvertant; quod in jure tum civili, tum noſtro familiariſſimum eſt. Et ita cautio illa apud nos Prætoria, vulgo Lawburrows dicta, ſatiſdantes pro omni eo quod perpetratum erit a ſuis, vel uxoribus, ſervis, colonis, aliiſque quos impedire, vel quatenus reſiſtere poſſunt, obligat: Et ſupplicatione mihi ab uno ex nunc aſtantibus porrectâ, & a doctiſſimis his Advocatis, qui nunc pro iis orant, exaratâ, quâ ſe teneri paratos aſſerebant, adinſtar hujus legitimæ ſtipulationis; ego ſenatum hoc conceſſurum prædixi, ſed forſan ne exhiberetur, quidam etiam ex ipſis accuſatoribus curavere, ne deſideret accuſationis materies & pabulum.

DOMINOS colonos ſuos in Regem peccantes in judicio ſiſtere debere, nec novum, nec injuſtum: Nam feudis pro ſervitio ultro, & gratuito in initio conceſſis, conſtitutum eſt, a *Frederico* II. 2. Feud. Tit. 55. *Vaſſallum teneri omnes ſuos ſubvaſſallos ſuperiori exhibere, & ni faciat, feudo privandum*. Et ſtatuto 6. Parl. 3. *Ja.* V. apud nos domini ad hoc expreſſe tenentur, & probe quidem; nam ex hoc tantummodo obligantur colonos ſeditionis reos finibus ſuis ejicere; & quam ingratum eſſet in domini feudo gratuito domini hoſtes alere? Et licet mihi objiciatur, hoc tantum olim obtinuiſſe, cum feuda gratuita eſſent beneficia; nunc autem & hæc etiam venalia eſſe, nec pro ſervitio, ſed per nummos acquiri; & interpretanda eſſe ſtatuta de his tantum exhibendis, qui ſunt *Majeſtatis rei*, ſed non de omnibus ſtatuta noſtra poſt hæc tempora lata violantibus; nam cum tum temporis hæc non extarent, de his hoc intelligi non poterat; nec ſufficere reliquos ad terram colendam, omnibus in leges hodiernas peccantibus ejectis.

AD quæ omnia parata eſt reſponſio; nam lex in omnes feudi dominos lata eſt, & ubi lex non diſtinguit, nec nos; ſuntque adhuc quoad Regem omnia feuda beneficia gratuita ob fidelitatem, & ſervitia conceſſa. Et leges præſentibus, & futuris dant formam negotiis; ridiculum enim foret *ſectas* noſtras indies erumpentes legibus ante illas natis non teneri. Eſtque Reſpublica ante agros colenda, nec deerunt qui legibus ſe ſummittent, modo legum cura, pænarumque applicatio, magiſtratibus & dominis cordi fuerint.

AD ſecundam quæſtionem nunc tranſeundum, utrum Conſiliarii tui res commodè ſatis geſſerint? Et num ſint de hoc errore accuſandi? In qua, cum juriſconſulti, quibus certiora quæque a jure demonſtrantur, affirment *neminem de Conſilio teneri niſi fraudulento, & doloſo*; non video quomodo Conſiliarii politici, qui verſantur in iis quæ a fortuna indies variantur, nec jure ullo circumſcribuntur, de rebus non commode geſtis accuſari poterint; nam *ubi nulla lex, ibi nulla tranſgreſſio*. Et idcirco ſi in ullo caſu hæc fieri poſſint; cur non hoc a Tuis, hoc in caſu, commode factum ſit, explicari vix poteſt.

NON me latet Conſiliarios ſub *Jac.* IV. ſpeciali ſtatuto, 12. Parl. 2. *Reſponſuros, & accuſabiles fuiſſe*, (ut ſtatuti verbis utar) *pro conſilio ab ipſis Regi dato*: Sed hoc ideo ſtatutum novimus, Quod Regem tum minorennem, facile in eorum ſententiam iturum, apprime ſcirent Regni ordines; preſertim cum eos ſuſpectos juſte haberent, quia iidem Regem non ita pridem, ſolito boni publici obtentu, contra Patrem ſuum armaſſent. Unde potius colligi poteſt, Conſiliarios regios, conſilio a ſe dato, regulariter non teneri: nam aliàs cur quæſo ſpeciali ſtatuto opus erat? Et cur in ſubſequens tantum Parliamentum obſtringebantur? Et quis conſilium non refugeret, ſi ſine ſalario non modo imprudentiæ, ſed etiam fortunæ & eventus pœnâ luenda eſſet?

FINGAMUS tamen caſum, Conſiliarios Tuos (*Rex Sereniſſime*) his non credentes, belli improviſi mole oppreſſos; fuiſſentne illo caſu de ſtolida ſecuritate accuſandi? Quod abunde demonſtrat, quam fallacia, & lubrica ſint in Politicis argumenta, ea tamen quæ de ſalute publica adducuntur, (ut & ipſa Reſpublica rebus privatis) ſemper & ubique præferenda ſunt: Nam Conſiliarii ſacramento, juxtà & officio, ad omnia illa tenentur, quæ, ſecundum ea quæ proponuntur, ipſis æqua & bona videbuntur; in quibus alii alia quotidie ſentiunt: Et quâ fide quis conſilium promſerit eventus magiſter, non preſens judicium oſtendere poteſt. Sed nullum hic dolum, nullam fraudem interveniſſe, vel hinc inferre licet; quod nullum emolumentum vel Tibi, vel tuis hinc exurgere poterat; quod populari invidiæ ſe in hoc objiciebant, cui nemo niſi coactus ſe exponit; quod ſe, ſuoſque poſteros, ſuo exemplo tali caſu, in futurum obligant. Nullus enim ferre recuſabit, quæ facere curavit; nec ullus inter tuos erat, qui non preſentis oneris partem aliquam tulerit; ubi ergo dolus, ubi fraus latere poterat? Sed quod adhuc manifeſtius (licet, & Tibi, & Reipublicæ periculoſum eſſet Conſiliarios teneri, ea accuſantibus aperire, quæ Senatum in eam ſententiam allexerunt, nam ita poſſunt & inimici eorum, quæ tu feceris, fundamenta, & rationes perfectè addiſcere) poteſt tuus Senatus inſtituti ſui rationes tibi exponere. Nam hæc non prius deſtinarunt, quam a Magiſtratibus, ab Epiſcopis, Presbyteris, & tandem ab ipſis regionum harum comitiis ad unum congregatis confirmatum eſſet inſtare rebellionem, quicquid Regi reliquum erat oppreſſuram. Hoc ab ipſorum epiſtolis, hoc a transfugis, hoc a captivis didicimus. Et cum a quibuſdam mitiora ſuadentibus quæſitum eſſet, num de eventu reſponderent? Impoſuerunt iis ſilentium, quæ jam adduxi; docuitque inſequuta rebellio, quàm inſanum fuiſſet hæc non credidiſſe.

HIS ita te coram (*Rex auguſtiſſime*) expoſitis, licet ego tuæ clementiæ nunquam invidebo; qui tamen officii, & rei tuæ eſſe credo apud te expendere Regum Majeſtatem difficilius a ſummo faſtigio ad medium detrahi, quàm a mediis ad ima præcipitari: ut nobis reminiſcendum nos pro religione acriter pugnantes, in Atheiſmum; & pro libertate contendentes in ſervitutem non ita pridem prolapſos eſſe.

*FINIS.*

# OBSERVATIONS
ON THE
# Acts of Parliament,
MADE BY

King *James* the Firſt,
King *James* the Second,
King *James* the Third,
King *James* the Fourth,
King *James* the Fifth,
Queen *Mary*,
King *James* the Sixth,
King *Charles* the Firſt,
AND
King *Charles* the Second.

WHEREIN

I. It is obſerved, if they be in deſuetude, abrogated, limited, or enlarged.
II. The Deciſions relating to theſe Acts are mention'd.
III. Some new Doubts not yet decided, are hinted at.
IV. Parallel Citations from the Civil, Canon, Feudal and Municipal Laws, and the Laws of other Nations are adduc'd, for clearing theſe Statutes.

## TO THE
# KING.

SIR,

*NONE are ſo much obliged to Laws, as Monarchs; ſince by them Millions, whom corrupt Inclination, and miſtaken Intereſt, tempt to ſhake their Thrones, are yet forced by theſe to defend them, and find great Satisfaction in the Reaſonableneſs and Gentleneſs of that kind of Force: By thoſe, Your* Majeſty's *Predeceſſors were able to govern us very long, without any other Arms; and when ſucceſsful Uſurpers got the moſt victorious Armies in* Europe, *theſe Armies were perſuaded by Law to ſerve You and ruin them, tho' they ſaw in Your Service a Diſſolution of that Society, for which they had with much Courage, but no Juſtice, ſo often expoſed their Lives. To prevent which, for the Future, provident Law ſettled on Your Majeſty,*

*Majeſty, ſuitable Revenues to defend Your Authority, and therein ſhewed, that the Safety of the King and Law were inſeparably joined.*

*IT is to our* JAMES'S *that we owe the great Body of our Laws, and ſo there lies a ſpecial Obligation upon Your* Majeſty *to cheriſh them as their Offſpring, to maintain them as Your ſureſt and leaſt expenſive Guards, and to look on them as the only Counſellors that can neither be byaſſed by Partiality nor Intereſt.*

*BUT becauſe Your* Majeſty *has a ſpecial Eſteem for* Heroes, *and* Courage; *allow me to repreſent to You, That all thoſe eminent* Romans, *who conquer'd the World, were raiſed by Pleading, and the Command of Armies were Rewards beſtowed by the Suffrages of the People, on thoſe who pleaded beſt for them. Nor did* Cæſar *(as their Story obſerves) take him to the Camp, but becauſe he loved rather to be Firſt there, than Second to* Cicero *at the Bar; where, if he had ſtaid, he had not deſtroyed his Native Country, which* Cicero, *who continued to plead, ſo wiſely preſerv'd. That is the moſt generous Heart which is warmed by Reflection, elevated by the Hopes of Fame, and uſed to Victory; and no Reflections are ſo ſtrong as thoſe of Men always employ'd in Reaſoning. Fame has no ſuch Trumpet as Eloquence; nor can Courage give ſo many and ſolid Victories as Reaſon does. And ſuch Courage does the Love of Juſtice inſpire in thoſe who adore it, that our Profeſſion has had its own Martyrs too, who dar'd to die for it, without being diverted by Action, from looking fixedly on the Terrors of Death, or comforted by the Hopes of eſcaping it, as Soldiers in Battles are. The virtuous* Papinian *is a glorious Inſtance of this, who being chief Miniſter of State to his Emperor, after he had illuſtrated the Law by many learned Volumes, before he attained to the Age of* 36. *chooſed rather to die, than juſtify a barbarous Act, even in his Prince and Maſter. This only Uſe of our Reaſon we want under Your* Majeſty's *happy Reign, You being more unwilling to command what is unjuſt, than any of Your Subjects would be to ſuffer. And it was,* Sir, *the attending Your Royal Brother and You, that heighten'd thus in me an Eſteem of Law; for I could not but admire that fix'd Juſtice which govern'd ſo abſolutely Two Glorious and Wiſe Monarchs, and made ſo many Thouſands happy under Them. Amongst whom, none is more ſenſible of that general Happineſs, and of your* Majeſty's *ſpecial Favours, than,*

May it pleaſe Your MAJESTY,

Your MAJESTY's moſt Dutiful,

Loyal, and Obedient Subject and Servant,

GEO. MACKENZIE.

## TO THE READER.

*MY great Pleaſures are to inform and defend my Country, the one whereof I do without Vanity, and the other without Humour, equally deſirous to have my Deſigns ſucceed, and careleſs how they are cenſur'd. We have an excellent Pattern for a Lawyer in the Great* Labeo, *Tit.* de Orig. Juris: *Labeo* plurimùm ſtudiis operam dedit, & totum annum ita diviſerat, ut *Romæ* ſex menſibus eſſet, ſex menſibus ſe cederet, & conſcribendis libris operam daret. *In thoſe Obſervations I have ſatisfied the ardent Deſire our Parliaments have had, to have the Laws reviſed; and I have ſincerely endeavoured to preſerve honeſt Men from falling into Snares by their Ignorance, and to inſtruct my younger Brothers in a Science, by which I wiſh them to riſe, for the Service of their Country, and their own Advantage. One of the Reaſons which mov'd me to undertake this Work, was, That even after I was a Lawyer, I found that I underſtood not our Statutes, tho' theſe be the chief Pillars of our Law: And I wiſh'd often then, ſuch an Interpreter, as now, I hope, this Book will be. Theſe who have read my Obſervations upon the Act concerning* Bankrupts, *will find that I might have been more voluminous, and ſeem'd more learned; but my Deſign was to write Notes, and not Commentaries: And this Book, as all others of this Kind, ſhould not be judged by any one Page, but by the Whole; and yet oft-times a Line, which may ſeem eaſy now, has coſt me conſiderable Pains, even after I was* King's Advocate. *The difficult Acts or Queſtions, which ſometime I omit, ſhall be largely treated in the Papers I ſhall leave.*

I. *IT is fit for my Readers to know, That I cite ſometimes theſe Acts by* Skene'*s Edition, and ſometimes by* Glendoek'*s; and ſo that Act, which for inſtance, is the* Third *in the One, may be the* Fourth *in the Other.*

II. *SOMETIMES I refer my Reader for the Explication of one Act, to the Obſervations on another; and yet ſometimes poſſibly it is not treated there, which was occaſioned by my not having all my Papers together: But the Reader may look the* Index *of* Glendoek'*s Acts, and he will find the Acts omitted, treated in one or other of the Acts relating to that Subject: And thus alſo that* Index *may ſerve generally for one to this Book alſo.*

III. *I follow ſometimes the ordinary Opinion, tho' poſſibly it is not my own; common Opinions being ſtill ſafe, even when they are not well founded.*

# OBSERVATIONS
## UPON THE
## STATUTES and ACTS
## OF
## King JAMES I.

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## PARLIAMENT I.

ACT. I. IT is obſervable, that our Parliaments do ordinarily begin with Acts in favours of the Church, as *Juſtinian*'s *Codex* does: And this Statute renews the firſt Statute, *Robert* I. *Cap.* 1. Our Hiſtory obſerves, that this Act was made to oblige the Clergy to aſſiſt the King againſt Duke *Murdoch*; and this is the Firſt of theſe Acts, upon which the Reduction of Erections was founded in *Anno* 1627. It being ſubſumed there, that tho' by this Act, all Deeds done to the Prejudice of the Church, are declared null; yet theſe Erections were very prejudicial to it, being in effect Alienations of Church-benefices and Lands, in favours of Laics.

II. TO make War againſt the King, is Treaſon; and even to make War againſt private Perſons, is puniſhable conform to the Common Law; that is to ſay, conform to the Civil Law: For the Civil Law is ſtill called the Common Law in our Statutes, which Word we have borrow'd from the *French*, who call the Civil Law *Le droict commun*. And by the Common Law, and our preſent Cuſtom, the raiſing of Men in warlike Manner, by muſtering them, or forming them in Companies, or ſwearing them to Colours, tho' no Deſign againſt the King be proved, is Treaſon: For to raiſe War, is a Part of His Majeſty's Prerogative; and whoever makes War, uſurps the Regal Power. The Civil Law, to which this relates, is, *L.* 3. *ad L.* Jul. Maj. & *L. un. C. Ut armorum uſus, inſcio principe, interdictus ſit: Nulli prorſus, nobis inſciis atque inconſultis, quorumlibet armorum movendorum copia tribuatur.* But the Juſtices refuſed to ſuſtain the raiſing of fewer than an Hundred Men, to be Treaſon; or to ſuſtain, that the raiſing them till after Letters of Fire and Sword, did infer more than a Convocation. Earl of *Seaforth* contra *Aſſint*, *Febr.* 2. 1674. And Invaſions made by one Subject upon another, with Numbers of Men without theſe

ACT. Qualifications, was found only puniſhable as a Convocation by an arbitrary Puniſhment; but I conſider more the Deſign than the Numbers.

III. REBELLION, is properly riſing in Arms againſt the Commonwealth, openly and notourly. It was called *Perduellion* by the Common Law: And that is the Species of Treaſon, that is here puniſhed by Forfeiture of Life, Lands and Goods, *vid.* R. M. *L.* 4. *C.* 1. *Leg.* Malcol. 2. *C.* 12. *quon. attach. C.* 19.

IV. THESE who refuſe to aſſiſt the King to puniſh notour Rebels, are, by this Act, puniſhed as Favourers of them. Notour Rebels, are only ſuch as are denounced Rebels, or againſt whom there are Commiſſions of Fire and Sword granted by the Council, or thoſe who have riſen in open Rebellion, tho' there be yet no legal Diligence againſt them; as was decided *February* 1680: And theſe who refuſe to aſſiſt againſt ſuch, are puniſhable as Favourers of ſuch Rebels; that is to ſay, as Art and part of their Crimes, as is clear by the 29. *Act, Parl.* 3. Ja. IV. where Favourers of Rebels are declared puniſhable as Art and Part: And conſequently, the ſtaying from the King's Hoſt, after open Proclamation, commanding all Heritors to go thereto, is puniſhable as Treaſon. And it is clear by the *Journal Books*, that this Crime has been puniſhed by Forfeiture, *Jan.* 9. 1577, and the 21. of *April* 1599. Likewiſe, I find *Andrew Naiff* in *Baldordy*, pannell'd for treaſonable abiding from the King's Hoſt, at the Raid of *Biggar*, 1568. And yet I find, that Abſents from the Hoſt are bail'd, *March* 15. 1576, tho' Treaſon is not of its own Nature bailable; and that theſe Pannels, who are doom'd to have loſt their Eſtates and Goods, after much Debate, are, notwithſtanding *quoad* their Perſons, only warded during the King's Pleaſure: And His Majeſty, by His gracious Letter, *Nov.* 1679, allow'd ſuch as were abſent from the Hoſt at *Bothwel*-Bridge, to be only fined, at moſt, in Two Years valued Rent.

THIS Act was alſo the Foundation of all our old Proclamations, whereby all the Heritors, betwixt Sixty and Sixteen, were charged to come to the King's Hoſt, when our Kings were either engaged againſt their Enemies at home or abroad; at which Occaſions, Heritors and Liferenters, whether Men or Women, holding immediately of the King, were cited, and they cited and brought out their Vaſſals: And therefore it was a good Defence that they held not of the King, as is to be ſeen in the *Journal Books*, *Febr.* 19. 1600. But now the Council commands all Heritors by Proclamation, to go to the Hoſt, under the Command of ſuch Captains as are named in the Proclamation. This Obligation and Statute, is not now taken away by the late Act, giving His Majeſty the Militia, as was found by the Privy Council, *October* 1677, and by the Juſtices in *March* 1680, ſo that Heritors muſt attend either, but not both in the ſame Countries. So the laſt Act abrogates not the firſt; and that being given as a Favour, were none, if it took off the firſt, which is greater, and ariſes from a feudal Obligation, or at leaſt is due to the King as King, and without which the Peace of the Country could not be maintained. And by the *Act* 25. *Seſſ.* 3. *Parl.* 1. Car. II. after the Militia is granted, the Parliament in the ſame Act, makes a further Tender of all their Lives and Fortunes, betwixt Sixty and Sixteen, when they ſhall be called for.

*Secundò*, IT was found that this Crime was not puniſhable now only by the Puniſhment expreſs'd in *Chap.* 15. *Stat. Alexander* II. whereby a Thane was only puniſhable in Six Cows and a young Cow; an Ochiern, in Fifteen Ewes, or Six Shillings; and a labouring Man, in One Cow and One Sheep: For that Statute is juſtly abrogated by this Act that is poſterior; the Remedies in that Statute having been probably found ineffectual becauſe of their Meanneſs. This Ochiern is, by *Skeen*, called a Freeholder; but I find by many old Evidents, that an Ochiern is a Chief of the Branch of a great Family, who has a conſiderable Command; and it is the Corruption of the *Iriſh Wochteran*, which ſignifies ſtill in the *Highlands*, a Maſter or Superior.

*Tertiò*, IT was found, That tho' ſuch as were above Sixty, or below Sixteen, were not obliged to go to the Hoſt themſelves, becauſe of the 23. *Stat.* K. *Will.* (and this is ſuſtain'd, *Feb.* 21. 1600.) yet their Age did not excuſe them from ſending; which clears, why *David Lawſon* was convict for biding from the Raid of *Dumfries*, in Regent *Morton*'s Time, tho' he was alledged to be paſt Sixty Five.

*Quartò*, THAT ſuch Burgeſſes as had Lands in the Country, were obliged to ſend One for theſe Lands, (tho' it was alledged, that Burgeſſes did not uſually keep Horſes) except they had been commanded by the Town where they lived, to ſerve there.

*Quintò*, THAT the Captains under whom they were commanded to go to the Hoſt, could not warrand them to ſtay at home; becauſe this feudal Obligation could not be diſpenſed with by Captains, who were only empowered to command: But if they came once out, and were liſted; it was found, That the Captains might allow them to return Home, upon Occaſion of Sickneſs, or for other Excuſes, of which he was a competent Judge.

*Sextò*, THAT the King needed not prove that the Pannels came not to the Hoſt, that being a Negative; but that it was neceſſary for the Pannel to prove that he was at the Hoſt.

ACT.

*Septimò*, That the King was not obliged to prove the Pannels to be Heritors; but that they were obliged to renounce any Heritage they had in favours of the King, if they denied they were Heritors; even as in other Caſes, the King is not obliged to prove that any were His Vaſſals, but they behov'd to diſclaim upon their Hazard: And of old, the Notoriety of their being Heritors was referred to the Aſſize, without any further Probation, as *June* 12. 1557. and ſometimes to the Pannel's Oath, as in the Caſe of *William Wallace*, *July* 2. 1600.

*Octavò*, That not only ſuch as were Heritors by being actually infeſt, were to ſend to the Hoſt; but that apparent Heirs, and ſuch as poſſeſſed the Lands, were to ſend; it being unreaſonable, that the apparent Heir's lying out, and not entering, ſhould prejudge the King more in this Caſe, than it does as to the Caſuality of Eſcheat, *&c.*

*Nonò*, It was found, That ſuch as poſſeſs'd by the Courteſy of *Scotland*, were obliged to go to the Hoſt, by an expreſs Deciſion at this Time, tho' the Curiality be but a Liferent; and other Liferenters were not obliged to go, ſince Heritors, in our Law, are exponed in oppoſition to Liferenters.

These Words in this Act, *Without a reaſonable Excuſe*, ſeem to inſinuate, That not only relevant or legal Defences, but even reaſonable or equitable Defences ought to be received, to defend ſuch as ſtaid from the King's Hoſt. And thus Inqueſts favour ſuch as were known to be of ſo infirm a Conſtitution, as that they could not, without great Danger to their Life, undergo the Fatigue of an Army, tho' they were not labouring under any preſent form'd Diſeaſe, or *morbus ſonticus*: And for the ſame Reaſon, mean Heritors were excus'd, tho' of old, I find that this was found to be no Defence, in the Caſe of *John Roſs* of *Drumgranich*, *July* 2. 1600. But the Reaſon that inclin'd the Judges in this Year 1680. not to fine ſmall Heritors was, becauſe the Proclamation commanded none to come out, but ſuch as were to come upon Horſeback; and ſo, ſuch only could be fined as could keep Horſes. And tho' the Deciſions at this Time, did only oblige ſuch as had 100 *l.* of valued Rent to go; yet by the 120 *Act*, *Parl.* 9. *Jac.* I. ſuch as can ſpend Twenty Pounds of Land-rent yearly, are obliged to keep a Horſe; which by the 267 *Act*, *Parl.* 15. *Jac.* VI. is to be computed 200. *l.* of yearly conſtant Rent.

I find by the Feudal Law, That the Vaſſal *qui dominum in bello non adjuvavit, aut periclitantem deſeruit, feudum amittebat*; Roſenthal. *Concluſ.* 16. *Num.* 1. But yet the Words of the Text in the Feudal Law; *Feudorum Lib.* 2. *Tit.* 24. *Parl.* 2. are only, *Item qui dominum ſuum cum quo ad prælium iverit, in acie periclitantem dimiſerit, beneficio indignum ſe judicavit*: And yet even by this Text it is implied, that he is obliged to go; and the expreſſing of that Obligation ſeems omitted, becauſe it was unneceſſary, being implied in the very Nature of the Feu. *Craig* expreſſes it thus, *Alia eſt etiam feudi, ſi non amittendi, ſaltem vaſſalli, ob quaſi delictum, puniendi ratio, ſi dominum, ſe pro* Cæſaris *expeditione inſtruentem, non fuerit comitatus, feudum enim eo caſu amittet, & dimidium fructuum illius anni, ex feudo domino pendet*; *non enim hic tantum contra dominum, ſed contra imperium & rempublicam peccatur*: So that it ſeems in his Time, the Vaſſal who held of another Superior than the King, forfeited his Feu for not going to the Hoſt; but the immediate Superior had Right to Half a Year's Rent: And the Reaſon of this ſeems to have been, becauſe by all our old Laws, the Vaſſal was obliged to attend his immediate Superior in going to the King's Hoſt; and the Proclamation then commanded every Man to come with his Vaſſals: And therefore as the King had Right to the Forfeiture, for not attending His Hoſt: ſo the immediate Superior had Right to this Half Year's Duty, for his not attending him: And ſometimes by the *Journal Books* it appears, that when Vaſſals were fined, and not forfeited, the immediate Superior crav'd the Half of the Fine.

V.

THE Puniſhment of ſuch as ride with more than their ordinary Houſhold, is arbitrary; and this Act muſt only be interpret againſt ſuch as ride ordinarily with great Trains, and which may look like an unpeaceable Deſign; nor is any Man puniſh'd for riding at ſolemn Occaſions, with his Friends and Followers: And I alſo think, That this Act would only extend to ſuch, againſt whom there lies a Preſumption, that they gather, or keep Men together, upon ſome ſiniſtruous Deſign, either againſt the Government, or their Neighbours; for if this were allow'd, Great Men might keep Troops together: And for this ſame Reaſon are Convocations diſcharged by other Acts; and betwixt theſe Acts and this, there is this Difference, That by theſe, the convocating for a Time irregularly thoſe in whom the Convocator pretends no Intereſt, is diſcharged; but by this Act, the conveening Men upon Pretext of a Retinue is diſcharged: And tho' it may ſeem, that every Man may keep as great a Retinue as he pleaſes; yet *quilibet tantum in ſuo facere poteſt illud, quod fieri poteſt ſine æmulatione vicini*; but *multo magis ſine æmulatione Reipublicæ*.

VI

THOUGH by this Law it is only appointed, That there be Officers and Miniſters of the Law, made thro' all the Realm indefinitely, without telling by whom they are to be made; yet by the 2. *Act*, *Parl.* 1. *Ch.* II. *The Power of chooſing Judges is declared to be One of His Majeſty's Prerogatives.*

ACT IT is obſervable from this Act, That none can be Judges who have not ſufficiently of their own, where-thro' they may be puniſhed if they tranſgreſs; which is very juſt, for a Judge who decerns unjuſtly by palpable Unjuſtice, *litem ſuam facit*; and therefore it may be well argued, That when any who is a Judge, or has an heritable Office, becomes inſolvent, he may be forc'd to find a Depute, who is ſolvent, or elſe he may be diſcharg'd to ſit.

*Obſ.* THO' it may ſeem, That if any heritable Officer be incapable to exerce, the King ſhould name Deputes *jure devoluto*; yet by this Act it is ordained, That if the heritable Officer be incapable, he ſhall ordain others, for whom he ſhall be anſwerable.

VII. THE Deſign of this Act is, to empower the Sheriff to arreſt Oppreſſors and Vagabonds: By theſe Words, *To ſojourn Horſe*, is meant, to quarter Horſe, from the *French* Word *ſejour*; by *Husbands of the Land*, is ſtill meant Husbandmen, in our Acts of Parliament; by *taxing the King's Skaith*, is meant, to cauſe modify what is due to the King; and by *aſſything the King*, is meant, the cauſing the Malefactors pay what is modified.

*Obſ.* THAT the legiſlative Words in our Statutes, are very various; for in this, and many other Statutes of this King, the *Formula* is, *The Parliament ſtatutes, and the King forbids*: Which Words ſhew, that the legiſlative Power is in the King; for, to *forbid* is the chief and moſt vigorous Part of a Statute.

IN the *17th Act*, it is ſaid, *It is ſtatute, and the King forbids.*

IN the *14th. It is ſtatute by the whole Parliament, and the King forbids.*

IN the *13th. It is ſtatute by the whole Parliament, and by the King forbidden.*

IN the 30. *Act*, 2. *Parl. Jac.* I. *It is decreeted by the whole Parliament.*

IN the *Act* 37. *It is decreeted, and ſtatute.*

IN the *Act* 47. *Parl.* 3. *It is ordained by the King and Parliament.*

*ACT* 50. *It is ordained and forbidden.*

*ACT* 60. *Parl.* 3. *Jac.* I. *Our Sovereign Lord, through the whole Ordinance of the Parliament, ſtatutes.*

*ACT* 125. *Parl.* 9. *Jac.* I. *Through the Conſent of the whole Parliament, it is ordained.*

*ACT* 62. *Parl.* 3. *Jac.* I. *It is ſeen ſpeedful.*

*ACT* 76. *Parl.* 5. *Jac.* I. *It is ſtatute and ordained.* And *Act* 78. and 79. *It is ordain'd.*

*ACT* 83. *Parl.* 6. *Jac.* I. *Rex per modum ſtatuti ordinavit.*

*ACT* 85. *Rex mandavit.*

IN the old Statutes of King *Robert* and King *Alexander*, &c. it is ſaid, *Dominus Rex vult*, or *Statuit Rex*, or *Deſinivit Rex*, or *prohibet Rex*, or *Decrevit & deliberavit Rex*; without ſpeaking one Word of the Parliament, or Eſtates.

*ACT* 105. *Parl.* 7. *Jac.* I. *The King with the Conſent of the Council.*

*ACT* 104. *The King with the Conſent of the Parliament and Council.*

*ACT* 108. *The King of Deliverance of Council*

BUT the *Formula* now is, *Our Sovereign Lord, with Advice and Conſent*; or, *Our Sovereign Lord, and Eſtates of Parliament*; which laſt is not ſo proper. And tho' in moſt of the *Acts* of the 14. Parliament, K. *Ja.* III. it be ſaid, *That it is ſtatute and ordained by the whole Three Eſtates*; yet it may be eaſily ſeen, that theſe Acts were but, in effect, Overtures propoſed by the Three Eſtates, to be ratified in Parliament; and ſo, in effect, are conceiv'd rather as Overtures than Acts: As alſo, where any Thing is to be put in execution by the King, there the Act runs in Name of the Parliament, and not of the King, as in the 23. *Act*, *Parl.* 1. *Jac.* I. it is ſaid, That *the Parliament has determined and ordained, That our Lord the King gar mend His Money*; and in the 6. *Act*, *Parl.* 3. *Jac.* II. *The Three Eſtates has concluded, That our Sovereign Lord ride throw all the Realm*, &c.

IX. THERE are many Ways whereby the Superior may crave Production of his Vaſſals Evidents; for the King ſometimes gets an Act of Parliament, ordaining all the Vaſſals of ſuch a Country to produce their Evidents, as 262. *Act. Parl.* 15. *Jac.* VI. whereby all the Heritors in the Highlands are ordain'd to produce their Evidents, with Certification of loſing their Rights. The Superior may alſo crave Exhibition of theſe Rights: But the ordinary Way is by an Improbation, wherein Certification is granted againſt the Papers that are not produced; which is deriv'd to us alſo from the Feudaliſts, who affirm, That *Vaſſallus imperari poteſt ſub pœna caducitatis, comminatione legali, & certus terminus ſtatui, ſi intra eum inſtrumenta non edat.* This *Commination* is our *Certification*; and this *Terminus*, is our Term in Improbations. *Roſenthal. Cap.* 8. *Concl.* 33. *Num.* 13. and 14. In theſe Actions the King needs produce nothing to prove that he is Superior; for the King is preſum'd to be general Superior, and is infeſt *Jure Coronæ*, in all the Lands of *Scotland*; but tho' other Superiors muſt produce a Saſine of the Lands, yet they need produce nothing to prove that the Defender is Vaſſal, who is oblig'd to produce upon his Hazard, or elſe to diſclaim: And yet if the Superior libel only that he is infeſt in ſuch an Earldom, and that the Defender's Lands are Part and Pertinent of the Earldom, without producing any Thing to inſtruct that he ſtands expreſly infeſt in theſe Lands, as a Part of his Earldom; the Lords would not put the Defender in that Caſe to produce *ſimpliciter*, but allow'd the ſame Day to the Purſuer to prove that they were Part and Pertinent of the Lands wherein the Purſuer ſtands infeſt, and to the Defender to produce if that were proved: For the Lords thought it hard, to force Heritors to propal and lay open the Secrets of their Conveyances, where it was not certain if the Purſuer had any Intereſt; albeit it was alledged, that this would occaſion two Litiſconteſtations in one Cauſe, *viz.* One, Whether the Purſuer had Right? and another, Whether the Defender had ſufficient Intereſt to ſeclude the Purſuit? For the Lords thought, that this being an Act before Anſwer, did ſolve this Difficulty; and the ordinary Maxim, *That the Vaſſal muſt diſclaim upon his Hazard*; and the Argument, *That either the Purſuer was Superior, and would be found to be ſo, and then there was no Wrong done, or elſe he was not*, and in that Caſe the Defender was in no Danger by diſclaiming; were both found only to take Place, where the Purſuer produced a ſpecial Right to the Lands libelled, but not where he pretended only, that the Land poſſeſs'd by the Vaſſal was Part and Pertinent of his Land; which any Purſuer might alledge.

The Third, and old Way of forcing the Vaſſal to exhibit his Evidents, was by a Feudal Trial, *per pares curiæ*, that is to ſay, before an Inqueſt: For of old, the King ſummoned his Vaſſals to appear before an Inqueſt, to bring with them any Right they pretended to ſuch or ſuch Lands. And that Way is expreſs'd in this Act, as well as the other; and in *Statut.* 36. Rob. III. *Num.* 3. but is now in deſuetude, the Lords of Seſſion being come in place of the Inqueſt. The Earl of *Rothes*, as Donator to the Ward of the Counteſs of *Buccleugh*, having purſued the Tutors for Inſpection of the Charter-cheſt, that he might know what Lands held Ward; the Lords ordained one of their own Number to take Inſpection, and to ſhew to the Donator what Papers could prove the Ward-holding, becauſe it is preſumed that all Lands hold Ward, *Decemb.* 20. 1661.

X. FROM this, and the ſubſequent Acts, it is obſervable, that the Parliament may, without citing Parties, diſcharge Privileges contained in private Men's Rights, tho' they cannot, without Citation, caſs and annul private Rights.

XI. FOR underſtanding this Act, it is fit to know that the Diſtance betwixt the Hecks of Cruives ſhould be Three Inches wide, which is renew'd by the 73. *Act*, *Parl.* 10. Ja. III. and ſhould not be Five Inches, conform to the 15. *Act*, *Parl.* 2. Ja. IV. which the Lords found, 29. *July* 1665, to be an Error in the Printing. They there alſo found, That the Mid-ſtream was in deſuetude, notwithſtanding that it was reviv'd in all theſe Statutes; but that the *Saturday*'s Slop was to be obſerved in all Cruives, which was to continue by pulling up all the Hecks to the Breadth of an Ell in every Cruive, from *Saturday* at Six a Clock, till *Monday* at Sun-riſing.

XII. THO' Mines of Gold and Silver be, by this Act, declar'd to belong to the King, yet by the 27. *Act*, *Parl.* 4. *Seſſ.* 2. Car. I. they were declared to belong to the Heritor, he paying to the King the Tenth Peny, which was the *Canon Metallicus*, that was only due out of Mines found in private Fields, *L.* 2. *C. de Metal.* But that Act is reſcinded in the general Act *Reſciſſory*; and this Act is conform to the Feudal Law, *Feud. Lib.* 2. *Tit. quæ ſunt Regalia* 56. It has been doubted, whether Lead, Copper or Tin belong to the King or the Heritor; but the King is in Poſſeſſion of diſponing upon theſe alſo; and when He diſpones them in a *Novodamus*, even to the Heritor, He reſerves a Tenth Part to be paid in to His Exchequer. And His Majeſty has granted general Gifts of all Copper Mines. And *Craig* tells us, *L.* 1. *Dieg.* 14. That *omnium gentium, omniumque ætatum conſenſu, fodinas omnes auri, argenti, ſtanni, æris, & ſimilium, in patrimonio principis numerari.* But yet they are not enumerate in the foreſaid Text of the Feudal Law, otherwiſe than by being comprehended under the Word *Argentaria*; *& frequens eſt in jure, ſub majoribus minora comprehendi*; and yet I think, that if His Majeſty diſpon'd Land with all the Silver Mines, this would not comprehend Copper, Tin, *&c.* So that this Rule holds not in all Caſes; nor doth it hold in any Caſe where Things require ſpecial Diſpoſitions, as *omnia Regalia* do.

*NOTA*, From this Act to the 23. the Acts are either in deſuetude, of no Import, or explained in the Obſervations upon other Acts.

XXIII. BY this Act, it is ordain'd, That our Coin be of the Weight and Fineneſs of *England*, which was formerly ordain'd by the *Ch.* 28. *Stat. Dav.* II. And tho' by the 17. *Act. Parl.* 1. *Ja.* VI. it is declared, *That our Sovereign Lord cauſe Print and Conzie Gold and Silver, of ſick Fynneſs as other Countries doe*; yet after King *James* ſucceeded to the Crown of *England*, He paſt a Contract betwixt the Mints of both Nations, wherein they oblige themſelves to keep the ſame Standart. And tho' the Denominations be different now, yet the Standart is now the ſame; for the *Engliſh* Denomination is 11 Ounces, 2 Deniers fine, which is called *Sterling* fine; our's is 11 Deniers and 2 Grains. And albeit upon a

ACT. very ſubtle Enquiry, it is alledged that the Denominations cannot be adjuſted without ſome Difference, yet it is ſo ſmall a Fraction as is not to be regarded; and there are Four indented Pieces, Two of Gold, and Two of Silver, made of the ſame Fineneſs, and out of the ſame Eſſay-pot, Two whereof are ſent to *Scotland*, the One of which is kept by the Treaſurer, and the other in the Mint; and Two are retain'd in *England*, the Denominations are printed upon theſe Pieces. And in the Lord *Hatton*'s Caſe, it was fonnd that this common Standart was to be the Rule. *Vid.* Obſervation on the 249. *Act.* 15. *Parl. Ja.* VI.

THE laſt Act of this firſt Parliament in the *Black* Impreſſion, is an Inhibition made by King *James* I. to the Biſhop of St. *Andrew*'s, delegated by the Pope, to proceed upon the Diſmembration of a Benefice purchaſed at *Rome*.

*NOTA*, There are many Acts omitted out of *Skene*'s Impreſſion which were in that Impreſſion, becauſe *Skene* judg'd them temporary, as this Act and a Taxation impos'd for the King's Ranſom by this Parliament, wherein ſo much was put not only upon every Boll of Victual, but upon every Beaſt of Cattel. Some Acts are alſo to be found in *Skene*, which are not in that *Black* Impreſſion, as the 80. *Act*, *Parl.* 10. *Ja.* III. (in the old Impreſſion it is *Act* 79.) concerning Purpriſion. As alſo, ſome Acts which were there only temporary, are made by *Skene* conſtant and perpetual Laws, as the 29. *Act* of the 2. *Parl.* of this King, runs thus in *Skene*, *It is ſtatute and ordained, that the Breakers of the Acts of Parliament be puniſh'd after the Form and Ordinance thereof*; whereas that Act runs thus in the *Black* Impreſſion, *Item, That it be enquired by the King's Miniſters gif the Statutes made in His firſt Parliament be kept, and if they be broken in any of their Punctilio's, that the Breakers of them be puniſh'd after the Form and Ordinance of the ſaid Parliament.*

THE Rubrics alſo of the Acts of that *Black* Impreſſion differ almoſt every where, and very much from this Impreſſion; which proves that *argumentum à rubro ad nigrum*, is of no great Weight with us, the Rubric being an Inſcription made by the Clerk-Regiſter, and no Part of the Act of Parliament.

# PARLIAMENT II.

IN the Iuſcription of this Parliament it is ſaid, *and of his Kinrick the* 19. *Year*; by which Word *Kinrick* is meant His Reign; For Kinrick in the *Saxon* Tongue ſignifies Reign, and ſometime Kinrick ſignifies Kingdom with us, as in the 145. *Act*, *Parl.* 13. *Ja.* I.

IN the Inſcription of this Parliament, according to the *Black* Impreſſion, it is ſaid, *That to the Three Eſtates of the Realm there gatherit were propon'd ſundry Articles*, to which was anſwer'd in manner as after follows, by the Inſcription of the firſt Parliament, according to that Impreſſion, it is ſaid, *Electæ fuerunt certæ perſonæ ad Articulos datos per Dominum Regem determinandos data cæteris licentia recedendi.* By which it appears that the Lords of Articles being nam'd, the Parliament adjourn'd, and the Cuſtom was, that they never met again till the laſt Day of the Parliament, when the Reſolution of the Articles was voted. 2. The Reſolution of the Articles is ſaid to be *per Dominum Regem*, becauſe he is only Law-giver, and the Parliament only conſents.

IT is ſaid in the Inſcription of the Third Parliament, *That theſe Articles were put to certain Perſons choſen by the Three Eſtates*, which inſinuates that the Lords of the Articles were choſen by the Three Eſtates; whereas now, the Way of chooſing the Articles is preſcrib'd by the 1. *Act*, 1. *Parl. Seſſ.* 3. *Ch.* II.

XXVI. BY this Act it is ordained, That if any Lands or Poſſeſſions of Haly Kirk be wrongouſly annaly'd, they ſhould be reſtor'd by Proceſs of Law.

FOR underſtanding whereof, it is fit to know, that regularly, the Lands and Goods of the Church, are not annaliable; and Churchmen are not Proprietors of them, but Adminiſtrators and Liferenters, *precariii poſſeſſores, quibus tanquam commendatis, non tanquam propriis uti debent*, *Salv. Lib.* 1. And this is clear by the Canon Law, *Canon ſine exceptione*, 12. *Queſt.* 2. & *Can. ult. Queſt.* 1. and the Civil Law, *L. Jubemus*, 14. *C. de ſacro-ſanctis Eccleſiis.* But yet there are Three Caſes excepted, in which it is permitted to alienate them expreſs'd in *Gloſſ. cauſa*, 12. *Queſt.* 2. *viz.* 1. *In cauſa neceſſitatis*, if the Churches Debts require the ſame, as for maintaining its Fabric, or to maintain the Chriſtian Religion againſt Infidels or Heretics. *2do. Cauſa pietatis*, as to maintain the Poor, when ſtarving, or to redeem Priſoners from Infidels. *3tio. Cauſa damni vitandi*, when the Lands are not otherwiſe

wiſe improvable; for which laſt there is an Act in the *Lateran Council* under *Alexander* III. *Cap. ad aures Extr. de Reb. Eccleſ. non alienand.*

By our Law, all Eccleſiaſtical Perſons are diſcharg'd to leſſen the Rental of their Benefices, by ſetting Feus, Tacks, Converſion of Victual for Money, or any other Diſpoſition. By the 5. *Act*, *Parl.* 22. *Ja.* VI. Biſhops are diſcharged to ſet in Tacks their Quotes and Caſualities: And tho' this laſt Act ſeems unneceſſary, becauſe of the former; yet it was made, leſt it might have been debateable, whether Caſualities fell under the former Prohibition, ſince Tutors may tranſact for theſe, as we ſee in *Francis Montgomery*'s Caſe againſt the Earl of *Leven*, where it was found, That Tutors, who cannot alienate, may tranſact for Caſualities, as to give a Liferent to the Husband of the Heretrix, in place of the Courteſy. And tho' Prelates, as well as Barons, were allowed to Feu their Ward-lands, for the better Improvement of them, *Act* 71. *Ja.* II. *Parl.* 14. *Act* 91. *Ja.* IV. *Parl.* 6. yet theſe Acts are only to be underſtood of Lands to be feu'd out for the equivalent Rent, when at firſt they were barren; but they are no Warrant to Biſhops to tax their Wards for a certain Duty: For this is contrary to the Intereſt of the Church, and is ſo far from being warranted by any Law, that there is an expreſs Act, *viz.* 9. *Parl.* 23. *Ja.* VI. allowing them only to feu out their Ward-lands by a temporary Statute, to endure for Three Years allenarly: Which ſhews, that regularly it was not lawful. And this did prejudge the King alſo, who might have Right to the Ward and Marriage, *ſede vacante*, from which he would be debarr'd by taxing theſe Caſualities. And therefore *Sharp*, Archbiſhop of St. *Andrew*'s, having tax'd the Ward-holdings of the Lands of *Blebo*, that Right was reduced by his Succeſſor, 12. *March* 1684, tho' it was alledged, That tho' Churchmen cannot alienate Tiends, which are the Spiritualities of the Church; yet they are *domini*, and not *adminiſtratores tantum*, as to the Temporality, which was ſaid to be alſo *Craig*'s Opinion. And taxing was a more conſtant Rent to the Church, and as a Biſhop might gift a Ward which could not be quarrelled by his Succeſſors, even for Years after his Death, or Removal, ſo might he tax.

*NOTA*, Tho' by the 41. *Act*, *Parl.* 10. *Ja.* II. The King may reſume the annex'd Property unlawfully diſpon'd, *but any Proceſs of Law*; yet in this Act Kirk-men are not to reſume the Lands wrongfully annalzied by them, otherwiſe than by lawful Proceſs of Law.

By this Act, Hoſpitals founded by the King, are to be viſited by the Chancellor, but Hoſpitals founded by Biſhops, or other Subjects, are to be viſited by the Biſhop, and Ordinary; which Act is renew'd by the 63. *Act*, *Parl.* 5. *Ja.* VI. But by the 101. *Act*, *Parl.* 7. *Ja.* V. all the Viſiters are to be appointed by the King, and by our preſent Practice, All Actions intented for cauſing Patrons, or others, compt for their Intromiſſions with the Rents of Hoſpitals, are ſtill intented at the Inſtance of the Chancellor. By the Canon Law, *Curis hoſpitalitatis, & hoſpitalium ad Epiſcopi ſolicitudinem pertinet, ſed ubi non ædificantur hoſpitalia cum permiſſione Epiſcopi locus non eſt ſacer, nec eſt ſub Epiſcopi cura.* XXVII.

HERETICS are, by this Act, to be puniſhed as Law of haly Kirk requires, *id eſt*, by Excommunication; with us they were burnt; and by *Act* 46. *Parl.* 3. *Ja.* VI. Churchmen, who are Heretics, are to be excommunicated and depoſ'd, if they revoke not their Hereſie. The Puniſhment by the Common Law is Burning, and Confiſcation of Moveables, *Clar. Num.* 13. This Act was made againſt the Firſt of our Reformers, called then *Lollards*, for the Rubric in the *Black* Impreſſion bears, *Of Heretics and Lollards.* XXVIII.

*OBSER.* From this Act it is obſervable, that the Kirk was Judge to Hereſy, *in prima inſtantia*; and *Clarus* makes the Trial ſo far Eccleſiaſtic, that the Cognition belongs to the Church, and the Puniſhment to the Secular Judge; but with us the Juſtices are Judges *in prima inſtantia.*

It may be alledged from this Act, That all Tranſgreſſions of Law are not puniſhable, as Contempt of Authority, where there is no expreſs Sanction in the Law; ſince by this Act it is appointed that the Breakers of Acts of Parliament are to be puniſhed after the Form and Ordinance thereof. By which Words alſo it ſeems, that all Acts of Parliament are with us *ſtricti juris*, and not to be extended *de caſu in caſum*; but yet with us Laws are extended by Parity of Reaſon, and by Analogy; as in the Caſe of making Men anſwerable for their Wives not going to Church, *&c.* And the Meaning of this Act is, that Judges ſhall not have Liberty *commutare pœnam Lege definitam expreſſe*; for the beſt Lawyers acknowledge, that tho' a Statute ſhould ſay, *And it is ordained that this Statute ſhall be underſtood exactly according to the Letter*, yet it is capable of even an extenſive Interpretation, if no Injuſtice follow on that Extenſion; but much more if without this it would be unjuſt. Bald. *de Stat. Num.* 3. Voet. *de Statut.* § 7. *Cap.* 1. And a declaratory Interpretation is, by all Lawyers, acknowledged to be a literal Interpretation, *Voet. ibid.* albeit in general it XXIX.

ACT cannot be denied, that theſe who have Power to make Statutes, muſt, by a neceſſary Conſequence, have Power to modify and qualify them as they pleaſe; and as they may allow inferior Judges a Power to interpret Statutes in general, ſo they may diſcharge them in a particular Statute to uſe that their Power; and in that Caſe an inferior Judge cannot extend or interpret otherwiſe than in the Terms foreſaid.

XXX. LEAGUES and Bonds, are by this Act only declared null; but by the *Act* 12. *Parl.* 10. *Ja.* VI. and *Act* 4. *Parl.* 1. *Ch.* II. they are declared puniſhable as Sedition, and were puniſhable by Warding, *Act* 43. *Parl.* 6. Q. *Mary.*

XXXI. IF any carry Horſes under Three Years old, to be ſold out of the Country, they eſcheat them by this Act; and by the 22. *Act, Parl.* 1. *Ja.* VI. if Horſe (without making Difference as to their Age) be carried beyond Sea, the Horſe, and Ship, and Goods of the Owner are eſcheated, and their Perſons to be puniſh'd arbitrarily. It is declared by that Act, That there were ſeveral Acts before diſcharging the Exportation of Horſes; whereas I ſee none ſave this; and therefore theſe behov'd to have been Acts of Council, or unprinted Acts of Parliament, tho' generally all Acts inferring Eſcheat ſhould be printed for Certioration. Theſe Acts are now in deſuetude, carrying Horſes out of the Country being an Improvement of Rent, tho' that was then diſcharg'd upon the Account of our Wars with *England.* But it would appear, that the carrying Horſes out of the Kingdom till they be Three Years old, was not diſcharg'd upon the Account of War, but to the End the Horſes ſhould be kept till they gave a greater Price, and ſo ſhould bring in more Money; therefore this Prohibition, it ſeems, ſhould ſtill laſt.

XXXII. BY this Act, Tallow tranſported is eſcheated; and the Reaſon hereof is given by the 123. *Act, Parl.* 7. *Ja.* V. becauſe by the Tranſportation thereof it became very dear at home; and therefore the Eſcheat of the Tranſporter's whole Moveables is added: But the Ill increaſing, the Moveables of the Maſters, and Skippers of ſuch Veſſels in which it is tranſported, are declar'd to fall under Confiſcation; *Act* 40. *Parl.* 6. Q. *M.* And this Act extends the former to Strangers.

IT is obſervable, That tho' this Act diſcharged all Perſons to export; yet all other Acts mention Strangers, when it is deſigned that the Prohibition ſhall be extended to them; as is alſo clear by the *Act* 22. *Parl.* 1. *Ja.* VI. and the 31. *Act, Parl.* 7. *Ja.* II. So that it may be doubted, if ſuch penal Acts ſhould be extended to Strangers, where they are not mentioned; and if the Words, *all Perſons,* are not, in our Acts, to be reſtricted to Natives.

THO' by the Civil Law, the Owners be liable for the Skipper's Fault, in ſo far as concerns the Prejudice done in the Ship; yet it ſeems hard, that an Owner's Eſcheat ſhall fall for the Skipper's taking in Tallow, elſe rich Men would not be Owners, and Skippers might maliciouſly ruin their Owners: And therefore it ſeems, that by Maſters, here ſhould only be mean'd Skippers; and by the Civil Law, the Skipper was called *Magiſter navis.*

XXXIII. THO' this Act puniſhes only Stealers, or Cutters of green Wood in the Night-time; yet they are puniſhable for ſuch Faults at all Times; the Puniſhment is expreſt *Act.* 84. *Parl.* 6. *Ja.* VI. But thereafter cutting of green Wood is puniſh'd, as Theft, with Death, *Act.* 82. *Parl.* 11. *Ja.* VI. and yet I find none ever puniſh'd capitally for this Crime: And the ordinary Way of purſuing is, by Proceſs before the Sheriffs, or the Lords, for *pecuniary Mulcts.*

XXXIV. BY the Common Law, no Judge can cite a Malefactor without his own Territory; and therefore, if a Man cut my Trees, I could only purſue him within my Juriſdiction, *ratione criminis commiſſi,* if I find him within it: But yet here it is enacted, That if a Man ſteal my Wood, the ſame ſhall be puniſhed in the Court within which the Lands lie, out of which the Wood was ſtoln, and none other: But it ſeems, that this being only introduc'd in favours of the Perſon injured, he may renounce it, and purſue before the Judge of the Juriſdiction in which the Offender dwells, who cannot obtrude this Statute.

XXXV. FOR clearing this Act, *Vid. infra Ja.* I. *Parl.* 9. *Act.* 131.

XXXVI. BY this Act, Stalkers of Deer are to pay 40 Shilling to the King; and their Reſetters, Ten Pounds. *Nota,* Reſet in ſome Caſes, and in this, is more ſeverely puniſhed than the Malefactors. The Pain is augmented to 100. *l. Act.* 210. *Parl.* 14. *Ja.* VI. And at laſt, ſhooting them with Guns is declared puniſhable by Death; *Act.* 9. *Parl.* 4. and *Act.* 51. *Parl.* 6. Q. *M.*

ACT XXXVII. BY this Act, theſe who wilfully reſett, maintain, or do Favours to open and manifeſt Rebels, are puniſhable by Forfeiture. For underſtanding whereof, it is fit to know, That there are ſome manifeſt Rebels *de jure*, and ſome *de facto*: Such as are denounced, and regiſtrated, are manifeſt Rebels *de jure*; for tho' the Lieges know them not, yet they ought to know them; and it would ſeem, that this requires a Denunciation within the Shire where the Reſetter lives; *Act.* 126. *Parl.* 12. *Ja.* VI. And tho' that Act bear, That the Denunciation at the Head-Burgh of the Shire be ſufficient; yet it ſeems that the Denunciation being only a tranſient Act, is not ſufficient to put the Lieges *in mala fide*, except the Rebel be regiſtrated, as Regiſtration of other Letters is neceſſary to put Buyers *in mala fide*. Such likewiſe as are by poſitive Act of Parliament declared to have been forfeited, (as theſe expreſt in the Act 11. *Parl.* 2. *Ch.* II. *Seſſ.* 1. are likewiſe manifeſt Rebels *de jure*, ſince all are obliged to know what is in Acts of Parliament: But it has been doubted, whether the reſetting even of theſe, after they have been allow'd for many Years to appear publickly in Kirk and Mercat, to the Knowledge of the King's Servants, ſhould infer *pœnam ordinariam*; or whether the ſaid *pœna ordinaria* can be inferred, by reſetting ſuch as are mentioned in a Proclamation.

THESE are manifeſt Rebels *de facto*, whom the Pannel knew to be Rebels, or Traitors, tho' they were not denounced: And thus *Hamilton* of *Monkland* was forfeited for reſetting his own Man, whom he had ſeen in the Rebellion: And if a Man did ſee one kill the King, or ſhould aſſiſt Rebels in Arms, before they were defeated; it were ridiculous to alledge that this were not puniſhable as Reſet, becauſe the Rebels were not denounced Rebels, ſince they could not be denounced before Citation; and the Danger in reſetting actual open Rebels is greater, than in reſetting poor lurking Vagabonds. But this Kind of Acceſſion muſt be inferred only from clear Qualifications of Knowledge; ſuch as theſe whereupon *Lawrie* of *Blackwood* was forfeited, Winter-Seſſion, 1682. In which Proceſs it was likewiſe found, That Letters of Intercommoning were not neceſſary to infer notour Rebellion, becauſe Denunciations for Treaſon include Intercommoning *ex ſua natura*; it being hard to leave ſo dangerous Certifications to be arbitrarily inferred from Conjectures: And the Acts of Parliament require very wiſely, that the Rebellion be wilful. Theſe who are here called *manifeſt*, and *open Rebels*, are by the 4 *Act*, *Parl.* 1. *Ja.* I. called *Notour Rebels*; and *notorium*, by the Common Law, is that which is committed *palam*, *&* *inſpectante populo*, *&* *non eget probatione*; Mattheus, *de probat. Cap.* 15. Clar. § *fin. Quæſt.* 9. which is to be underſtood of that which is *in ſe notorium*; but there may be *notorium reſpectu noſcentis* without this, as in *Monkland*'s Caſe.

BY the 97 *Act*, *Parl.* 7. *Ja.* V. Such as reſet any Rebels, are puniſhable by Death, and Confiſcation of Moveables: But it ſeems ſtrange, that reſetting Rebels for a civil Debt ſhould infer Death, or that reſetting Traitors ſhould infer no more; and therefore the 144 *Act*, *Parl.* 12. *Ja.* VI. is more juſt, ordaining the Reſetters of Rebels to be puniſhed with the ſame Pain that the Rebels ought to have been puniſh'd with. By this Act alſo, all Men are bound to ſearch, take, and apprehend them, or to certify the King and Council of their lurking in their Bounds, *ſub pœna talionis*.

BY the 29 *Statute*, *David* II. *The Reſetter is not to be puniſhed, till the principal Malefactor be convict*: But this was repelled in *Blackwood*'s Caſe, becauſe he had reſet Perſons that were *de facto* notour Rebels: And certainly if a Man ſhould reſet a Company of notour Rebels, who could not be convict, becauſe they could not be perſonally and diſtinctly known; yet the Reſetter might be convict.

IS in *Deſuetude*. XXXVIII.

XXXIX. THOUGH this Act appoints Deacons to be; yet all Deacons are diſcharged; *Act* 86. *Parl.* 6. *Ja.* I. *and Wardens are appointed in their place*; *Act* 103. *Parl.* 7. *Ja.* I. and thereafter *Viſitors are brought in*; *Act* 52. *Parl.* 6. Q. *M.* But now *Deacons are reſtored to all incorporate Trades*; but *Maltmen are diſcharged to have Deacons*, by *Act* 29. *Parl.* 2. *Jac.* VI. And yet if a Trade be not in Poſſeſſion of a Deaconry, they cannot begin to chooſe Deacons, without firſt obtaining Liberty from the Council for that Effect, by Petition; ſo far ſtill is the public Peace of the Nation thought concern'd in all Deaconries: And in a Proceſs at the Inſtance of the Tradeſmen of *Burntiſland*, againſt their Magiſtrates, concluding that they ought to have Deacons, becauſe their Charter gave them as great Privileges as *Edinburgh* had: The Lords found, That this Charter gave the Trades a Liberty to have Deacons, but did not oblige them to have them; and therefore, they having liv'd ſo long without Deacons, and the Tradeſmen being ſo few, they were not oblig'd to have Deacons. In *Spain* and *France*, ſuch Colleges are diſcharged; *Vid.* Perez. *ad Tit.* 16. *Lib.* 11. *Num.* 19. *Habere tamen poſſunt Decanum ſuum*; *ibid. Vid. infra Act* 86. *P.* 6. *Ja.* IV.

IS much innovated by the Book of Rates. XL.

ACT XLI. IS in *Deſuetude.*

XLII. BEGGARS, (or Thigſters, who are gentle Beggars) ſhould have a Token from the Sheriff, or Magiſtrates of Burghs, elſe they are to be burnt in the Cheek: This Act ratifies only the 25th. *Act, Parl.* 1. *Ja.* I. and adds to it, That the Chamberlain ſhall inquire in his Air concerning this; but all this is regulated by the 18th. *Act, parl.* 2. *Seſſ.* 3. *Ch.* II.

XLIII. THIS Act is extended to Hearers of ſuch Leaſing making; *Act* 134. *parl.* 8. *Ja.* VI. By this Act Leaſing Makers loſe Life and Goods; and this Act is made to determine the Uncertainty of the *Cap.* 21. *Stat. Rob.* I. whereby the Inventers of Rumours betwixt King and People, were put in the King's Will. I find an Act in *England*, againſt the ſame Crime; *Vid.* 3. *Hen.* VIII. *Cap.* 10. *Anno* 1537.

XLV. *NOTA*, That tho' the legiſlative Power belongs properly to the King in the Parliament; yet the judicative Power belongs properly to other Courts; and therefore by this Act, private Cauſes are appointed to be diſcuſs'd before inferior Courts; and the Parliament ſhould not be Judges in the firſt Inſtance; but *de facto* many private Caſes are intented before them.

XLVI. THO' by this Act it be ordain'd, that honeſt Men be appointed to modify Aſſythments; yet this Modification now belongs to the Exchequer, who modify the Aſſythment, when the Signature for the Re-inmiſſion paſſes in the Exchequer.

# *PARLIAMENT* III.

XLVII. IS in *Deſuetude.*

XLVIII. THIS Act was made to exclude all Pretenſions of the Emperor or Pope, and all Laws made, or Privileges granted by them; but was not deſigned to exclude the Civil and Canon Laws, which by many of our Statutes are called *The Common Law*, and are followed in this Kingdom; and to exclude the *Daniſh* Laws in the *Iſles*; *Ja.* IV. *Parl.* 6. *C.* 79.

XLIX. THIS Act againſt transporting of Money, is after many Innovations ſeverely renew'd, and the Merchants ordained to ſwear thereupon, allowing only Sixty Pounds to Paſſengers for their Charges, by the 11. *Act, Par.* 1. *Seſſ.* 3. *Ch.* II. But many think it more reaſonable to allow Exportation as in *Holland*, ſince the hindering Exportation prejudges much all manner of Commerce.

L. THE firſt Part of the Act, diſcharging Officers in the Country, wherein any Man is indicted to be upon his Aſſize, ſeems to be founded upon the Suſpicion that ariſes from an Intereſt they may have, in having the Pannel convict, ſince a Part of his Eſcheat belongs to them; and therefore I think this ſhould not be extended to exclude any ſuch Officers within the Shire, as may expect no Share, ſuch as Commiſſars, *&c.* The ſecond Part of the Act, which diſcharges thoſe who indict a Man to be upon his Aſſize, extends alſo againſt Informers, and theſe who gave Advice for raiſing the Libel. But from this Part of the Act it clearly appears, that it is not generally true, that when a Penalty is adjected to an Act the Deed is not null, tho' the Penalty be due; for it is here forbidden, that any Officer, or other who indicts a Man, ſhall be on his Aſſize, under the Penalty of Ten Pounds: And yet certainly this Act would ſet the Informer from being on the Aſſize. And tho' to this it may be anſwered, that this is unlawful by the Law of Nations, prior to all Law, and ſo this Law is only declaratory; yet that cannot be alledged as to diſcharging Officers within the Shire, to be upon Aſſizes. It may be alſo alledged, that this Penalty is only irrogated, in caſe any ſhould paſs on ſuch Aſſizes, without being known to be ſuch. But I do really believe, that we in our Parliaments conſidered not the ſubtle Diſtinction betwixt Acts, which proceed *pœnam irrogando*, and theſe which proceed *actum irritando, vide* Obſerv. on the 216. *Act, Parl.* 14. *Ja.* VI.

It may be likewiſe concluded from this Act, that the King's Advocate is oblig'd to condeſcend who is his Informer, for elſe the Informer may be upon the Pannel's Aſſize; and yet becauſe that would diſcourage Men from informing, & *intereſt Reipublicæ ne crimina maneant impunita*: Therefore the Council has ſeveral Times found, that the Advocate is not obliged to condeſcend upon his Informer, further than that, if it be referred to the Advocate's Oath of Calumny, that ſome of the Aſſizers, or Witneſſes, were his Informers, as to which he will be obliged to give his Oath of Calumny.

LI. THE Difference betwixt Forethought-Fellony and *Chaudmella*, is only obſerved as to Murder, tho' this Act ſeems to extend it to all Tranſgreſſions; and even as to murder the Murderer is to be impriſon'd, whether it be committed upon Forethought-Fellony, or *Chaudmella*; for *Chaudmella* or *homicidium in rixa commiſſum*, is capital by our preſent Law.

LII. THIS Act appointing all Barons to appear in Parliament, may ſeem abrogated by the 102. *Act*, *Parl*. 7. Ja. I. *Whereby the Barons of each Shire are allow'd to chooſe two wiſe Men to repreſent them*, which is the Cuſtom at this Day. But it is obſervable, that tho' by that Act they may, for their Conveniency, chooſe Two; yet they are by no expreſs Law diſcharg'd to come in greater Numbers.

*NOTA*, It ſeems by that Act, that a Prelate or Earl may ſend their Procurator to vote for them, if they have themſelves a lawful Excuſe; but yet *de praxi*, that is not allowed; but this Act is more fully explain'd in the Obſervations on the 7. *Act*, *Parl*. 22. Ja. VI.

LIV. OBSERVE, That this Act proves the Books of *Regiam Majeſtatem*, and *quoniam attachiamenta*, to be our Law; for they are called the Books of Law.

LVII. and LVIII. ARE explain'd in the 96. *Act*, *Parl*. 6. Ja. IV.

LIX. THIS Act, appointing all Ferriers to have Bridges in Places where Horſes are to be ferried, is renewed by the 20. *Act*, *Parl*. 4. *Ja*. III. wherein *all Paſſages on each Side of the Water are ordained to have Bridges*: Whereupon *Burntiſland* and *Kinghorn* rais'd a Proceſs againſt *Kirkcaldy*, to have their Paſſage-Boats diſcharg'd, as not being able to have ſuch Bridges, and for the Good of the Kingdom; ſince if all Places were allow'd to have Boats, *Kinghorn* and *Burntiſland* (which in the old Evidents is called *Weſter-Kinghorn*) could not have ſufficient Boats againſt Storms as now. But this being thought by the Council Matter of Property, was remitted to the Seſſion; it being dangerous, upon Pretext of public Good, to diſcharge Property; for elſe many Innovations might be pretended.

LXV. BEFORE this Act, the King's Council were the ſupreme Judges in Civil Cauſes; but by this Act ſome Commiſſioners of Parliament are to be choſen by Turns, who, with the Chancellor, are to be the Seſſion, and are to be paid out of the Unlaws; ſo that the Seſſion was then a Committee of Parliament. Their Power is further ſettled and declared by the *Acts* 61, 62, 63. *Parl*. 14. *Ja*. II. By which it is clear, that they were to *ſit but Fourty Days at a Time*, and that the Seſſion was then ambulatory, and their ſitting was proclaim'd in each Shire where they were to ſit, Three Months before; and they were by that 63. *Act* to bear their own Expences. After which the Seſſions were, by K. *Ja*. IV. *Par*. 6. *Act* 58. turn'd in a daily Council, which was to be choſen by the King, and was to ſit at *Edinburgh* continually, and wherever the King reſided, they had the ſame Power that the Seſſion had, and their ſitting was to be notified to the People by open Proclamation at the King's Pleaſure. In Place of all which, *The College of Juſtice*, and *The Lords*, as they now are, were inſtituted by King *James* V. *Parl*. 5. *Act* 36.

*NOTA*, There is Power granted by this Act to determine Cauſes finally, which may import an excluding of Appeals; but thereafter Appeals are diſcharged expreſly, *Ja*. II. *Par*. 13. *Act* 62.

LXVII. THE Sheriffs are not now oblig'd to publiſh the Acts of Parliament, but they are to be publiſhed at the Mercat-croſs of *Edinburgh* only, and bind not the Lieges till Fourty Days after Publication, K. *Ja*. VI. *Par*. 7. *Act* 128.

ACT

# PARLIAMENT IV.

LXVIII. and LXIX. ARE explained in the 96. *Act*, 6. *Parl. Ja.* IV.

LXXV. BY this Act, wilful Fire-raiſing is Treaſon. 2. Fire-raiſing by Miſgovernance, is puniſhable in Servants. 3. Reckleſs Fire-raiſing is puniſhable, either in the Owner, or the Mailer, or Tenent. By the Civil Law, *incendium caſu fortuito* is not puniſhable, but *conductor tenetur de leviſſima culpa, & incendium præſumitur culpâ inhabitantium factum fuiſſe, ſi intra domum originem habuerit; & eo caſu pater familias tenetur ex facto & delicto familiæ, ſed non tenetur ſi ortum habuerit incendium extra familiam, vide* Gail. *Lib.* 2. *Obſerv.* 21. & 22.

THO' by this Act, the Magiſtrates of Towns are to enquire concerning the Skaith ſuffered by Fire-raiſing; ſo that this ſeems to be a Matter of Government, and conſequently proper to be try'd alſo by the Privy-Council: Yet where the Caſe is intricate in Point of Law, the Council uſes to remit the ſame to the Seſſion, as in Dr. *Sibbald*'s Caſe, *April* 168

# PARLIAMENT V.

LXXVII. FOR Explication of this Act, *vid. ſup. Act* 39. *Par.* 3. *Ja.* I. and *Act* 86. *Par.* 6. *Ja.* I.

LXXX. THIS Combination of Workmen was alſo puniſhed by the Civil Law, and it was found in the Caſe of the Lord *Hattoun*, againſt the Deacon of the Maſons of *Edinburgh*, That a Man might chooſe any Stranger Maſon to build his Houſe; and if any Maſon within the Town give over the Work, any other Maſon within the Town might undertake it, notwithſtanding of their own private Statute.

# PARLIAMENT VI.

LXXXV. THE Act here related to, is 24 *Act*, *Par.* 1. *Ja.* I.

LXXXVI. DEACONS are diſcharged by this Act, as tending to Sedition; and in Place of them, the King did introduce Wardens of Crafts, who were to ſupervise the Work of the reſpective Tradeſmen, and were indeed Deacons, but were called Wardens, *quaſi Guardians*, *Act* 102. *Par.* 7. *Ja.* I. But thereafter, tho' Q. *Mary* of new ſuppreſt Deacons, and introduced in Place of them Viſitors; yet thereafter, about the Time of the Reformation, to ſtrengthen the Popiſh Party, and to oblige all Tradeſmen thereto, ſhe reſtored Deacons by a ſpecial Gift, and a Letter to the Council of *Edinburgh*; ſince which Time, they remain ſtill legal Corporations, and each private Trade has their Deaconry confirmed by Parliament. *Vid. Act* 39. *Par.* 3. *Ja.* I.

ACT LXXXVII. THIS Act, regulating the Expences of unjuſt Pleas, ſeems to have been firſt made in a Provincial Synod; for it relates to the Official, or Commiſſary Court, and ends thus, *Et quod iſtud ſtatuatur de authoritate Concilii provincialis.* But I find that in Voet. *de ſtat.* that general Laws are call'd *Jura provincialia.*

LXXXVIII. THO' all Submiſſions, with the Decreets following thereupon, be declared null, if the Submiſſion be not made to an odd Perſon; yet this is now in deſuetude, *vide* R. M. *L. 2. C. 5. Num. 4, 5.* which ſays, *That it is ordinary to ſubmit to Two,* tho' it be difficult to make them agree; and therefore the Law recommends to them, *to ſubmit to an odd Man.*

LXXXIX. THIS Act relates only to Proceſſes; for by it the Cauſes of all Merchants dying abroad, ſhould be decided by their ordinary Judges within the Kingdom, *viz.* in the reſpective Commiſſariots and Shires where they lived, if they went not abroad, *animo remanendi*; but notwithſtanding of this Act, the Teſtaments of ſuch as live abroad, tho' *animo remanendi,* muſt be confirm'd in *Scotland* by the Commiſſaries of *Edinburgh,* as *communis patria,* elſe no Purſuit can be ſuſtained for their Moveables that are in *Scotland, July* 18. 1666. in the Caſe betwixt *Duff* and *Biſſet.*

XC. *AND if it be Forethought-Fellony, he ſhall die therefore.* This may ſeem to imply, that Men die not for Murder committed without Forethought-Fellony; but this holds not in our Law: For Murder, tho' committed without Forethought-Fellony, is puniſhable by Death, except it was either caſual, or in Self-defence, and then it is called properly Homicide or Man-ſlaughter.

IT is obſervable, that Crimes ought regularly to be puniſhed in the Place where they were committed, that where the Scandal was given, there the Reparation ſhould be made; *vide Act* 34. *Parl.* 2. *Ja.* I. & *Act* 148. *Park.* 12. *Ja.* I. And this ſame Act is renew'd, *Act* 98. *Parl.* 6. *Ja.* I.

XCI. THE Way preſcribed by this Act, is now *obſolet* and in *deſuetude*; but the juſter Way now uſed is, That when a Man is denounced Fugitive for a Crime, there are Letters of Intercommuning got out againſt him by Authority of the Council, and theſe are publiſh'd at the Mercat-croſſes where he uſes to reſide; and if any within theſe Shires where theſe Letters were publiſh'd, do reſet or ſpeak with him, they are purſu'd as Intercommuners.

*NOTA,* The Reſetter of a Murderer is puniſh'd as a Murderer, and this by the Civil Law is clear in Reſetters, as to all Crimes, *L.* 1. *ff. de receptat. L. un. C. de crim. pecul.* which is made our Law by the 144 *Act, Parl.* 2. *Ja.* VI. and yet ſome think, ſome Reſetters are only to be puniſh'd as ſeverely as the principal Offenders, who aſſiſt in the Crime, and then reſet; for theſe contract a double Guilt: But that ſuch as only reſet them who are guilty, ſhould be more benignly puniſh'd. And this anſwers *D. L. un. C. de crim. pec. in fine,* & *L. ult.* § *ult. ff. abig.* The Civil Law excuſes Parents who reſet, and puniſhes leſs Friends and Allies who reſet, than others, *L.* 2. *ff. h. t.* And tho' this Act be general, yet it ſeems that it ought to be reſtricted by the Common Law.

XCII. OBSERVE *Firſt,* That tho' Barons do not uſe to judge Murderers, yet by our old Law, ſuch as are infeſt with Pit and Gallows may puniſh Slaughter, *Q. attach. c.* 77. and this Act allows them, if they be infeſt with ſuch Freedom.

OBSERVE *Secondly,* That by this Act, Judges who are negligent to arreſt Malefactors, if they eſcape the being warned in both theſe Caſes, pay Twenty Pounds.

XCIII. IT is fit for underſtanding this Act, to know that Magiſtrates within Burghs, have not Power to judge Murders, except they be Sheriffs within themſelves, as *Edinburgh, Perth, Inverneſs,* and ſome other Towns are.

XCIV. A Lord of Regality and his Deputes, have as much Power in judging Murder as the Juſtices have; tho' ſome contravert, whether they can judge Murder under Truſt, becauſe that is Treaſon, and the Juſtices are only Judges competent to Treaſon.

*NOTA,* There is a Caſe expreſs'd in this Act, where more Witneſſes than Two are required to prove a Crime. The Word *Cro*y here ſignifies an Aſſythment, which the Judge ſhould pay to the neareſt of Kin, if he be negligent in miniſtring Juſtice againſt the Murderer. But this is in *Deſuetude.*

ACT XCVIII. THE Senſe of this Act is, That if a Man has found Lawburrows, which was called *Aſſurance* by our old Law, the Friends of him who has found the Lawburrows, are puniſhable if they wrong him to whom Lawburrows are found.

He who aſſaults with Edge and Ure, is to be impriſon'd; that is to ſay, with an edged Tool, or any Thing made of Metal; for Ure in *Scots*, ſignifies Metal.

# *PARLIAMENT* VII.

CI. THE baniſhing ſuch as pay not Cuſtom, is in deſuetude, and they now loſe only their Goods ſo ſtold, as by the *L. 2. C. de Vectigal.*

CII. ALL Barons might come to Parliament before this Act, but by this Act they are allow'd to chooſe Commiſſars, who are now called Commiſſioners; and by this Act their Expences are to be paid to them, which is now done thus: The Clerk-regiſter gives them a Teſtificate, declaring, *That according to the Sederunts of Parliament, ſuch Commiſſioners did ſerve ſo long*; and by the late Act they get Letters of Horning for Five Pounds a Day. *Vid. ſupra Act 52. Parl.* 3. *Ja.* I.

*NOTA*, That tho' this Act impowers theſe Commiſſioners to chooſe one to repreſent them as their Speaker; yet there is no ſuch Perſon now choſen, and the Chancellor is now conſtant Preſident of the whole Council, by the *Act* 1. *Parl.* 1. *Ch.* II.

CVIII. THIS Act, ordaining ſuch as interpret the King's Laws wrongouſly, to be puniſhed arbitrarily, ſtrikes only againſt ſuch as interpret the King's Laws ſo, as to make them a mere Cloak for doing Injuſtice; but Miſtakes and probable Errors are not puniſhable; nor are the Lords puniſhable for ſuch Miſtakes, becauſe *ipſorum ſententiæ pro veritate habentur*.

*NOTA*, Laws, like Oaths, are to be taken according to the Meaning of the Impoſer, elſe they be eluſory; and otherwiſe, every Man would be his own Law-giver and Judge. The Earl of *Argyle* was found guilty upon this Statute, 1681. for miſinterpreting ſo the *Teſt*, by a Quality adjected to his ſwearing of it, *That he reſerved ſtill a Power to himſelf, to riſe in Arms when ever he judged the ſame fit.*

# *PARLIAMENT* VIII.

CX. BY this Act, all the Prelates, Lords and Barons are to ſwear the ſame Allegiance to the Queen that they ſwore to the King; and by the 136 *Act*, *Ja.* I. they promiſe *literas retinentiæ & fidelitatis* to the ſame Queen; but the Queen being a Subject, there is no Oath now made to her. And tho' by this Act none were to be allow'd to enter to their Feu till they had given this Oath of Fidelity to the King and Queen, (which was conform to the Feudal Law) yet no ſuch Oath is required as to either King or Queen, before the Vaſſal's Entry, *Princeps legibus ſolutus eſt, Auguſta autem licet legibus ſoluta non ſit, tamen eadem illi tribuunt privilegia, quæ ipſi habent*, L. 31. ff. de leg.

CXII. BY this *Latin* Act, it is ſtatute, That all ſuch as flee from the King, or his Lieutenant, are to be puniſhed as notour and public Rebels; which Act ſtrikes not only againſt ſuch as were ſworn to Colours, for thoſe are puniſhable only by Death according to the Military Law; but all ſuch as leave the King's Hoſt being obliged to attend. And tho' it may be alledged, that this Act is to be extended only againſt ſuch as flee in to the Enemy; for elſe the Puniſhment of Treaſon were too ſevere for ſimple Deſerters. And by the Common Law, there is Ground for this Diſtinction; but by our Law there is no Ground for this Opinion, becauſe the going in to the Enemy is *per ſe* Treaſon.

*NOTA*, This is to be puniſhed as *Perduellion* and Rebellion; but it is not declar'd *Perduellion*, or Rebellion: And therefore it may be argu'd, that the Fisk has not the ſame Privileges, as to the Way of Procedure here, that he has in other Species of High Treaſon, or *Perduellion*; ſuch as that the Perſon himſelf may be purſued and condemn'd in Abſence upon Probation; and that his Heir may be purſu'd after his Death, &c.

*NOTA*, It may be argu'd, That this Act ſhould only be extended againſt ſuch as flee from the Army, when the King, or His Lieutenant are there in Perſon in the Fields; becauſe then there is great Hazard, but not againſt ſuch as deſert any Under-Officer.

# *PARLIAMENT* IX.

THE Office of Maires was to execute Summons, and the King's Maires *præco Regis* aſſiſted in Criminal Courts. There are yet ſome Maires of Fee, or heritable Maires in *Scotland*, who have Right by their Charters to ſo many Pairs of Shoes, and ſo much Money, &c. out of every Plough; which Fees are now very much regulated by Poſſeſſion. By this Act, Maires of Fee are to preſent Perſons to the Sheriff, to ſerve under them; and if there be no Mair of Fee, *id eſt*, heritable Mair in that Ward or Diſtrict, the Sheriff is to preſent an able Perſon, who ſhall ſupply his Place by ſummoning; and this is the Origine of Sheriffs in that Part, to whom all our ordinary Summonſes are direct, by the 51 *Chap. Stat. David* II. The Serjeant or Mair (for they are the ſame) is ordained to give in his Execution in Writ, or by Word, if he cannot write; but he muſt prove all by Witneſſes, and there the Sheriff, or Mair may make Executions or Records; for ſo Executions were called of old. CXII.

THAT Witneſſes in Executions ſhould dwell in different Baronies is in Deſuetude: That Witneſſes ſhould ſwear that they by-ſtood, ſaw, and heard, is only requir'd now in the Execution of Brieves, who muſt ſwear the Verity of their Executions; but the Witneſſes, even in that Caſe, need not ſwear that they were Witneſſes, eſpecially required to be Witneſſes; which is only required now in Saſines which bear, that the Witneſſes were *ad hoc ſpecialiter requiſiti*; and yet by this Act, all theſe Qualifications are required in all Executions. CXIII.

*NOT.* IT may be argued from this Law, That the Dates are ſubſtantial, not only in Brieves, but in all other Papers, likeas the *Rubric* of this Act calls them *Subſtantialia*; and therefore if they be falſe, the whole Writ is falſe; and it was ſo found as to Executions, whereupon one Creditor is to be preferred to another, ſuch as are the Intimations of Aſſignatious; 29. *March*, 1628. or the Executions of Arreſtments; for there to allow Witneſſes to make up the Dates, were, in effect, to allow Witneſſes to prefer one Creditor to another, and to eſtabliſh conſiderable Sums by Witneſſes; but if the Date of any other Writ, or Security be blotted, the Owner is allow'd to aſtruct it by Witneſſes; 10. *Feb.* 1636. And tho' the Month and Day be blank; yet if the Year be expreſs'd, a Bond, or ſuch like Writ is ſufficient, being *in re antiqua*; 15. *January*, 1662. *Grant* contra *Grant*; but in ſuch Caſes, the Law preſumes that the Bond was granted the laſt Day of that Year; *Vid. Gem. Conſil.* 79. *Vid. R. M. L.* 1. 11. CXIV.

THERE is no Neceſſity now, that he who propones an Eſſonzie, or Excuſe, ſhall find Caution to prove it at the next Court; for now an Eſſonzie being a Dilator of it's own Nature, muſt, like all Dilators, be inſtantly proven. *Note*, Sickneſs is only allow'd here to be proven by Two leil Men, or the Pariſh-Prieſt, or Miniſter deponing upon it; but with us, Teſtificates upon Soul and Conſcience are allow'd in all Courts, except the Juſtice-Court; where Eſſonzie muſt be proven by Witneſſes preſent in Court; and to allow Teſtificates is dangerous, becauſe they may be forg'd; yet they were allow'd even in Treaſon, in E. *Loudon*'s Caſe; 1. *April*, 1684. but the Speciality there was, That the Earl was in *Holland* for it was thought hard to bring Phyſicians from thence: And yet I think, the Seal of the Town ſhould be brought in that Caſe; *Vid. Stat. Will. C.* 26. *Num.* 2. & *C. Quon. Attach. C.* 33. CXV.

THE Meaning of this Act is, When any Defender finds Caution to anſwer as Law will, (which is called here, a Borgh upon a Weir of Law) he may either anſwer preſently, or may have a Day to give in his Defences, he finding Caution to anſwer of new: CXVI.

ACT This is explained, *R. M. L.* 1. *C.* 11. *Num.* 4. But now with us there is no Diet allow'd in Criminal Courts, for the Diets there are peremptory.

CXVII. THIS falſing of Dooms, or Appeal, was altered; and in Place of them are come our Suſpenſions, and Reductions of Decreets, for the Doom is a Decreet; and in theſe Reductions and Suſpenſions it is lawful to inſert only one Reaſon at firſt; and the reſt may be now eeked without proteſting for a Liberty to eek new Reaſons, as is required by this Act; and a Borgh or Caution is yet neceſſary in Suſpenſions, as it was in falſing of Dooms.

By the Civil Law, Appeals were to be interpos'd within Ten Days after Sentence; but by this Act, the Appeal was to be us'd immediately, or at leaſt before the Purſuer walk'd Fourty Paces, by the *Act* 99. *Parl.* 6. *Ja.* IV. and in Place of the Words here uſed, *viz. That Doom is falſe ſtinkand and rotten in the ſelf, and thereto a Borgh*; the Party leſed was to ſay, *I am gratumly hurt and injured by the ſaid Doom, and therefore I appeal*; and this was done, becauſe the Words here uſed were rude and unmannerly.

CXVIII. THE Meaning of this Act is, That if the Purſuer be forc'd to find Caution to anſwer as Law will, he may force the Defender to recounter it; that is to ſay, To find Caution alſo; and whoſoever is abſent after Caution is ſo found, ſhall loſe the Cauſe, and ſhall be unlaw'd alſo; *Vid. C.* 18. *Verſ.* 2, & 3. *L.* 1. *R. M.*

CXXIV. THIS Act appoints, That the Ships which break in this Kingdom ſhall be confiſcated amongſt us, if the Ship belongs to a Country which uſes that Law againſt us. For clearing this, it is fit to know, that by the Civil Law, the Goods of ſhipwreck'd Perſons fell not to the Fisk; *L.* 1 *C. de Naufr. Si quando naufragio navis expulſa fuerit ad littus, vel ſi quando aliquam terram attigerit, ad Dominos pertineat, fiſcus meus ſeſe non interponat; quidenim jus habet fiſcus in aliena calamitate, ut de re tam luctuoſa compendium ſectetur:* And by the Canon Law, *Qui chriſtianos naufragium facientes damnata cupiditate rebus ſuis ſpoliant, excommunicantur, C.* 3. *Extr. de Rapt.* But yet *France* does confiſcate ſhipwreck'd Goods; *Le bris eſt confiſque au Seigneur Soveraigne*; Bodin. *de Repub. C. ult.* where it is aſſerted, that this was the Law of both Eaſtern and Weſtern Seas: Which is falſe, for it is not the Cuſtom of *Holland*, nor *Pole*, nor *Denmark*; *Vid.* Curick, *ad Tit.* 9. *Jur. Hans.* With us, if no living Creature eſcape that was in the Ship, the Goods are Wreck, and belong to the Admiral, by his Gift from the King; but if any living Creature eſcape, neither Ship nor Goods are Wreck; as was decided where only an Ox eſcap'd, 12. *December*, 1622. And yet by the preſent Cuſtom of the Admirality, tho' no living Creature eſcape, the Admiral ſecures only the Goods, and reſtores them, if the true Owner claim them, and prove his Property within Year and Day, being repaid of his Salvage, for which we have no poſitive Statute: And it ſeems we have borrowed this from the Statute of *Henry* III. *Anno* 1226. cited by *Curick, Tit.* 9. tho' *Skene, de verb. ſig. verb.* Wreck, cites another Statute, *viz. Anno* 3. *Ed.* I. *C.* 4. So that tho' the Cuſtom ſeems unjuſt, yet this Law has ſeem'd juſt, becauſe of *Lex Talionis*; and the Title. *Quod quiſque juris in alium ſtatuit, ut ipſe eodem jure utatur*; *Tit.* 2. *Lib.* 2. *ff.* And yet our preſent Cuſtom has juſtly corrected this Law, in Manner abovementioned. And I likewiſe believe, that even after the Year is elapſed, the true Proprietor may recover his Goods, if he prove the Property, and if his Goods be extant; for, 1. That which is mine, cannot be taken from me without my own Fact and Deed. 2. There were as good Reaſon for the King to ſeize upon Goods that were robb'd by Land; for the Proprietor quites his Goods as unwillingly in the one Caſe as in the other. 3. Even in Goods that are thrown over Board for the Security of the Veſſel, the Law preſumes no Deſign in the Proprietor to quite them as *derelicta*, § *fin. Inſt. de rer. divis*; and therefore much leſs ought this to be ſuſtain'd in Goods forc'd from the Proprietor by a Tempeſt, ſince there is ſome Conſent in the one, but none in the other. 4. If any private Man ſeize on ſuch ſhipwreck'd Goods, his ſeizing on them would be a Crime; *L.* 1.& *L. ult. de incend. ruin. L. de ſubmerſis, C. de Naufrag.* And it is ſtrange, that private Men ſhould be puniſh'd, becauſe they ſeiz'd on what was another's; and yet the ſame Calamity which aggrages the Crime in them, ſhould eſtabliſh a Right in the Public: And it may be well argued, That either the Property is loſt by the Shipwreck; and if ſo, why has the Proprietor Action againſt the Seizers? Or if it be not loſt, how has the Fisk acquired the Property? for *duo non poſſunt eſſe domini ejuſdem rei in ſolidum.* 5. There is leſs Reaſon for a ſhorter Preſcription in ſuch, than in any other Moveables; for in other Goods there may be a preſum'd Deſign to quite the Poſſeſſion, but here there can be none; for it is palpably to be imputed to Force. 6. This is deſtructive to all Commerce, and no Nation ought to ſuſtain it, becauſe all Nations will loſe equally by it. 7. The Owners may not know where to ſeek their ſhipwreck'd Goods, becauſe loſt in very remote Countries; and often-times the Owners themſelves being loſt with them, leave none to proſecute their Rights: So that upon the whole Matter it ſeems, that the Cuſtom of other Nations can no more juſtify our's in this, than the eating of our Men amongſt the *Cannibals*, would juſtify

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our eating them; and it ſeems rather that Letters of Mark ought to be granted in ſuch Caſes, if Reſtitution be refuſed.

CXXV. THO' this Act appoints Advocates to give their Oath of Calumny only in Temporal Courts; yet this holds alſo in the Commiſſary Court, which is a Spiritual Court, and *Curia Chriſtianitatis*.

*Obſ.* 2. It ſeems that Oaths of Calumny can only be craved *in initio litis*, in the Beginning of the Plea or Cauſe; but yet now an Oath of Calumny may be asked at any Time.

*Obſ.* 3. That tho' this Act appoints Advocates to give their Oaths of Calumny, if their Client be abſent; yet that only holds in Matters of Fact, as to which the Advocate is not obliged to ſwear, if his Client be preſent; but as to Alledgances in Point of Law, the Advocate is obliged to ſwear, tho' his Client be preſent.

These Verſes are taken out o *Hoſtienſis, Tit. de jur. Calum.* & *Gloſſ. in* § 1. *Inſt. de pœn. tem. litigant*; which ſhews, amongſt other Arguments, That the Acts of Parliaments, as we have them now printed, are not the ſame as they paſt in Parliament.

I have heard it debated in the Proceſs *Keith* contra *Purves*, *March* 1684, That an Advocate was not obliged to give his Oath of Calumny, whether he thought the Right upon which he debated was really to the Behoof of the Earl of *Marſhal*, but only in general, That the Advocates had good Reaſon to debate it was not to his Behoof, becauſe their Client ſaid ſo to them: But if this be allowed, an Oath of Calumny will ſignify nothing; for Advocates may always find *Subterfuges* to depone, that they have good Reaſon to urge ſuch a Thing; for they may think their Client's Information ſufficient Warrant for them, tho' they are convinced the ſame is palpably falſe: Whereas the true Deſign of the Act of Parliament was, to debar Advocates from proponing Defences, and inſiſting in Pleas which they thought unjuſt and calumnious.

CXXVI. and CXXVII. ARE in *Deſuetude*. But I am of Opinion, That Brieves, with us, have not their Origine from the Civil Law, as *Skene* thinks; becauſe *ſententia erat de brevi recitanda*; or from the *breve teſtatum* of the Feudal Law; for theſe are very different from our Brieves; but from the Court of *Rome*, for their Brieves are exactly the ſame with ours; as *Breve de capienda poſſeſſione, Breve contra intruſum*; *Vid.* Amydenium *de ſtylo datariæ, Cap.* 28. *Lib.* 1. Rebuff. *Prax. Reg.* 34.

CXXVIII. THIS Act is abrogated by the Union of both Kingdoms; but from it may be obſerved, That to go and live in a Country that is in War with the King, is Treaſon, ſince the Enemy becomes thereby ſtronger and richer, and the Kingdom weaker and poorer.

CXXIX. UPON this Act is founded the Stile of Lawburrows, which bears, *That the Raiſer dreads bodily Harm of him againſt whom he ſeeks Lawburrows; and that he has given his Oath to that Effect.* This is like that Oath of Calumny, *quod tenetur ille præſtare qui novum opus nunciat*; *L.* 5. § 14. *ff. de novo oper nunciat:* But it is the ſame exactly with the *Cautio de non offendendo*, uſed both in *France* and *Flanders*, in which the Oath of the Party is ſufficient, *ubi expectatio mali juramento ejus qui ſecuritatem petit confirmari ſufficiet*; Chriſtien. *ad Leg.* Mechlin. *Art.* 1. *Tit.* 4. *Num.* 4. And with us, ſuch as break Lawburrows, are purſued by an Action of Contravention: Which Term is likewiſe uſed among them in the ſame Senſe; *Art.* 8. *Num.* 16. *Ibid.*

*Obſer.* That tho' the Letters of Lawburrows contain no ſuch Warrant in the Body of them, for taking the Charger's Oath, *That he dreads bodily Harm*; and tho' the Meſſenger who executes the ſaids Letters, does not exact the ſaid Oath from him, at whoſe Inſtance the Letters are to be execute; yet that neither annuls the Letters, nor the Act of Caution, tho' it would ſeem that Caution is only to be found becauſe that Oath is given; but yet the Party might have ſuſpended upon that Ground, and would not have been obliged to have found Caution, till the Charger had given his Oath, conform to this Act.

CXXX. FREEHOLDERS or their Acturneys ſhould compear at Head-Courts; but tho' this Act ſays, *That if they be abſent upon a neceſſary Cauſe, they may ſend their Acturney*; yet *de praxi*, tho' they can prove no reaſonable Cauſe, they cannot be unlaw'd, if they ſend any Perſon with a Letter of Acturney, which is rais'd out of the Chancellary, and the ſending of Seals is now in *Deſuetude*; for Services, and Verdicts in Criminal Cauſes, which are the only Papers that need now to be ſealed, may be ſealed with any borrowed Seal.

*Obſ.* I. Several Regalities in *Scotland* have Chapel and Chancery of their own, and grants Acturneys themſelves.

*Obſ.* II. Regalities are ſtill a Part of the Shire; and therefore the Sheriff may cite the Vaſſals of the Regality; but the Lord of Regality cannot cite theſe who live within the Shire, without Letters of Supplement, obtained by Deliverance of the Lords for that Effect; *Vide Act* 10. *Parl.* 5. *Ja.* II.

ACT *Obſ.* III. That the Un-law warranted by this Act to be impos'd by Sheriffs, for Abſence from Head-Courts, cannot exceed Ten Pounds; *February* 7. 1624. *December* 6. 1628. And the ſame Un-law of Ten Pounds is allow'd for Abſence from Baron Courts; *March* 16. 1622. It has been likewiſe found, That tho' a Vaſſal, having been in uſe to have his Servant received as his Acturney at thoſe Courts, without a formal Letter of Acturney out of Chancellary, cannot be fined *quoad* Bygones, becauſe of the preceeding Cuſtom; yet for the future, they will be obliged to ſend formal Letters of Acturney, or elſe they will be fineable, Intimation being made to them, that the former Cuſtom will be no more allow'd; *July* 11. 1678. The Bailie of the Regality of *Paſlay*, againſt the Laird of *Duntreath*.

CXXXI. THE Taking of Salmon at all Times is allow'd on the Waters of *Saloway* and *Tweed*, as long as *Berwick* and *Roxburgh* are in the *Engliſhmen*'s Hand; but it is reſcinded upon our King's ſucceeding to the Crown of *England*, by the 5th. *Act*, *Parl.* 18. *Ja.* VI.

# PARLIAMENT X.

CXXXII. THIS Act diſcharging the ſelling Salmon Abroad, except the One Half of the Price be paid in Money, is in *Deſuetude*.

CXXXIII. THIS Act is declaratory of the former Law, elſe it could not have been drawn back to the Prejudice of the private Right here mentioned, and this was ſuitable to the Common Law; for the Governor of the Kingdom is but a Tutor; and a Tutor cannot alienate Lands belonging to the Crown.

# PARLIAMENT XI.

CXXXIV. THESE who break the King's Protections, are ordain'd to be puniſhed; and the Protections here mentioned, are theſe Letters which our King of old granted to Monaſtries, Burghs, *&c.* taking them into His ſpecial Protection, and diſcharging all His Subjects to injure them, under Pain of His higheſt Diſpleaſure: And it is obſervable, That Aſſizes were to ſit upon theſe, whether the Party accuſed was preſent, or abſent. Thoſe Protections are now in *Deſuetude*; nor can any Pannel be proceeded againſt now in his Abſence, except in the Caſe of *Perduellion* allanerly. What we now call Protections, were called their *Superſedere's*, but not Protections. By the Civil Law, *publicæ tutelæ aſſertio Principis ſolius erat*; *L. Capital.* § *ad ſtatuas, ff. de pœn. nunc* Salvagardiæ *dicuntur*; *Vid.* Argentorat. *Pag.* 190.

# PARLIAMENT XIII.

CXXXVII. IT was lately doubted, Whether Theſt-boot, which is the tranſacting with Thieves, by a Judge, for freeing them from Puniſhment, be in *Deſuetude*; and it was found a Crime yet puniſhable. There are Two Kinds of Theſt-boot declared by this Act to be puniſhable; the one is, to ſell a Thief, which is to take a Ranſom for liberating him; the other, to fine with a Thief, that is, to take a Share of what he has ſtoln, and ſo diſmiſs him; both which are expreſſed, *Act* 2. *Parl.* 1. *Ja.* V. by concording with the Thief, and putting him from the Law.

ACT

The Puniſhment by this Act ſeems to be the Loſs of the Right of Regality, as to Lords of Regality; but to be Death in Sheriffs, Juſtices, *&c.* And if ſo, it ſeems ſtrange that the Lords of Regality ſhall be leſs puniſhed than others: But I think the Puniſhment as to both, is Loſs, of Life and Office; and the Words of the Act are only ill plac'd. And by the Civil Law, whoever commits either of theſe, are puniſh'd as the Thief himſelf; *L.* 1. *ff. de Receptator.* where the Two Specieſes of Theft-boot expreſs'd in this Act, are alſo there expreſſed, *quia cum apprehendere latrones poſſint, pecunia accepta, vel ſubreptorum parte, demiſerunt*; and this Act puniſhes only Theft-boot in Judges: But yet if a private Perſon take a Part of the ſtoln Goods, he may be puniſhed as a Reſetter, albeit the mere letting of a Thief go is not a Crime in him, ſince he is not obliged to take him.

This Act was neceſſary, becauſe formerly tranſacting with Thieves was diſcharged, but no Puniſhment expreſs'd; *Quon. Attach. C.* 42. & 77. & *Stat.* 1. Rob. I. *C.* 3. & *Stat.* Wil. *C.* 15. By which laſt, who redeems a Thief, *eſt legem aquæ ſubiturus*, which is now in *Deſuetude.*

CXXXVIII. THIS Oath is not now put to Aſſizers, except the Party require that they be purged of Partiality; for the ordinary Oath now uſed is, *That they ſhall Truth ſay, and no Truth conceal, in ſo far as they are to paſs upon this Aſſize.*

CXXXIX. CROWNERS do not now arreſt Malefactors; for all Arreſtments are by Meſſengers, or the Macers of the Criminal Court; but yet ſome heritable Crowners do aſſiſt at Juſtice-Airs to this Day, and keep the Bar, and ſecure Malefactors as they go and come, from and to it.

CXL. THERE is a double Intereſt in all Crimes: The Fisk or King has an Intereſt, becauſe His Peace and Laws are broke, and His Subjects wrong'd; and this is called by the Civil Law, *vindicta publica.* The Perſon wrong'd has another Intereſt, which is called *vindicta privata.* That the King may purſue without the Concourſe of the Perſon injured, is clear by this Act; but becauſe this Act allowed only Sheriffs to purſue without Conſent of the Party; therefore this is extended to all Caſes, in favours of the King; *Act* 76. *Parl.* 11. *Ja.* VI.

CXLI. THIS Act is abrogated by the Union of both Nations; but *argumento hujus legis*, the taking Protections from, or Aſſurance with any Enemy of the State, is Treaſon; and it may be alledged, that aſſuring Merchant Goods, or Ships, by *Hollanders* when we had War with them, was Treaſon by this Act, and by the Common Law; for this is a correſponding with Enemies.

CXLII. A Thief now, by the Regulations, muſt be purſu'd upon Fifteen Days only, as all Malefactors.

CXLIII. VIDE *Act* 50. *Parl.* 7. *Ja.* III. & *Act* 107. *Parl.* 7. *Ja.* VI. and ſuch as faillie to bring in Bullion are puniſhed, *Act* 51. *Parl.* 7. *Ja.* III. and *Act* 65. *Parl.* 8. And all is now innovated by the *Act* 37. *Parl.* 1. *Ch.* II.

CXLIV. RHE Bell rung in *Edinburgh* at 9 at Night, conform to this Act, till it was ordain'd to ring at 10. (as it does;) which being alter'd at the Deſire of the Earl of *Arran*'s Lady when he was Chancellor, it is therefore call'd the Lady's Bell. From her alſo, the Steps leading to St. *Giles* Church are call'd the *Lady's Steps.*

CXLV. BY this Act, the Law is to be holden where the Treſpaſs is done, which is moſt juſt; becauſe, by puniſhing Crimes upon the Place, the Scandal there given is taken off by a proportional *Terror.* 2. The Friends of the Party injur'd, are thereby better repaired. 3. Probation is more eaſy got, and Aſſizers upon the Place are readier to do Juſtice, as knowing better the Matter of Fact. *Vide Stat.* Will. *Reg. C.* 18. And is conform to the Civil Law, *L.* 3. *ff. in prin. de re. milit.* & *tot. tit. C. ubi de crimine agi oportet.* And that this was the old Law of Nations, is clear by *Quint. Curt.*

CXLVI. THE Carriers of Gold and Silver, (except in ſo far as is neceſſary for ſpending) infers alſo the Eſcheat of the Carrier's other Moveables, *Act* 69. *Parl.* 9. *Q. M.* But the falling of their Eſcheat was but 5 *Lib.* after that Act, and is now in deſuetude; ſo that the Words, *Under the Pain of Eſcheat*, is to be interpreted of eſcheating the Money ſo cary'd allanerly.

# King JAMES II.

# *PARLIAMENT* I.

I. THIS is not an Act, but a Declaration concerning the Fidelity ſworn by the Parliament to their young King; and I find no ſuch Declaration, or Acknowledgment in an other Parliament of any other King: So this is rather ſet down as a Narration, than as an Act of Parliament. For it mentions not Biſhops, and it expreſſes the Conſent of all the Freeholders.

II. THIS is the firſt Revocation that I find made by any of our Kings; and here Diſpoſitions made by the King, of Moveables, is revoked, and tho' no Mention be made of Moveables, in latter Revocations; ſince a King, who is Minor, diſponing Moveables without an onerous Cauſe, may revoke them.

*Secondly*, IT is obſervable, that the King is (as His Subjects) Minor till 21 Years complete, and that the Parliament is in Place of Tutors to Him.

*Thirdly*, THIS Inventary is conform to the Civil Law, whereby the Tutor was oblig'd to make an Inventary of his Minor's Eſtate; and which is made our Law, by the *Act* 2. *Seſſ.* 3. *Parl.* 2. *Ch.* II. And to make an Inventary unto *Dupois*, is to make it according to Weight; *Dupois* being a *French* Word, ſignifying Weight.

*Fourthly*, THAT in this Act, rather the Parliament than the King revokes; for the King was then Minor: But regularly, the King's Revocation paſſes under His Privy-Seal firſt, and then is confirmed, and paſt by an Act of Parliament, *Vide Act* 9. *Parl.* 1. *Ch.* I. But ſometimes it paſſes firſt by Proclamation, and then by Act of Parliament, *Act* 51. *Parl.* 4. *Ja.* IV. and ſometimes by way of Inſtrument, *Act* 70. *Parl.* 6. *Ja.* V.

# *PARLIAMENT* II.

III. THE only Act in this Parliament, warrants the King's Lieutenant to force ſuch as ly under violent Preſumptions of ſpilling and troubling the Country, to find Caution, that the Country and the King's Subjects ſhall be unharm'd; which ſhews clearly, that the King may, upon Preſumptions, (of which He is ſole Judge) oblige any of His Subjects to give Bond to live peaceably, without which, the Government could not ſubſiſt.

THIS Act was occaſion'd by the great Outrages committed by *Archbald* Earl of *Douglas*, in the South, during the King's Minority.

# PARLIAMENT III.

VIDE *Stat.* Dav. II. *Cap.* 42. concerning the *Liberties of the Haly-Kirk.* IV.

TWO Juſtice-Courts were to be held Yearly by the Juſtices, at *Edinburgh* and *Peebles*, *C.* 79. *Quon. Attach.* and Two Juſtice-airs are to be held yearly, the one upon the North-ſide of *Forth*, and the other upon the South-ſide of *Forth*, *C.* 30. *Stat.* Rob. III. and by the *Scottiſh Sea*, is meant here, *The Water of* Forth. *Secundo*, That Part of this Act, which appoints Lords of Regality *to hold Juſtice Courts twice a Year*, is now in deſuetude. V.

BY this Act, after Word is ſent to the Council, that there is any Rebellion, Burning, *&c.* the King is to call the Sheriff and ſee it redreſs'd, and all the Barons oblige them to aſſiſt the King with their Perſons and Goods, as oft as it ſhall be ſeen needful, by Advice of His Council. From which it is obſervable, that the King needs not call a Parliament to aſſiſt Him in a War; but that the King and His Council may call for Men and Maintenance, in caſe of War. And this was very reaſonable, for Rebellion may be invincible before a Parliament be aſſembled; and Parliaments do often give little Help, in caſe of Combination, if the Occaſions of it be popular, as was too clearly diſcover'd in our late Rebellion. VI.

THE Reaſon why in the former Act and this, the Advice of the King's Council is ſtill expreſs'd as neceſſary, was, becauſe the King was then Minor, and His Perſon had been ſeveral Times ſurpriz'd.

IN all this Parliament, there is no Mention made of the Authority of the Regent, as uſes to be when the King is Minor, but only, *The hail Three Eſtates have ordain'd*; which I think proceeded from the Hatred the Nobility had at that Time to *Alexander Livingſton*, who was then Regent. I find, that in the Ratification of the Acts of Parliament, called, *The black Acts, Folio* 149. the Duke of *Chattelrault* then Governour, is plac'd before the Queen-Mother, then Regent.

# PARLIAMENT IV.

OBSERVE, that Excommunication takes away *perſonam ſtandi in judicio*; ſo that excommunicate Perſons cannot purſue nor defend: For the Act ſays, *That they ſhall not be heard nor anſwered in the Law of Judgment.* And tho' the Word *Anſwered* would import only, that they cannot purſue; yet the Word *Heard*, imports both Purſuing and Defending; and the Words *Heard*, nor *Anſwered*, had been ſuperfluous, if they had been to expreſs only the Purſuing. VII.

THIS Act, and the 4. *Act*, 3. *Parl. Ja.* II. were made upon the Earl of *Crawford*'s Cruelty to *Kennedy* Biſhop of *Aberdeen*.

# PARLIAMENT V.

VIII. THIS is the firſt Time I find Art and Part mentioned in our Law.

*NOTA*, The Time forbidden by Law for killing of Salmond is, from the Feaſt of the Aſſumption, *viz.* the 13. of *Auguſt*, to St. *Andrew*'s, which is the 30. of *November*, *Act* 34. *Parl.* 2. *Ja.* I. And tho' the Third Fault was Death by the 10. *Act*, *Parl.* 1. *Ja.* I. yet by this Act, the Third Fault is only puniſhable by Loſs of Office. *Vide Act* 224. *Parl.* 14. *Ja.* VI.

IX. THE Form of cauſing reſtore Goods ſpuillied now is, That the Sheriff, or any Judge diſcern, and upon this Decreet Letters of Horning are raiſed, and the Defenders denounced. We find by this *Act*, that old Rule of the Canon Law, *Spoliatus ante omnia reſtituendus*, here confirmed; and the Meaning of it is, That tho' the Spuillier have a ſufficient and valid Right to what he has ſpuillied, yet being purſu'd, his Right will not defend him; but he muſt firſt reſtore the Perſon ſpuillied to his Poſſeſſion: For the Law will not allow any Man to be his own Judge, and to intromet at his own Hand.

Obser. *Secundo*, That of old, all Decreets were under the King's Wax, that is to ſay, His Seal; and till of late, and the laſt Inſtitution of the Seſſion, all Decreets, even of the Seſſion, were under the Quarter-Seal.

X. OBSERVE, That all *Scotland* is divided in Royalty and Regality. The Royalty is that which was judged by the King's immediate Judges, as Sheriffs, and they are here and elſewhere, call'd the Lords of the Royal. *K.* Ja. II. *Parl.* 6.

XI. THESE who were excommunicated, were denounced Rebels, and Letters of Caption raiſed againſt them; and this Act, as to this Point, is founded upon *Cap.* 6. *Stat.* Rob. III. and is more fully explained, *Act* 53. *Parl.* 3. *Ja.* VI. Where theſe Letters are appointed to be raiſed by the Authority of the Council, after 40 Days are expired from the Date of the Excommunication.

*NOTA*, This is the firſt Act that ſpeaks of appriſing of Lands, and it was done then at the Mercat Croſs, in the ſame Way that Moveables were then, and are yet poindable.

XII. *NOTA*, The Puniſhment of ſuch as break the Peace, is left arbitrary by this Act, and and by this Act, Juſtices of the Peace are ordained, (*Irenarchæ* by the Civil Law) of which there are whole Titles in that Law.

XIII. *VIDE ſup. Act* 3. *Parl.* 1. *Ja.* I. As alſo by this Act, it is clear, that Forfeitures for Rebellion were only to be led before the Parliament; for it is here ſaid, That they ſhall be puniſhed by the Advice of the Three Eſtates. But now open Rebels, riſing in Arms, may be tried and forfeited by the Juſtices, by the *Act* 11. *Parl.* 2. *Ch.* II.

XIV. THIS was ſtatuted before, as to Murder, *C.* 17. *L.* 3. *R. M.* By a *Treſpaſſor juſtified in this Act*, is meant a Perſon condemned by Law or Juſtice, and it is oft ſo meant in all old Laws.

XV. THERE are now no Wardens in the Borders, but theſe Affairs are managed by Commiſſions from the King, called, *Commiſſioners for the Borders.*

XVI. ALL Officers offending wilfully, are to loſe their Offices for a Year by this Act; but this Act is not the only Puniſhment, for if a Judge execute a Man wilfully, he will die for it; and a Judge being partial, or refuſing to do Juſtice, is to be puniſhed rigorouſly, *Ja.* I. *Parl.* 2. *Act* 45. and if he be faulty or negligent he loſes his Office, if it be temporal, for an Year; or is to be ſuſpended from it, if it be heritable; *Ja.* II. *Parl.* 14. *Act* 76. *vide Ja.* III. *Parl.* 5. *Act* 27. and *Ja.* III. *Parl.* 14. *Act* 105. And the Puniſhment of Judges offending in their Offices, is now arbitrary, ſuitable to the Nature of the Offence.

XVII. TACKS, which before this Act were only perſonal Rights, and were only valid againſt the Granter, are by this Act (for encouraging Tenents to improve their Rooms by Tacks, and for the Security of poor Labourers) made real Rights, and defend againſt all ſingular Succeſſors; that is to ſay, the Buyer, or the Superior of Liferent-Eſcheats, or Comprizers, ACT XVII.

prizers, or Donators to Baſtardies, or *ultimus hæres*; but if the Land fall in the Superior's Hands, thro' Ward, the Tack ſleeps, and revives again at the Expiration of the Ward; *Vide Obſ.* on *Act* 26. *Parl.* 3. *Ja.* IV. and they will defend againſt Donators to Forfeiters, tho' the Tack be not confirmed, if it be ſet for an ordinary Duty, and without Deſign to prejudge the Fisk, as was found in the Caſe of General *Dalziel, contra* the Tenents of *Caldwal*, 28. *January*, 1674. For tho' the Rubric ſays, *That the Buyer ſhall keep the Tacks*; yet the Act bears, *in whoſe Hands ſoever they come*: And as no Tackſmen craved ever a Confirmation to defend againſt Forfeiting; ſo it would ſhake looſe all poor Labourers Securities, if they were not ſecure againſt ſuch Delinquencies; and might probably prejudge much the King's Intereſt, by tempting them to follow their Maſter, if they knew that they behov'd to be forfeited by his Crime. This Deciſion agrees with *Craig, Pag.* 206. and a Deciſion, 1570. *Hume of Manderſton*: But the Council did juſtly think, That this Deciſion could not defend the Tackſman of a Caſtle from giving it up to the King, ſince Fortalices are not made for labouring the Ground; and therefore alſo ſummar Warnings are allowed from them on Six Days.

THO' this Act be only conceived in favours of Labourers of the Ground; yet it is extended ſo as to defend all Tackſmen, whether of Tenements within Town, (tho' the Act ſeems only to be made in favours of poor Labourers of the Ground) or of Caſualities; ſuch as Salmon-fiſhing, Coal-heughs, Coal-work, &c. and generally it extends to all Tacks, but not to Rentals; for theſe are Tacks for Graſſums and Entries, and ſo for ſmall Duties; providing always theſe Tacks be cled with Poſſeſſion; for Poſſeſſion is the ſame Thing to Tacks, that Saſines are to Alienations; and of old ſome Tacks had Saſines, or Inſtruments of Poſſeſſion, but neither was neceſſary, nor is now uſual; but Poſſeſſion is ſo far neceſſary, that the laſt Tack with the firſt Poſſeſſion is preferred. And the Reaſon why they uſed Saſines then, being to make the Tack real, and to defend againſt ſingular Succeſſors; this was no more uſed after this Act of Parliament, by which Poſſeſſion makes a Tack a real Right; but a Tack is preferred to an Appriſing, tho' the Appriſing was led before the Tack was cloth'd with Poſſeſſion, ſince the Lands were denounced after the Date of the Tack, *March*, 1628.

SINCE Tacks are only declared *valid* againſt ſingular Succeſſors by this Act, therefore Obligations not to remove a Tenent, will not be ſuſtained againſt a ſingular Succeſſor, albeit it be expreſs'd in the Tack, tho' that as a perſonal Obligement be valid againſt the Setter and his Heirs; for if this were ſuſtained, the Buyer would be thereby debarred from uſing and improving his Property as he thought fit, *contra naturam Dominii*: And that it is not of the Nature of a Tack, is clear from this, becauſe Tacks muſt have a certain Iſh, which this has not, tho' the Obligation ſhould bear not to remove, till Money lent at the ſetting of the Tack were paid; 15 *June*, 1664. *Thomſon* contra *Reid*: And for the ſame Reaſon, a Tack ſet to one during his Lifetime, with expreſs Proviſion to receive the Tackſman's Heirs as kindly Tenents, for Payment of the accuſtomed Tack-duty, will not be valid againſt a ſingular Succeſſor, as wanting a certain Iſh; albeit the Tackſmen offer to reſtrict the Tack to the Life of One Heir allanerly; 2 *March*, 1626. And a Tack ſet from Five Years to Five Years, upon Payment of the old Duty, was not ſuſtain'd againſt a ſingular Succeſſor; 26 *July*, 1631. But Tacks are valid, tho' they bear no ſpecial Time of Entry, ſince the preſent Time is, in the Conſtruction of Law, preſumed to be the Time of Entry in that Caſe; 4. *December*, 1629. As alſo, ſince a Tack muſt have a certain Tack-duty, as well as a certain Iſh; therefore, where the Tack contains not a certain Tack-duty, it is not valid againſt a ſingular Succeſſor; and thus a Tack bearing, That a Tackſman ſhould retain the Annualrent of 600 Merks, for the Tack-duty, would not have been valid againſt a ſingular Succeſſor, becauſe in that Caſe, there would nothing have been payable to the ſingular Succeſſor; yet if the leaſt *Superplus* had remained over the Payment of the Annualrent, tho' it had not exceeded one Peny, the Tack would have been valid; becauſe there would have been, in that Caſe, a Tack-duty; 15 *June*, 1664. *Thomſon* contra *Reid*: And for the ſame Reaſon, a Diſcharge of the Tack-duty before-hand, tho' for an onerous Cauſe, and tho' the Diſcharge was in the Body of the Tack, will not defend againſt a ſingular Succeſſor: And this very Statute bears, That theſe Tacks ſhall be valid to the Tenent, for ſiklike Mail as they took them for; 31. *January*, 1627. *Roſs* contra *Blair*: And therefore it being controverted, Whether a Tack ſet to a Creditor, wherein he was to have Retention of the Tack-duty, ay and till he were paid, and reliev'd of the Sums due to him, ſhould be ſuſtain'd againſt a ſingular Succeſſor; it was found, 11. *December*, 1671. *Currie* contra *Oliphant*, That the Tack was to be ſuſtain'd, becauſe the Retention was to be allow'd, by an expreſs Clauſe in the Body of the Tack itſelf, and not by a Paper a-part, and becauſe the Tackſman was to pay a Dozen of Hens, and another of Capons, by and attour the Sums that he was to retain; and was to relieve the Setter of the public Burdens, which was to be in Place of a Tack-duty: But tho' this may hold where the Tack bears the Sums expreſly, whereof the Tackſman is to have Retention; yet it were very dangerous to allow Tacks bearing only in general, That the Tackſman ſhould retain his Tack-duty till he were paid, and reliev'd of what Sums were due to him, and for which he ſtood engaged: And if this were allow'd, no ſingular Succeſſor could know, even by Production of the Tack, whether there were any Superplus due, which might be in Place of a Tack-

ACT duty: And it cannot be denied, but that the firſt Deſign of this Statute was to continue Tacks, the Tackſman paying the true Duty; and therefore this Act ſays, They ſhall be valid for ſicklike Mail as they took them for. And *Craig*, Page 205. ſays, *Si aſſedatio facta fuerit, nec certam contineat mercedem, non valet ex jure, & ſi eadem merces aſſignata ſit calono, aſſedatio non valet.* And therefore a Tack for 36 *Lib.* of Duty, bearing, That the Tackſman ſhould retain the Tack-duty for Reparations, was not ſuſtained, [illegible] ſo far as concerned the Reparations, tho' the Reparations were neceſſary; nor is there any tacite Hypothetic in our Law for Reparations, as in the Civil Law. But if the ſingular Succeſſor had known of ſuch a Clauſe in the Tack, the Lords enclined to think that the ſame had been Obligator againſt him; and yet a ſingular Succeſſor is not obliged to conſider a prior Saſine, except it be regiſtrated, or a prior Diſpoſition, nor any Aſſigney a prior Aſſignation, 5. *February* 1680, *Rae* contra *Finlayſon.*

BY the Civil Law, Tacks were not valid againſt ſingular Succeſſors, *L.* 9. *C. de locato*; but the Law of *Holland* agrees with this Statute, *Neolſtad. deciſ.* 30.

XVIII. THIS Act was thought to have been in deſuetude, till it revived by a Deciſion, *Feb.* 1666. Lord *Lee* contra *Mark Porteous*; but it is yet ſo to be underſtood, as that the Land ſet in Tack, muſt be valu'd according to what it was worth when the Land was wadſet: For if the Land be improved by the Wadſetter, it were unjuſt that the Wadſetter ſhould loſe thereby; and therefore a Wadſetter improving Land will not loſe his Tack, tho' the Land become worth more than twice the Tack-duty. And tho' it would ſeem, that there is a Contradiction in this Act, becauſe it ſays in the firſt Part, *That if any Man has wadſet Lands, and ſyne takes them for long Time after the Land be quite out, for half Mail, or near thereby, that theſe Tacks ſhall not be keeped, but if they be ſet for the very Mail, or near thereby.* Yet the Anſwer is, That this Law was ſo worded; to ſhow that the Parliament deſigned, that Tacks after Wadſet ſhould not be keeped after Wadſets are redeemed, except they be ſet for a Tack-duty ſomewhat proportionable to the Worth of Land. And becauſe this could not preciſely be determined, therefore by comparing theſe two Expreſſions, it is clear, that ſuch Tacks after Wadſets are to be ſuſtained if they be ſet for more than the Half of the real Duty, tho' they be not for the full Duty.

THIS Act is in effect but an Exception from the former Act, which having appointed all Tacks to be valid againſt ſingular Succeſſors. This Act begins, *But if Lands be wadſet, and the Heritor Granter of the Wadſet be obliged to grant long Tacks for an inconſiderable Duty, after the Lands are redeemed, theſe Tacks ſhall not be kept.* And therefore it may be argued, that this Act ſhould only defend againſt the Setter, but not againſt ſingular Succeſſors, becauſe the preceeding *Act*, from which it is an Exception, was only conceiv'd to ſecure againſt ſingular Succeſſors. But to this it is anſwered, that the former Act needed not ſecure againſt the Granters; for they were ever, and ſtill are ſufficient againſt them. And this Act runs not againſt ſingular Succeſſors, but in general declares ſuch Tacks null as exorbitant and uſurary, and ſo ſhould be null againſt all; but if there be a valuable Conſideration to clear that they are not forc'd and exorbitant, they will be ſuſtain'd; as in the Caſe, *Polwarth* contra *Hume*, *January* 21. 1662, where it was found, That a Tack for a Duty far within the Worth, to be granted after Redemption, was valid, becauſe it was by one Brother to another, who might have given it for a Patrimony, and the Brother who got the Wadſet, was excluded by a Liferenter Thirty Six Years.

THIR Tacks, who are to begin after the Redemption of Lands wadſet, are valid againſt ſingular Succeſſors, tho' they be not cloathed with Poſſeſſion prior to the ſingular Succeſſor's Right, becauſe they are a Part of the Reverſion, and not becauſe they could not begin till the Lands were redeem'd; for if that were a good Reaſon, then a Tack, whereof the Entry is deferr'd for ſeveral Years, ſhould be valid againſt a ſingular Succeſſor, who had got a Diſpoſition of the Lands long after the ſetting of the Tack, tho' before the Tack was cloathed with Poſſeſſion, which is not true; and if it were true, ſince Tacks are not to be regiſtrated, no Man ſhould know with what Tacks Lands are burdened, for this can be known no otherwiſe but by Poſſeſſion.

THESE Tacks which are to follow Redemption are valid, tho' they be not contained in the Wadſet, if they be of the ſame Date with the Wadſet and Reverſion, as *Haddington* obſerves; but in this Caſe it may be doubted whether theſe Tacks ought not to be regiſtrated, ſince all Eiks to Reverſion are to be regiſtrated, or elſe how can a ſingular Succeſſor know them? And yet it is otherwiſe in Tacks, which are to follow Redemption of Annualrents; for as an Annualrent is different from the Land, it being but a Servitude upon the Land, ſo the Poſſeſſion of the one cannot in Law be conſtructed to be the Poſſeſſion of the other.

XIX. VIDE *Stat.* 2. *Rob.* I. *C.* 12. But now Spuillies are purſu'd before the Lords or Sheriffs as other Civil Actions. There are many ſevere Acts in this King's Parliaments againſt Spuillies, becauſe there were many then committed by the *Douglaſſes* and others.

ACT XXI. F*EINZIED Fools*, and *Bards*, and *Sornars*, and *ſuch like Runners*, are by this Act to be impriſon'd, and have their Ears nailed to the Trone for the firſt Fault, and to be hang'd for the next; and ſuch as feinzie themſelves to be dumb, are puniſhable by the general Words of this Act, or *others ſuch like Runners*. But it may be doubted, if ſuch Puniſhments inferr'd *argumenta legis*, can be extended beyond an arbitrary Puniſhment; and yet the feinzieing one's Self dumb, thereby to draw Money from the People, is *ſpecies falſi*.

XXII. THE buying and keeping of Victual to a Dearth, is a Crime in all Nations, and is puniſh'd with us, as *Regrating*: By this Act it is puniſh'd as Uſury, and by eſcheating the Victual, and yet this Puniſhment has never been practis'd. But the ordinary Courſe to prevent this Crime is, that either the Secret Council ſets Prices, in Caſes of foreſeen Dearth, or elſe the Magiſtrates uſe in their reſpective Towns, to cauſe break open the Doors where ſuch Victual is kept, and ſell it at convenient Prices; which is warranted by the 29 *Act*, 4. *Parl.* Ja. V. *Vide Crim. Pract. Tit. Foreſtallers.*

XXIII. THE eſcheating of old Corn-ſtacks that are kept longer than *Yule*, was found to be in deſuetude at the Juſtice-air in *Jedburgh* 1669. and the firſt Part of the Act, ordaining all Victual bought by private Perſons, more than will entertain their Families for that Cropt, to be therefore eſcheat, is alſo in deſuetude. This was puniſh'd in the Civil Law *per L.* Jul. *de annonâ*, and is puniſh'd *tanquam crimen extraordinarium, L.* 6. *ff. de extraor. crim.* and ſuch as are guilty of it, were called *Dardanarii*, or *Revenditores*, *Tholoſ. Cap.* 135. *Num.* 10.

XXIV. NOT only ſuch as keep out their Houſes upon public Accounts are puniſhable as Traitors, but even theſe who keep out their Houſes for private Quarrels, if they be charged by Letters from the Council, to render them as uſe is by Herauld s, they are alſo puniſhable as Traitors, in caſe of Contempt; but if theſe who keep out their Houſes upon private Feuds, do thereafter yield them, the keeping them out is only puniſhable arbitrarily, and not as Treaſon. Not only are ſuch as keep out their Houſes immediately againſt the King executed as Traitors, as we ſee in *Robert Stuart*'s Caſe, who was executed *January* 5. 1615. but ſuch as hound them out to keep their Houſes, are executed as Traitors: And thus the Earl of *Orkney* was executed for hounding out his Son, *February* 5. 1615. tho' hounding out be not expreſs'd in this Act, for hounding out is ſtill Art and Part; but the Juſtices refuſed, *February* 2. 1674. in *Aſſint*'s Caſe, to ſuſtain the gariſoning of *Aſſint*'s Houſe to infer Treaſon, except it was gariſoned after the Publication of the Letters of Fire and Sword, and that the gariſoning of it before did only infer Deforcement, it being commanded to yield by the Sheriff in the King's Name. By which it ſeems, that gariſoning Houſes to defend againſt Execution of the Law, infers not Treaſon, except it be done either upon a public Account, or after raiſing and publiſhing Letters of Fire and Sword. 2*do.* Some argue from Act, That ſince the aſſailing of Houſes where the King's Perſon is ſhall be repute Treaſon, if it be done without Conſent of the Three Eſtates, that therefore it is lawful to aſſault Houſes, or riſe in Arms, with Conſent of the Three Eſtates. But this is a great Miſtake, for no Oppoſition to, or invading of the King, can be juſtified by a Warrant from the Three Eſtates. And the Meaning of this Act is, That tho' it be pretended that the King is Priſoner in any Caſtle, it is not lawful for any private Perſon, upon that Pretext, to raiſe Armies and invade that Place, without Authority of Parliament: For it is dangerous to make private Perſons Judges in ſuch conſiderable Caſes. And the riſing in Arms, or defending Caſtles, on what Pretext ſoever, is declar'd Treaſon by the 5. *Act*, 1. *Parl. Ch.* II. The Occaſion of this Act was, becauſe this King had been twice kept in Caſtles in His Minority, once by the Chancellor Sir *William Creichton*, and thereafter by Sir *Alexander Livingſton* Governor; and at both Times Endeavours were uſed to beſiege the Caſtles of *Edinburgh* and *Stirling*, where He then was. *Vide Obſerv.* on 5. *Act*, 1. *Parl. Ch.* II.

XXV. BY this Act, Regalities, returning to the King in Property, *viz.* either by Sale or Forfeiture (for the King's Property is never erected in a Regality, but in a Stewartry) ſhall be judg'd by the Sheriffs and the ordinary Judges; and ordinarily when Regalities return to the King, they are expreſly ſuppreſs'd, and erected of new in Stewartries, as *Orkney*, *Act* 13. *Parl.* 2. *Ch.* II.

*OBSER.* That *regulariter*, theſe who dwell in Regalities are not ſubject to the Sheriff, *vide Act* 43. *Parl.* 11. *Ja.* II. And Erections of Regalities do ordinarily bear *a Power to repledge*.

XXVII. THE Meaning of this Act is, That the Juſtice-Clerk ſhall not reveal who raiſes Summons, or obtains Warrants for apprehending Malefactors, *&c.* leſt alſo the Malefactors, ACT or Defenders eſcape, before they be cited or apprehended: As alſo, that when any Man is delated for one Crime, the Juſtice-Clerk change not the Purſuit and raiſe it for another Crime. And whereas it is ſaid, *That it ſhall not be lawful to him to tranſlate ſuch Actions, except it be for the better to the King*; the Meaning is, That if the Informer ignorantly inform in a great Crime, as if it were a ſmall Crime, as if he ſhould inform only that to be a Riot which is Treaſon, the Juſtice-Clerk may raiſe the Purſuit as for Treaſon.

It is clear, that ſince by this Act the Name of the Giver up of Dittay in the *Porteous Roll* is to be conceal'd, (which is done for encouraging Perſons to delate) that therefore Treaſon ſhould not be given up in a *Porteous Roll*, or elſe the *pœna talionis* is loſt; nor do I remember, that Treaſon was taken up of old ſo. And if this were allow'd, diſcontented Tenents or Servants, knowing they were ſecure againſt *Talion*, might be induc'd eaſily to deſtroy their Maſters.

XXVIII. THIS Act appoints the Strikers of falſe Coin to be puniſhed as Law will, and by the *Act* 124. *Parl*. 7. *Ja*. V. it is ordained, *That they who falſify Money, or counterfits the King's Irons, ſhall be puniſhed according to the old Law*; and yet I find no Law before that Time ſpecifying the Puniſhment in general: For the 41. *Act*, *Parl*. 5. *Ja*. III. puniſhes only with Death the Home-bringers of Black Money, that is to ſay, Copper Money; and by the *Act* 70. *Parl*. 9. *Q*. M. the Home-bringers of the falſe Coin ſhould be delated, and the delaters is to have the Half of all his Goods moveable and immoveable. But tho' the Puniſhment of Treaſon be not ſpecified in any expreſs Act, yet it appears that it infers Forfeiture; for elſe the Revealer could not have the Half of the Offender's Goods immoveable. And I find one *Drummond* burnt for falſe Money forging, the 27. *November* 1601, and his Brother *Patrick Murray* burnt alſo, for *Art and Part, red Counſel, and concealing the treaſonable Forging, Coining, and outputting of falſe Money*. And the Sentences upon falſe Coin bear ordinarily Forfeiture, *vide ſupra Act* 49. *Parl*. 3. *Ja*. I. But it were expedient to make an expreſs Act in this Caſe.

XXIX. THIS Act is now in *deſuetude*; and it was founded upon the *miſſio in poſſeſſionem per primum & ſecundum decretum*, ſo much treated of in the Civil Law; but in place of all theſe are come our Compriſings and Adjudications, whereby, if the Debitor pay not, the Creditor compriſes and is put in Poſſeſſion; and if he redeem not within the Legal, then the Land belongs abſolutely to the Creditor without Redemption.

# PARLIAMENT VII.

XXX. BY this Act the Home-bringing of Poiſon is diſcharged, under the Pain of Treaſon; and yet I find none puniſhed as Traitors upon this: And *John Dick* in *Anno* 1649, for poiſoning his Brother and Siſter, is only executed, but not forfeited; but I believe he has had no Lands to forfeit. Nor do I ſee how a Judge can proceed leſs ſeverely in this Caſe than the Law appoints; eſpecially ſeeing the Act is ſo expreſs, that this ſhall remain *as an aye laſting Statute*. And the Reaſon why the Law is ſeverer againſt Poiſoning than Murder is, becauſe no Man can defend himſelf againſt Poiſon; and Poiſon uſes never to be given but by Perſons who have ſome Truſt, and ſo is Murder under Truſt, which is likewiſe Treaſon by our Law, and yet it was only puniſh'd capitally by the Civil Law, *L*. 1. § 1. *ff*. *ad L*. Cornel. *de ſicar*. Tho' this Act diſcharges the bringing home of any Poiſon for any manner of Uſe, yet Apothecaries are allow'd to bring it home for their Medicins; and this is likewiſe allow'd by the Common Law, and Doctors; and there is a *venenum bonum*, as well as *malum*. And tho' buying and inbringing of Poiſon be declared Treaſon by this Act, tho' it be not given, yet by the Opinion of the Doctors, it is only puniſhable in that Caſe, *pœnâ extraordinaria* Gothofred. § *venenum*. *Num*. 21.

XXXI. THIS Act againſt Strangers bringing home Poiſon, has not been obſerv'd amongſt us, and it is hard to puniſh Strangers for a Law that they are not oblig'd to know; and it appears they cannot be liable, except they be advertiſed by ſome Magiſtrate that there is ſuch a Law, and that therefore they ſhould carry back theſe Commodities; and yet if a Stranger ſhould actually give Poiſon, he would be puniſhable, tho' no ſuch Act as this had been made, ſince every Man is oblig'd to know that it is unlawful to give Poiſon.

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# *PARLIAMENT* VIII.

XXXVI. EITHER it is provided that wadſet Lands ſhall be redeem'd for Payment of ordinary Money of *Scotland*, and then it muſt be paid according to the Rate the Money gives at the Time when the Redemption was us'd, and not according to the Rate it gave at the Time when the Wadſet was granted; as for Inſtance, If Lands be wadſet for Ten Thouſand Pounds, and thereafter the Money be cry'd up, ſo that the Dollar that was Fifty Six Shilling, is to give a Crown; or a Shilling is to give a Merk: In that Caſe, the Ten Thouſand Pounds is to be conſign'd according to the Rate the Money gave, tho' the Wadſetter paid more Dollars and Shillings than he is to get back. This holds not only in Redemption by virtue of this Act, but in all Payments, as is clear by *Act* 19. *Parl.* 3. *Ja.* III. and *Act* 68. *Parl.* 8. *Ja.* III. But if the Money to be conſign'd be tailied Money, (that is to ſay, a ſpecific kind of Money, from the Word *Talis*) as for Inſtance, Five Thouſand Merks in Roſe-nobles, or the like ſpecific Kind of Money, then if ſo much Money cannot be had of that Kind in *ſpecie*, it may be paid in as much of the preſent current Coin as will anſwer to that Kind of Money, being of the ſame Value as the Gold and Silver ſpecifi'd in the ſaid Reverſion, conform to the Common Law, which the Lords interpret to be Payment, according to the Price and Value that the ſaid tailied Money was worth the Time of granting the Obligation, *March* 3. 1623.

# *PARLIAMENT* IX.

XXXVII. and XXXVIII. THIS Act, diſcharging the keeping of old Stacks of Corn; and the next Act, diſcharging the girnalling of Corn; ſeem to have been temporary, and the Juſtices have refus'd to ſuſtain Dittay upon either.

XXXIX. THIS Act, diſcharging the keeping up of more Victual than will ſerve a Man's Family for a Quarter of a Year, and that they ſhall preſent the Superplus to the Mercat within Nine Days, ſeems likewiſe to have been but temporary, becauſe of the Scarcity that then was; and at any Time of Scarcity, the Magiſtrates of any Burgh-Royal are in uſe, and may lawfully (as ſome think) break up the Doors of Victual-houſes within Burgh, and ordain the Victual to be ſold at competent Rates, if the Merchants be either unwilling or abſent; but if the Privy Council be ſitting, it is ſafer to make Application to them.

# *PARLIAMENT* XI.

XLI. OBSER. I. This is the firſt formal Act of Annexation; and tho' it bear only *That it ſhall not be lawful to the King to analzie any Part of His annexed Property in Fee, Heritage, or Frank-tenement, without Conſent of Parliament*; yet this extends to long Tacks, for it is not lawful to ſet even long Tacks of the annex'd Property: And if it were, then the Deſign of Annexation might eaſily be eluded, and the Crown impoveriſh'd.

ALBEIT this Act declares it lawful to the King to intromet with any of the annex'd Property, without Proceſs of Law; and by the 203. *Act, Parl.* 14. Ja. VI. *Such as had, or*

ACT *ſhould intromet for the Future, by the King's Command, with annex'd Property, are ſecur'd.* Yet by our preſent Cuſtom, the King uſes to reduce ſuch Rights, and not to intromet with them *brevi manu*.

Obser. II. That becauſe this Act bears, *That the annex'd Property cannot be diſſolv'd, except by Deliverance, and Decreet of the whole Parliament, and for great ſeand and reaſonable Cauſes of the Realm*; therefore a Diſſolution contain'd in a Confirmation of the annex'd Property, after it is diſpon'd, is not ſufficient, but is reducible, ſince Diſſolutions ſhould be ſpecially read and conſidered: Whereas, Confirmations and Ratifications paſs in Courſe without Obſervation. Likeas, Diſpoſition of the annex'd Property made before the Diſſolution, are declar'd null by the 236 *Act*, 15. *Parl. Ja.* VI. This was ſo decided, *February* 25. 1669, the King's Advocate *contra* the Earl of *Morton*. And by the 13. *Act*, 2. *Parl. Ch.* II. that Decreet bearing this Interpretation of all former Annexations is ratified, and it is appointed, *That* Orkney *ſhall not be diſſolv'd without the Advice of the whole Parliament, and for great and weighty Cauſes*, relating to the public Intereſt of the whole Kingdom, to be conſidered before the Diſpoſition, leſt by a previous Diſpoſition the Parliament ſhould be pre-determined in their Deliberation; and therefore it would appear, that where there is a Diſpoſition granted before Diſſolution, not only is that Diſſolution null, as being *filius ante patrem*; ſo that it could not make the preceeding Diſpoſition to convaleſce even from the Date of the Diſſolution: But that a poſterior Diſpoſition relating to that Diſſolution, would be null, ſince by the firſt Diſpoſition the Parliament is once pre-determined in the Deliberation; and therefore it would be fit, that ſuch Diſſolutions ſhould expreſly bear this Difficulty, and diſpenſe therewith, *per expreſſum*.

It is here alſo fit to obſerve, That Diſpoſitions of Rights, made of annex'd Property in the King's Minority, tho' ratified in Parliament and after the King's Majority, are null; albeit any other Deed done by a Minor in his Minority, is valid, if ratify'd in Majority. For tho' it may be alledged, that the Reaſon of this Speciality is, becauſe Ratifications paſs in Courſe, and the Grounds are not conſidered as ought to be in Annexations; yet the true Reaſon of the Speciality muſt be, that it is eaſy to obtain Ratifications of ſuch null Rights; and therefore the Parliament, to preclude all from ſeeking them, has declar'd, *That they ſhall not be valid when obtain'd*; or elſe, becauſe a lawful Diſſolution is prerequiſite, and ought to preceed a lawful Diſpoſition of annex'd Property; and therefore, tho' the Ratification might ſupply the Defect of the prior Diſpoſition, yet it cannot ſupply the Nullity ariſing from the Want of the former Diſſolution.

Obser. III. That when any Diſpoſitions are reduc'd, the Perſon who took ſuch unlawful Diſpoſitions, muſt reſtore the bygone Mails and Duties from the very Date of his Intromiſſion; for his Right being contrary to an expreſs Law, he is not *bonæ fidei poſſeſſor*, *nec facit fructus ſuos*. And this Act bears, *That the Takers ſhall refound all Profits for the Time they had the Lands*; ſo that the Poſſeſſor has neither the Benefit of a poſſeſſory Judgment, tho' he has poſſeſs'd Seven Years. Nor ſhould ſuch Rights preſcrive, being null, and contrary to an expreſs Law, & *quod non eſt alienabile non eſt præſcriptibile:* Nor doth the Poſſeſſor *facere fructus conſumptos ſuos*, not being *bonæ fidei poſſeſſor*; and yet the Lords ſhunn'd to decern ſuch as had intrometted with the Rents of *Orkney*, liable in Repetition of the bygone Mails and Duties, when their Rights were reduc'd upon this Act, becauſe it had not been in Obſervance, as ſome Lords affirm'd; and there was a moſt probable Ground of Ignorance in that Caſe.

XLII. AS the Wardens could not cognoſce upon theſe Crimes, which are call'd *The Points of the Crown*; ſo neither can the Commiſſioners for the Borders, who are now come in their Place. The Meaning of the Exception made in this Act is, That tho' the Wardens cannot generally cognoſce upon Points of the Crown, as Treaſon, Fire-riſing, &c. yet they may, if ſuch a Trial be neceſſary, for Conſervation of the Truce; that is to ſay, if theſe Crimes be committed by common Robbers upon the Borders.

By this Act the Wardens are diſcharged to judge, which is here called very odly to intromet with, any Thing that pertains to the Dittay of the Juſtice-air, ſaving the Points that are needful for Conſervation of the Trews (or Truce) that is to ſay, the Juriſdiction of the Wardens, by this Act, is prorogated to the Cognition of all Crimes which were neceſſary to be judged by them, for Preſervation of the Peace betwixt the Kingdoms; and ſo the firſt Part of the Act ſpecifying Treaſon, was unneceſſary, for it was comprehended under the General: But now the Commiſſioners of the Borders, who are come in Place of the Wardens, have Power directly, and ſo not only *incidenter* to judge Thefts, and many other Points of Dittay.

XLIII. THO' this Act diſcharge any Regalities to be granted otherwiſe than by Deliverance of Parliament; yet they are ordinarily granted by Signatures under the King's Hand, and a Defence propon'd by the Vaſſals upon this Act, was repell'd by the Exchequer, 1664, at the paſſing of a Signature, containing a new Erection. But I ſee not how this could be repell'd

ACT

repell'd by the Lords of the Seſſion, the Act is ſo expreſs and ſo reaſonable; for the Erection of a Regality makes a new Juſticiar, who has very great Power; and a Lord of Regality is *Regulus*, a little King, and takes off the People from an immediate Dependance upon the King. Likeas, the Lord of Regality gets Right by the Erection to the ſingle Eſcheats, which prejudgeth both King and People, and is expreſly contrary to the *Act* 69. *Parl.* 11. *Ja.* VI. diſcharging the giving away the King's Caſualities in great, and they prejudge much the prior and eſtabliſh'd Rights of Sheriffs, ſubject the People to more Juriſdictions, and by multiplying Regiſters, diſtract and render uncertain all Buyers, and others who are oblig'd to know the Condition of their Debitors; and ſo much is the King concern'd in Erections of ſuch Regalities, that they are expreſly revok'd by all our Kings in their general Revocations. Tho' by this Act it would appear that Regalities ought to be null, if they be not originally granted in Parliament; yet a poſterior Confirmation in Parliament is by our Deciſions found ſufficient, tho' it may be alledged that Confirmations paſs in Courſe without exact Conſideration: Whereas ſuch Regalities ought not to paſs ſo ſlightly, ſince they eſtabliſh a ſummar Juriſdiction over the Lives of the Subjects. And ſuch previous Grants do predetermine the Parliament in their free Voting, and therefore ſhould no more be regarded than they are in the Caſe of annex'd Property. *Vide Not.* on *Act* 41. *ſupra.* and on *Act* 94. *Parl.* 6. *Ja.* I.

NOTWITHSTANDING of this Act, ſeveral Sheriffſhips are granted in Fee ſince this Act, and therefore are reducible; but it is very obſervable, that tho' theſe Two Prohibitions fell under the Parliament's Conſideration at once, yet the Parliament diſcharged only Regalities without Conſent of Parliament; but they diſcharged heritable Offices ſimply, as tending for ever to fix the Dependance of a whole Shire upon a Subject; whereas Regalities are only over a Man's own Lands, or his Vaſſals; but Sheriffſhips are over other Men. And were it not for this, it may ſeem that the firſt Act concerning Regalities was unneceſſary, ſince this Act would have ſerv'd for both, *vid. Obſerv.* on the *Act* 4. *Parl.* 18. *Ja.* VI. XLIV.

THE Rubric and Body of this Act being compar'd, makes Theft to be capital; for the Rubric bears, *That Sornars ſhall be puniſhed by Death*; and the Act ſays, *That Sornars ſhall be puniſhed as Thieves*; therefore Thieves ſhould be puniſh'd capitally, but we have no poſitive and ſpecific Law for puniſhing Theft capitally. XLV.

ORDINARY Actions within Towns are not judged now by the Council of the Burgh, as this Act requires, but by the Bailies. XLVI.

THIS Act, as to the Habit of Members of Parliament, is in deſuetude; for the Dukes, Earls, and Lords, wear all ſcarlet Cloth, with Bars of Ermine: The Duke has Five Bars, the Earl Four, and the Lord Three, and the Burrows have no ſpecial Habit. XLVII.

THE *Fore-ſpeakers for Coſt*, here mention'd, and who are to have green Habits, were the Advocates, who were allow'd to plead before the Parliament; and this Habit for them is in *deſuetude*, for they plead before the Parliament, without any Gown or ſpecial Habit. They are call'd *Fore-ſpeakers for Coſt*, becauſe they may ſpeak for Money; and Advocates, in our old Journal-books, are ſtill call'd Prolocutors, or Fore-ſpeakers: But Friends are alſo, in the Journal-books, called Prolocutors. And therefore Advocates are here diſtinguiſhed from them, by the Words *Prolocutors for Coſt*.

# PARLIAMENT XII.

THE Meaning of this is, that Boneſires (call'd here *Bails*) be made at ſeveral Places, to forewarn the People of the Approach of the Enemy. This is here call'd *Taikenings*. XLVIII.

THO' where Treaſon is committed, the Committers are to be impriſoned, and cannot be let out upon Caution, becauſe the Crime is not bailable; yet where there is only a Preſumption of Rebellion, tho' it may be violent, the Party may be let out upon Security; for elſe a Perſon might be puniſh'd without Probation; for Impriſonment is a ſevere Puniſhment: Likeas by the *Lib.* 4. *R. M. Cap.* 1. *Num.* 3, 8, 9, and 11. It is there ſaid, XLIX.

ACT *That he who is accus'd of Treaſon, may be let out upon Caution; and if he want Caution, he is to be impriſoned:* And yet by this Act it is appointed, *That Perſons ſlandered or ſuſpect of Treaſon, ſhall remain in Firmance till they be tried by an Aſſize*; and this laſt is now in uſe: But there muſt ſtill ſome previous Trial be taken, by Precognition, and Examination, before any Man can be impriſoned, or his Goods ſecured for Treaſon, it being moſt unjuſt, to uſe ſuch Severities without very good Ground.

BECAUSE this Act of Parliament ſays, *That if Perſons be ſlandered for Treaſon, they ſhall be tane, and their Perſons warded therefore*; it was given as an Inſtruction by the Council to the Circuit-court, 1683. That ſuch as compeared, and deſir'd to go to the Knowledge of an Aſſize, might be bail'd, and let out upon Caution; becauſe this Act ſtruck only againſt ſuch as would not appear, but needed to be taken: And yet this is not univerſally true; for if there be good Grounds from a previous Trial by Two Witneſſes, to ſuſpect the Perſon guilty, it is not juſt to admit Caution: And the true Speciality upon which the Council founded that Reſolution, was, becauſe above Four Thouſand were dilated in that Porteous Roll for Treaſon; and it was almoſt impoſſible to impriſon all.

L, LI, LII, LIII. THE Acts 50, 51, 52, 53. are abrogated by the Union of *England*; and ſo is the 56. but though they be abrogated, yet the following Obſervations may be made from them.

*Obſ.* 1. FROM the Act 52. That the ſupplying the *Scottiſh* Towns, then under the Command of the *Engliſh*, is declar'd Treaſon; as is in general, the aſſiſting of all Enemies to the State; *Vid. Ja.* I. *Parl.* 13. *Cap.* 141. *Ja.* II. *Parl.* 12. *Act* 50. For tho' we have no ſpecial Statute, declaring *the aſſiſting of Enemies of the State to be Treaſon*; our Acts running generally againſt ſuch as aſſiſt declar'd Traitors, or aſſure with *Engliſhmen* in particular; yet it is Treaſon by the Common Law, *L.* 3. *ff. ad L. Jul. Maj.* And ſuch of our Nation as continued in the *Dutch* Service, during the War with *Holland*, *Anno* 1666. were forfeited as Traitors.

BY the Second Part of this Act, it is declar'd Treaſon, for any who ride with the Warden of the Marches, or any other Chiftain, *to go away with any Manner of Goods, till they be thirded*; that is to ſay, till they be divided; for one Third, by the Law of the Borders, belongs to the King; a ſecond Third to the Warden, or Chiftain; and a Third to the Apprehenders: For underſtanding whereof, it is fit to know, That Lands, when taken from Enemies, become the King's, or the Commonwealth's, by the Laws of all Nations; but Moveables, by the Law of God, *Deut. Chap.* 20. *Verſ.* 14. *Joſh. Chap.* 8. *Verſ.* 1. when taken, were divided equally amongſt the Takers: But ſometimes there was a Diviſion, the one Half falling to ſuch as fought; the other, to theſe that ſtaid with the Baggage; and a fiftieth Part of their Part who fought not, was dedicated to the Lord; whereas one of five Hundred was only conſecrated out of their Part who fought, *Num.* 31. *Verſ.* 50. At preſent *Grotius*'s Diſtinction, *Lib.* 3. *de jur. bell. C.* 6, 11, 12. is generally obſerved, whereby, if Moveables be taken by a Party led on by an Officer, who only knew the Deſign, then the Soldiers get no Share, but all falls to the Public: But if the Moveables be taken in Excurſions, or free Adventures, they belong to the Takers. And *Voet. C.* 5. *N.* 19. *de jur. milit.* ſets down the ſeveral Proportions, whereby Goods are divided amongſt a Party and Officers in *Holland*; where, if the Party exceed 50. the Captain gets a Tenth, the Lieutenent a Fifth, the Enſign a Third, the Quarter-maſter a double Portion, the Serjeant one and an Half, and each Soldier a ſingle Share; but ſtill the Horſe get Double of what is due to the Foot.

LIV. BY this Act, which is a Continuation of the former, it is declar'd capital for any Man to take from another Goods, or Priſoners; which they are in Poſſeſſion of: From which it is obſervable in War, That Poſſeſſion, or Capture, gives only Right; thus, *Inſt. de rer. div. Parl.* 17. 'tis ſaid, *Item quæ ex hoſtibus capiuntur, ſtatim jure gentium capientium fiunt*: And therefore a Ship being pretended to belong to the King, becauſe one of the King's Friggots had beat the Convoy that guarded her, and was in Purſuit of another, and had taken both her and this Ship here controverted, if the Privateer had not interveen'd; and it being anſwered, that an actual Capture could only eſtabliſh the Property, and this Statute required Poſſeſſion; the Lords, before Anſwer, granted mutual Probation, for trying whether this Ship could have eſcaped from the Friggot, if the Privateer had not taken her.

LV. IT is Treaſon to raiſe a Fray wilfully in the King's Hoſt; for this wilfully done, ſhews a Deſign to ruin the Army: And I find that the Maſter of *Forbes* was hang'd for raiſing a Fray in the King's Hoſt at *Jedburgh*, *July* 14. 1537. The Words *Without Cauſe*, are added here, becauſe if a Man doing his Duty was the Occaſion of raiſing a Fray, he ought not to be puniſhed; as if an Officer puniſhing a Mutinier, ſhould by that Occaſion raiſe a Fray, this would not be puniſhable. By the Civil Law, ſuch as were Authors of Sedition in an Army, (for a Fray is properly Sedition) were puniſh'd as Murderers, *L.* 3. § 4. *ff. ad L. Cornel. de ſicariis:* But if the Commonwealth was in Danger, they were puniſh'd as Traitors, as

ACT in this Statute; and in *L.* 1. *ff. ad L. Jul. Maj.* And they are every where now puniſh'd by Death, *Sand. Deciſ.* 165. *Tit.* 9. *Def.* 12. *Vid. Voet. de jur. milit. C.* 4. *Num.* 40. And if the Authors cannot be known, all involv'd in the Guilt, are forc'd to caſt Lots, *Voet. ibid.* Sometimes alſo, if the Sedition was carried on *ſine gravi tumultu, & intra vociferationem*, the Guilty were only caſhier'd, *L.* 3. § 20. *ff. de re milit.* if the Tumult was rais'd upon private Picques or Grounds; but if it was rais'd upon Prejudices againſt the Commonwealth, or Prince, it was puniſh'd, even in that Caſe, and tho' no actual Prejudice follow'd, as Treaſon, *D. L.* 1. *ff. ad L. Jul. Maj.*

# PARLIAMENT XIII.

LVI. THIS putting the Kingdom in a Poſture of Defence, was formerly ordained, *Stat.* Will. *Cap.* 23. *Stat.* 1. Rob. I. *Cap.* 27. But all theſe Acts are now in *Deſuetude*; and the Act concerning the Militia is regularly come in their Place: But yet the King may call for either; *Vid. Obſerv.* on 4 *Act*, 1 *Parl. Ja.* I. By the King's Letters by *Bailis*, is meant Letters to raiſe Fire, or Takenings for advertiſing the Country. By *Out-horns*, is mean't theſe who follow'd the Sheriffs, and whoſe Office it was to raiſe the King's Horn, for warning the Country to aſſiſt the King's Officers.

LVII. THIS Act contains what is fit to be done in Time of Peſtilence; and becauſe it was an Affair to be governed by Chriſtian Charity, therefore the Regulation of it was referred to the Clergy; and upon this Account it is that the Act ſays, *The Clergy thinks*, without ſpeaking of King or Parliament; it being ordinary in our Acts of Parliament, to ſet down the Report, without drawing it into the Formality of an Act of Parliament: And thus in the 91. and 92 *Acts*, *Parl.* 13. *Ja.* III. it is ſaid, *The Lords thinks it expedient*; by which Word, *Lords*, muſt be interpreted *Lords of Articles*.

LIX. THERE was, of old, *Diſtreſſes* taken from ſuch as came to Fairs; that is to ſay, ſome Thing was taken to be a Surety for their good Behaviour, and was delivered back at the End of the Fair, if the Owners committed no Wrong during the Fair.

LX. THIS Act is only to be interpreted of the Fees due to the Great Conſtable of *Scotland*, who is now the Earl of *Errol*; for he only can exact during the Time of Parliament; but yet that Exaction by him at Fairs, in Time of Parliament, is in *Deſuetude:* And other Conſtables have Fees, which they exact in Time of Fairs, by ſpecial Infeſtment, as the Conſtable of *Dundee:* And it is obſervable from this Act, That a long Cuſtom of exacting Fees and Cuſtoms from the People, is not warrantable, except either that old Cuſtom be founded upon an old and expreſs Infeſtment, or warranted by an Act of Parliament.

# PARLIAMENT XIV.

LXI. SPUILLIES are here divided in Spuillies of Moveables, and Spuillies of Fee, or Heritage: But that improper Way of ſpeaking is not now uſed; for the diſpoſſeſſing a Man out of Heritage, is called *Ejection*; and Ejections are now purſued before the Lords as ordinary Actions, but not in the ſpecial Way here preſcribed. That Maxim of *Spoliatus ante omnia reſtituendus*, extends to Spuillies of both Moveables and Heritage.

LXII. ALL thoſe Forms of Proceſs are to be conſidered at the Inſtitution of the Seſſion, by King *James* V.

By this Act, Appeals to King or Parliament are utterly diſcharged: But the Queſtion is, Whether only Appeals ſtopping Execution be hereby diſcharged? And it is alledged, ACT That Appeals were only diſcharged here, becauſe the Seſſion was then a Committee of Parliament; and there lies no Appeals from the Parliament: But it ſeems there is likewiſe no Appeals from the Seſſion, as preſently conſtituted, becauſe they are inveſted in all the Privileges the former Seſſion had; and that the 99 *Act*, *Parl.* 6. *Ja.* IV. allowing Appeals, after this Act, muſt only be interpreted of Appeals from inferior Judicatures; but even theſe are alſo in *Deſuetude*. Whether Proteſtations for Remede of Law be allowable, notwithſtanding of this Act, was debated, *Anno* 1674. And the King determined by His Letter, *Anno* 1674. *That they were not to be allow'd to Advocates, nor Parties, after the Lords of Seſſion's Deciſions*; albeit it was alledged then, That by an Act of Sederunt, *Anno* 1567. *Proteſtations for Remede of Law*, were expreſly excepted in the Act diſcharging *Murmuration againſt the Lords*: And that *Lethington*, *Balfour*, and *Hope*, in their Practiques, *Tit. Lords of the Seſſion*, do expreſs theſe as allowable; nor are they diſcharged expreſly by theſe Acts: And tho' neither Appeals to the Parliament, nor Proteſtations for Remede of Law, before them, be not now to be practiſed by Parties, or Advocates; yet it is not yet decided, how far the Parliament may reſcind the Decreets of the Lords; and tho' they might, yet it was urged, that it is not fit they ſhould, ſince Parliaments may ſeem more ſubject to Paſſion and Factions, than the Seſſion; great Men have too much Influence there: And by theſe, and ſuch Appeals, the ſitting of Parliaments would be very much lengthned; and becauſe their ſitting is uncertain, the Sentences of the Lords could not be acquieſc'd in as a Security, and all Pleas would be thereby both endleſs and expenſive; and there is as great Reaſon for diſcharging Appeals to King and Parliament, as there was at this Time; for the Lords then, tho' a Committee of Parliament, were not more learned than the Seſſion now: And upon theſe Conſiderations, the Parliament, 1661. did by a Letter to the King, in a Caſe betwixt Sir *Thomas Hamilton* and *Alrud*, declare that there could be no Appeal from the Lords of Seſſion.

LXVI. THIS Act againſt Litſters buying and ſelling Cloth, is extended ſo by the 12 *Act Parl.* 2. *Ja.* III. *That no Craftſmen may uſe Merchandice*: And the Reaſon of this Law is, becauſe if they were allow'd to buy, they would make none, and ſo neither improve themſelves, nor the native Commodities of the Kingdom. This Act is renewed by the 47 *Act*, 1 *Seſſ.* 1 *Parl. Ch.* II.

LXVII. EVERY Merchant muſt ſail with at leaſt Three Serplaiths of Goods; and the Serplaith, contains 80 Stone of Weight; but by the 13 *Act*, *Parl.* 2. *Ja.* III. it is appointed, *That no Man ſail without Half a Laſt of Goods*; which was introduc'd, becauſe peddling Merchants having very ſmall Stocks, were both a Diſcredit to the Nation, and were alſo forc'd to ſell at any Rate; for they could not wait for a Price: But now all ſuch Acts are in *Deſuetude*.

*Obſ.* THAT by this Act it is appointed, *That none ſail or trade but free Burgeſſes*; which is reſtricted by the 11 *Act*, *Parl.* 2. *Ja.* III. in which 'tis declared lawful *for Prelates, Lords, Barons, and Clerks, to ſend their own Servants*; and by the 5 *Act*, *Parl.* 2. *Ch.* II. *Seſſ.* 3. it is declar'd lawful, *for Indwellers in Burghs of Regalities, or Baronies, and others, to ſend Abroad Corn, Cattle, Neat, Hides, and all the native Commodities of the Kingdom.*

LXIX. IN all Acts for viſiting Hoſpitals, the Chancellor is ſtill One; and tho' by this Act, where the Foundation of Hoſpitals cannot be found, the Remede is referr'd to the King; yet by the *Act* 10. *Parl.* 1. *Ja.* III. it is appointed, *That where the Foundation cannot be found, the Rents ſhall be beſtowed upon the Poor*. By the Canon Law, *Hoſpitals are not Benefices*; and yet the Care of them belong'd to the Biſhop, *Tit.* 10. *Quæſt.* 2. *Vid. Not.* on *Act* 27. *Parl.* 2. *Ja.* I. *ſupra*.

LXX. THIS ſumptuary Law is in *Deſuetude*: By *Muſling of Women*, here is mean't, *being Masked*.

LXXI. FEUS being free and gratuitous Donations, beſtowed for Service, it was juſt that the Vaſſal ſhould not have Liberty to ſell without the Conſent of the Granter; for elſe others might be obtruded upon him as Vaſſals, and he might want the Service of that Family which he particularly choos'd: But yet the Feudal Law allow'd the Vaſſal to grant a Sub-feu; which, tho' it may ſeem a Kind of Alienation, yet was allowed by that Law, *Lib.* 2. *Tit.* 3. § *Sed etiam*; becauſe in Alienations the Superior would have loſt the Service of the firſt Family, and would have had but one Vaſſal; whereas in Sub-infeudations, the firſt Vaſſal muſt ſtill remain Vaſſal, and be liable to all the Caſualities and Services; and the Superior gets likewiſe another Vaſſal, *viz.* the Sub-vaſſal; a Sub-feu being likewiſe but *Emphiteuſis*, the Sub-vaſſal is but, in effect, a Tenent: And therefore by this Act of Parliament, the King declares, *That for better cultivating and labouring of the Kingdom, He will allow all His own Vaſſals to ſet their Lands which they hold immediately of Him in Sub-feu*: And it is declared, *That this Act ſhall be equivalent to a Confirmation*. And theſe Sub-feus, are by this

Act only called *Aſſedations*; and are by the 9 *Act, Parl. 6. Ja.* IV. ordained *to be ſet for the Polity of the Realm*; becauſe, as I conceive, the King's Vaſſals being thus freed from the labouring of their own Lands, they might be the abler to ſerve the King in His Wars; and the Land likewiſe be the better laboured by theſe Sub-feuers, who could attend the labouring thereof. Upon which Words, *Our Sovereign Lord ſhall ratify and approve the ſaid Aſſedation*; it was debated, Whether a Sub-feu, ſet by Virtue of this Act, did fall under the Forfeiture of the Vaſſal, tho' it was not confirmed in the Perſon of the Sub-vaſſal: And it was alledged, That the Sub-feu could not be quarrelled; becauſe the King by this Act, having invited Men to take Sub-feus, it was not juſt that the Invitation given by a public Law, ſhould become a Snare; and having promiſed to ratify and approve the Sub-feu, that Promiſe being inſert in this public Law, was equivalent to a Confirmation; and therefore ſhould defend againſt a Forfeitute, as well as a Confirmation could have done: And tho' theſe Words were alledged only to import *a Promiſe to ratify*, which did imply, that Application ſhould have been made for a Confirmation; yet to this it was anſwered, That this was an Invitation; and the Words ſubjoin'd thereto, muſt therefore be conſidered as a preſent Approbation, eſpecially ſeeing there is no Time prefix'd for craving of a Confirmation, nor any Irritancy annexed to the not craving thereof.

It was likewiſe urged, That by the 91 *Act, Parl. 6. Ja.* IV. this ſub-feuing ſhould be no Cauſe of Forfeiture; and that ſince this Act would defend againſt Ward and Recognition, it ſhould much more defend againſt Forfeiture upon Treaſon; for that being a moſt perſonal Crime, of which not only the Sub-vaſſal is innocent, but oft-times concurs with the King, againſt his own Superior: The poor Sub-vaſſal ought therefore to be leſs troubl'd upon it, than upon Recognition, to which the Subvaſſal himſelf is ſomewhat acceſſory, becauſe he receives the Right upon which the Recognition is inferred.

And whereas it was urged, That by the 37 *Act, Parl. 2. Ja.* VI. the Sub-vaſſals of the King's Vaſſals who were forfeited at that Time, are ſecured, if themſelves were innocent: Which Act had been unneceſſary, if this Act had ſecured them; and that Act is declar'd to have been only temporary, *& pro ea vice*, by the 201 *Act, Parl. 14. Ja.* VI.

To this it was anſwered, That by this Act, ſuch Sub-feus are only allow'd, as are ſet for the juſt Avail, and all other Feus might have been quarrelled: and therefore that Act was made to ſecure the Sub-vaſſals of forfeited Perſons, whoſe Rights might have been quarrelled upon that Head; or elſe that Act has been made *ad majorem cautelam*; and to prevent all Debate, which is moſt uſual.

Upon this Debate the Lords found, That this Sub-feu fell not under the Forfeiture, this general Law being equivalent to a Confirmation, *February* 12. 1674. Marquiſs of *Huntly*, contra *Cairnburrow*.

It has alſo been debated, Whether Wadſets feu'd out are ſecur'd againſt this Act, as well as Lands irredeemably diſponed; and I think they are, ſince a Wadſet-right is as properly a Feu, as an irredeemable Right.

What is mean't in this Act by the *competent Avail*, for which Ward-lands may be feu'd, is dubious; but the *juſt Avail*, for which the King's proper Lands may be feued, is by ſeveral Acts of Parliament, declar'd to be the Retour-duty, or new Extent: And therefore, I think, that the *competent Avail* here, muſt alſo be interpreted to be the Retour-duty: And in *January*, 1680. betwixt the ſame Parties, it was found, That tho' the competent Avail be the Retour-duty expreſs'd in his Service; yet the Sub-vaſſal getting a Part of the Lands feu'd to him, he ought to pay no more for the competent Avail, but his Proportion of his Superior's Retour-duty; and that if a Charter was given him Blank by his Superior, which he filled up himſelf with a ſpecial *Reddendo*; the Charter was not therefore null, and he was only liable in his juſt Proportion of the ſaid Retour-duty; and the Vaſſal, if he pleaſes, may, by a Proceſs againſt his Superior, get this competent Avail, to which his Share ſhould extend, determined; and that being ſpecified in his Service, will thereafter become his Retour-duty; tho' ordinarily the Sub-vaſſal, to prevent Expence, or by Miſtake, uſes to retour the Duty that was payable by his Superior, eſpecially if the Difference be not great.

THE Puniſhment of ſuch as abuſe the Power of their Juriſdiction of Regality, is left arbitrary by this Act, *Vid. C. 14. Stat. Rob.* II. LXXII.

THIS Act is explain'd in the 96 *Act*, 6 *Parl. Ja.* IV. LXXIII.

BY this Act, all Remiſſions are null, except the Party injur'd be aſſyth'd; and he who produces the Remiſſion, muſt either find ſufficient Caution to pay the Aſſythment within Fourty Days, or to ſtay in Priſon till the Payment: And by the 155 *Act*, 12 *Parl. Ja.* VI. and 136 *Act*, 8 *Parl.* Ja. VI. 'tis provided, *That if the Remiſſion contain not an Aſſythment expreſly in the Body of it, the Remiſſion ſhall be null:* But becauſe theſe Acts were temporary, therefore by the 174 *Act*, *Parl.* 13. *Ja.* VI. *If any Remiſſion or Reſpite be granted, before the Party injur'd be firſt* LXXIV.

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*ſatisfied, the Remiſſion is to be null:* And tho' by that laſt Act it would ſeem, that an Aſſythment ſubſequent to the Remiſſion would not make the Remiſſion to convaleſce, becauſe that Act requires *that the Remiſſion ſhall be null*, as ſaid is; yet the Meaning of that Act ſeems only to be, *That without an Aſſythment the Remiſſion ſhall be null.*

FROM the ſame Act, Exception is made of Remiſſions granted for quieting the *Highlands* or *Borders*, which may be valid without Aſſythment; *Gratia facta à Principe nocenti non valet, niſi pax ſit prius habita ab hæredibus offenſi:* Which we call a *Letter of Slains*; *vel niſi fiat reparatio damnorum, Plot. Concil.* 78. *Clar. Quæſt.* 58. *Num.* 40. *ubi traditur, poſſe Regem tamen gratiare nocentem, ſine pace privati, quando damnandus elaboraſſet pro bono Reipublicæ, Vide L. Non omnes, § fin. ff. de re milit.*

THE Second Part of this Act relates to Remiſſions for Spuillies, or Theft; as to which the Lords of the Seſſion may reſtore the Party, and aſſyth him, notwithſtanding of the Remiſſion.

LXXV. BY this Act, no Freeholder can be forc'd to come to Parliament, except he hold a Twenty-pound Land of the King; but none can be now compelled; and this was only in the Time when all Freeholders were obliged to compear in Parliament, as the King's Head-court; nor can any now vote in the Election of the Commiſſioners, except they hold a Fourty-ſhilling Land of the King immediately, or hold Ten Chalders of Victual, or One Thouſand Pound Feu-duty, (all deducted) of a Biſhop, or Abbot, formerly, and hold the ſame now of the King, *Act* 35. *Parl.* 1. Ch. II. But now again, ſince the Reſtitution of Biſhops, the Biſhops repreſent their own Land in particular, and ſo their Vaſſals are not allowed to ſit in Parliament; *Vide Act* 21. *Parl.* 3. *Ch.* II.

LXXVI. THE Negligence ſo ſeverely puniſh'd in Judges by this Act, muſt be *negligentia doloſa & ſupina*; and the Diſtinction here obſerv'd, betwixt the Puniſhment of heritable Officers and others, is ordinary amongſt the Doctors, Bald. *ad L.* 1. *ff. de ſerv. fugitiv.* where he ſays, That *pro negligentia judex removetur ab officio*; *ſed hoc non tenet in judice perpetuo.* Farin. *Q.* 3. *Num.* 423. ſays, That *majores officiales non removentur*; *ſed minores facile removentur.* By the *Cap.* 14. *Stat.* Rob. II. a negligent Judge, *viz.* a Bailie of Regality, is to be puniſhed by eſcheating his Moveables; and their Life is to be in the King's Will.

A faulty Judge is alſo puniſhable by this Act, in the ſame Way as a negligent Judge; which muſt not be mean't of the meaneſt Fault, ſeeing the Puniſhment is ſo great: But whereas by this Act the Puniſhment is the Loſs of Office for ever, if it be not heritable; yet by the 26 *Act, Parl.* 5. Ja. III. the heritable Officer loſes his Office for Three Years: Whereas this Act bears, *This being lawfully prov'd, and notorly kend*; we muſt not conclude, that a Judge may be convict upon this Notoriety, without Probation; for theſe two are only exegetic of one another: And the Senſe is, They being convict upon notour Probation; *Vide ſupra Obſerv.* on *Act* 16. *Parl.* 6. Ja. II.

LXXVIII. THE Form now to be follow'd, in caſe any Man ſhould maſterfully poſſeſs another Man's Lands, is, That if Violence was us'd at the Entring, then the Council, upon a Complaint, will reſtore the Party diſpoſſeſs'd; but if the Intrant entred *in vacuam poſſeſſionem*, tho' without any Right, he behov'd to be purſu'd before the Seſſion, by an Action of Intruſion.

ACT

# King JAMES III.

## PARLIAMENT I.

II. BY this Act, the Third of the King's Rents of Aſſize, that is to ſay, the Third of His Lands and Cuſtoms belong to the Queen as her Dowry, or Terce, allenarly, which is conform to the Common Law of this Kingdom; by which the Wife has Right to a Third of all the Lands in which a Man dies infeſt; and that tho' ſhe be otherwiſe provided, if ſhe be not expreſly ſecluded from it by her Contract of Marriage: So that it ſeems the Queen would have had Right to a Terce of proper Lands belonging to the King, tho' this Act had not been made. But now by the 10. *Act*, *Parl.* 3. *Ch.* II. if a Wife be provided to a particular Proviſion, tho' never ſo ſmall, either in her Contract of Marriage, or in any other Writ, ſhe will be ſecluded from a Terce, except her Terce be expreſly reſerv'd to her by and attour the particular Proviſion.

*NOTA*, *The Rents of Aſſize*, comprehends the King's Cuſtoms and Lands, as was found *December* 9. 1466. and *March* 11. 1500. *Ogilvy* contra *Gray*.

IT may be doubted, whether this Act was temporary, relating only to this Queen, or if any Queen of *Great-Britain* will have Right, as Queen of *Scotland*, to a Third of the Property, conform to this Act; ſince the Act ſeems to be reaſonable in itſelf, and that the Queen is founded in this Right by the Common Law; and if this had been only a temporary Right relating only to this Queen, it would not have been inſerted amongſt the general Laws; or at leaſt, it would not have been generally conceiv'd, as this Act is, in theſe Terms, *The Dowry of the Queen*; for *terminus indefinitus æquipollet univerſali.* I find, that in the 191. *Act*, *Parl.* 13. *Ja.* VI. Queen *Anne* is provided to the Third of the Property, but not to the Third of the Cuſtoms; but that being by expreſs Paction, derogates not from this Law.

III. SOMETIMES Benefices Eccleſiaſtic were beſtow'd upon Secular Perſons, who were call'd Commendators, becauſe the Benefice was commended and intruſted to their Overſight, and they were *Procuratores in rem ſuam, & habebant tantum detentionem & poſſeſſionem*; but were not Proprietars, and ſo could not diſpone, *Roman. Concil.* 350. And becauſe Commendators were but Truſtees or Tutors, therefore Rights made by them, tho' with Conſent of the Chapter, are no longer binding in our Law, than during the Commendator's own Right. And by this Act, theſe *Commendams* are diſcharg'd, and yet the Deeds done by them are not annull'd; and therefore many Rights made by Commendators ſince this Act, are ſuſtain'd as valid, tho' they were not Proprietars.

BY the Canon Law, only the Pope could grant *Commendam perpetuam*, and the Biſhops could only grant *Commends* for Six Months. *C. Nemo. Elect. L.* 6.

V. THE Pain of Lawburrows here expreſs'd, is heightned by the *Act* 166. *Parl.* 13. Ja. VI. by which every Earl or Lord's Penalty is made 2000 *Lib.* every great Baron 1000 *Lib.* every Freeholder 1000 Merks; every Feuer 500 Merks; the unlanded Gentleman 200 Merks, and the Yeomen 100 Merks; which laſt Act is now obſerv'd. And tho' Penalties be expreſs'd here againſt Breakers of Lawburrows found to Churchmen, and that there be no Mention made of them

ACT in the laſt Act, yet an Archbiſhop, or Biſhop, can purſue now for the ſame Penalty that is due to an Earl: And Biſhops and their Wives are allow'd the ſame Solemnities at their Funerals that are allow'd to Noblemen and their Wives, by the 14. *Act*, 3. *Parl. Cha.* II. And tho' there be no Mention made here of Dukes and Marquiſes, yet the Privilege granted to Earls is extended to them.

II. By this Act, the Penalty is to be apply'd to the King, and is due by and attour the Reparation due to the Perſon leſ'd; but by the laſt Act and the preſent Cuſtom, the Penalty is to be divided betwixt the King and the Party. And tho' by this Act the Maſter is free, if he preſent his Servant who breaks the Lawburrows. *Leſs than the Lawburrows*, that is to ſay (he who found the Lawburrows) bring the Treſpaſſors to the King or Sheriff *within Fourty Days, Dominus noxali judicio ſervi ſui nomine conventus ſervum actori noxæ dedendo liberatur*; yet by our preſent Cuſtom the Maſter finds Caution, that the Raiſer of Lawburrows ſhall be ſkaithleſs from him againſt whom it is rais'd, and his Men-Tenents and Servants; and therefore the Maſter ſeems now liable, tho' he ſhould preſent his Servants.

Albeit theſe be the ordinary Penalties allow'd, where there is no other Proof of the Danger than the Oath of the Complainer; yet if the Complainer prove Threatnings, the Council, or Criminal Court, may ordain Surety of Lawburrows, to be found upon ſuch Sums as they think proportional to the Danger. *Vide Not.* on *Act* 129. *Parl.* 9. Ja. I. *ſupra.*

VI. THO' by this Act all Summons are to be on 21 Days Warning, yet all Summons that are privileg'd by their own Nature, or the Lords Deliverance, come in upon 6 Days, *vide* Hope's *Form of Proceſs.* And by an Act of Sederunt, *July* 21. 1672, it is declar'd, That no Actions can be privileg'd, except *Removings, recent Spuillies, recent Ejections, Intruſions ſucceeding in the Vice, Exhibitions, Cauſes alimentary, Summons for making Furthcoming, Transferrings, Poindings of the Ground, Waknings, ſpecial Declarators, Suſpenſions, Prevento's and Tranſumpts.* All which, and all ſecond Summons in all Actions, are to come in upon 6 Days Warnings, except recent Spuillies, becauſe by the 65. *Act*, *Parl.* 6. Ja. IV. theſe were to come in on 15 Days; Ejections, Intruſions, and ſucceeding in the Vice, which are of the Nature of recent Spuilſies. But ſince this Act appointed all Summons to come in upon 21 Days, *dubitatur* how the Lords could have privileg'd any Summons upon fewer Days, tho' there was an old immemorial Cuſtom for this, prior to this Act of Sederunt; and it will be fit to ratify this Act of Sederunt in the firſt Parliament.

By that Act of Sederunt likewiſe, ſecond Summons may be executed againſt Perſons within *Edinburgh*, or the Suburbs thereof, upon 24 Hours. *Vide* Obſervations on the *Act* 65. *Parl.* 6. Ja. IV.

VII. THIS is abrogated by the Union of the Nations.

VIII. MONEY is yet eſcheated to the King and his Cuſtoms, if taken out of the Country without a Warrant; but that Part of the Act which allows a Noble for every private Man's Expence, is in deſuetude; for now every Man is allow'd to carry out what may defray his Expence. And that Part of the Act, appointing every Man to make Faith, and ſwear that he carries no Money out with him, is alſo in deſuetude: But any Man may be purſued for having carried out Money, and his having carried out and the Quantity, may be proven by his Oath. We ſee alſo in this Act, that Seculars could not judge Eccleſiaſtics; for Eccleſiaſtics were to be judg'd by the Official, that is to ſay, the Biſhop's Judge, in whoſe Place the Commiſſars are now come. And this Privilege deſcends to Churchmen from the Canon Law, *C.* 2. *de judiciis*: But ſince the Reformation this Privilege fell, for now all Men, whether Secular or Eccleſiaſtic, anſwer to the Civil Judge.

The great Reaſon why our Coin ſhould not be carried out is, becauſe our Money is finer than foreign Money, being 11 *Denier* fine, and ſo is conſtantly exported, and being melted down into foreign Coin, is brought home again to us at a greater extrinſic Value. But yet becauſe it might be doubted if this Prohibition extended to the carrying out of all Money that is current, or if that which is not current may be carried out, ſuch as Ryals, *&c.* for the carrying out of Gold and Silver is generally ordain'd to pay Cuſtom when it is carried out, by *Act* 15. *Parl.* 1. Ja. I. But by the 149. *Act*, *Parl.* 13. Ja. I. the carrying out of all Gold and Silver, coin'd or uncoin'd, infers Eſcheat of the Gold and Silver ſo exported. *Vide Not.* on *Act* 49. *Parl.* 3. Ja. I. *ſupra.*

ACT

# PARLIAMENT II.

II. BY this Act, Noblemen and Gentlemen pretend to be free from Cuſtom of what is imported for their own Uſe; as to which, I have inſert this Paper.

## *REASONS why the Nobility, Barons, and other Heritors in* Scotland, *are liable to pay Cuſtoms and Exciſe for what Commodities they bring in, tho' for their own private Uſe.*

I. OUR Laws and Acts of Parliament, have granted to His Majeſty the Cuſtom of all Goods exported or to be imported, as is clear by the 251. *Act*, 15. *Parl.* Ja. VI. The Words being, *That His Majeſty, with Conſent of the Nobility, Council and Eſtates; have ordain'd that all Cloth, and other Merchandice brought into this Realm, ſhall pay Cuſtom,* &c. And therefore the King being, as to this, founded in the Rule, all muſt be liable, except where there are clear Exceptions derogating from the general Conceſſion. Likeas, by an expreſs Statute, 14. *Act, Parl.* 1. Ch. II. *The Cuſtoms of all Goods are confirmed to the King,* and a ſpecial *A. B. C. of all cuſtomable Goods,* expreſſing what each Species is to pay. In which Act there is no Exception of any Perſon whatſoever.

II. By the foreſaid Act 251. *Parl.* 15. Ja. VI. Cuſtoms are to be paid to the King, according to the Uſe of any other Kingdom: But ſo it is, that by the Uſe of other Kingdoms, and particularly of *England* and *France*, the Nobility, Barons, and others, pay Cuſtoms for all imported Goods.

III. The Cuſtoms being granted for the Defence of the Kingdom, and the Support of His Majeſty's Royal Dignity; it is juſt that the Nobility and Barons ſhould rather pay than any others, ſince they are, of all others, moſt concerned to maintain the One, and ſupport the Other.

IV. *SCOTLAND* being a Country that has no Conſumption for imported Goods, ſave within themſelves; if the Nobility and Gentry ſhould not pay, they might bring Home all their own Commodities, and ſo there ſhould be little or no Cuſtoms due to the King.

V. They might colour the Trade of Merchants, by granting ſimulate Commiſſions for bringing Home the Goods of Merchants, under their Names; which would occaſion much Perjury, and at leaſt put the Cuſtomers to a Proceſs, and ſuſpend the Payment of the true Cuſtoms, till that were clear'd by Proceſs.

VI. When this Kingdom thinks fit to guard againſt the Importation of any foreign Goods, they do this by impoſing great Cuſtoms; as was lately done by impoſing 80 *per Cent.* upon all *Engliſh* Cloth: But ſo it is, that if this Exemption were allow'd to the Nobility, and others, theſe Prohibitions would be uſeleſs and ineffectual; for thoſe prohibited Goods might be brought in by them, and ſo our Manufactories could never be encouraged, nor could we force other Nations juſtly, to balance their Trade with us, or keep our Money within our own Country.

VII. If theſe Exemptions were allow'd, there could be no Poſſibility of leſſening and curbing the Luxury of the Nation; for the Nobility and Gentry might ſtill wear what they pleaſed; at leaſt it would be an Encouragement to them to bring Home Things ſuperfluous, they being free from Impoſitions; whereas their being burdened with Cuſtom, would diſcourage them to bring Home Superfluities.

VIII. The Exchequer has in their Tacks been in uſe to ſet the Cuſtoms, with expreſs Order to allow no Exemptions; and the Cuſtomers have exacted Cuſtoms from the Nobility and Gentry; which proves the King's Poſſeſſion, and the Acquieſcence of thoſe who plead the Exemption.

Whereas it is pretended, 1. Cuſtoms are regularly a Duty impos'd upon Merchandice and Traffic: But what Noblemen and Gentlemen import for their own Uſe, is not Merchan-

ACT dice, nor Commerce. 2. By this *Act*, and by *Act* 152. *Parl.* 12. Ja. VI. the 251 *Act*, *Parl.* 15. Ja. VI. and the 143 *Cap. Leg. Burg.* there is an expreſs Exemption from Cuſtoms granted to the Nobility, Barons, and other Heritors, for what they import to their own Uſe.

IT is anſwered, That as to the Firſt, Cuſtom being impos'd for the Uſes foreſaid, the Payment ſhould be regulated, by the Reaſon that impoſed the Impoſition, and not by the Nature of the Traffic; and if that were a good Reaſon, neither Merchants, Burgeſſes, nor any elſe ſhould pay Cuſtoms, for what they are to apply and conſume for their own private Uſe. 2. Tho' that were generally true, as it is not; yet the Laws and Cuſtoms of this Kingdom ſhould alter the Caſe here, as it does in other Kingdoms.

TO the Second, 'tis anſwered, That 1. there is a great Difference, in our Law, betwixt theſe, Perſons being free to trade, and ſo not liable to the Pains of unfree Traders, and their being free from paying of Cuſtoms; and the firſt two Acts cited, do certainly militate only in the firſt Caſe, by granting them a Freedom to trade, but not a Freedom from paying of Cuſtoms. And as to the 251. *Act*, 15. *Parl.* Ja. VI. it does not grant an Exemption from Cuſtoms. And albeit it may be urg'd, that the firſt Part of that Act having impoſed Cuſtoms on all, and this being an Exception, it muſt be an Exception from the Rule, yet conſequential Arguments ſhould not take away expreſs Laws; Nor is this an Exception, but rather a cautionary Reſervation, and theſe uſe to be inſert *ad majorem cautelam*, and ſhould never be extended beyond the Terms of the Reſervation. But ſo it is, that the Reſervation is not conceiv'd abſolutely, but only conform to the Laws and Liberties granted to them before. And therefore ſince it cannot be ſubſumed, that there are any former Laws granting this Exemption from Cuſtoms, it muſt be reſtricted to the Privilege of their being free from the Pains of unfree Trading only. 2. It is to be conſidered, that the former Laws allows them only the Liberty from being puniſhed as unfree Traders, as to what they import by their own Servants for their own private Uſe, and as the Return of Commodities of their own Product exported by them. Nor does the 143. *Chap. Leg. Burg.* extend further than to exeem Barons from inland Cuſtoms due to Subjects. 3. The Time of that Act the Cuſtoms were juſtly impoſed upon exported Goods, but thereafter His Majeſty was graciouſly pleaſed to lay the greateſt Part of the Cuſtoms upon the imported Commodities; and ſo having very much freed the Barons of a Duty that burden'd their Product, it was not reaſonable that their Product and imported Goods ſhould be both free. Likeas, ſo convincing was this Argument, that albeit ſome Shadow of an Exemption was ſubjoin'd when the Cuſtoms were impoſed upon their Product by the firſt Conſtitution in that Act 251, yet when this Burden was transferred by the Act 1670, from the Export to the Import, the Barons did require no ſuch Exemption, nor does the Act bear any. And ſo this Act is innovated by the ſaid poſterior Act.

AS to the Exciſe, there can be no Pretence for any Exemption from it, ſince there being no ſuch Duty extant the Time of the Act 251, that Act cannot be extended to the Exciſe. And whereas it is pretended, that by the 5. *Act*, 3. *Seſſ.* 2. *Parl.* Ch. II. this Exemption is renewed after the impoſing of Exciſe.

IT is anſwered, That the ſaid Act *Ch.* II. does not expreſs any ſuch Privilege, but only ſays, *That the Regulation of the Differences betwixt the Burghs Royal and Burghs of Barony, introduced by that Act, ſhall be but Prejudice to the Noblemen, Prelates and others, of their Privilege of importing any of the Goods allowed to be then imported, for their own and Families Uſe allenarly.* Which can only be interpreted to relate to their Freedom of Trading, that being the only Deſign of the whole Acts, in which there is no Deſign of reſtricting or innovating any Thing with relation to Cuſtom or Exciſe.

AND thereafter ſince at all Times, the King is founded *quoad* the Payment of Cuſtoms, much leſs ought we to debate this with Him at this Time, when His Majeſty is content to leſſen His uncontroverted Right in the Cuſtoms for the enriching theſe who controvert this His Right, by conſenting, at their Deſire, to diſcharge more imported Goods than would pay Him more Cuſtoms than he can expect from theſe not exeemed.

NOTWITHSTANDING of theſe Reaſons, yet by the preſent Tacks, Noblemen and Gentlemen are exeem'd from paying Cuſtoms for what they bring for their own Uſe; but they are not exeem'd from Exciſe, nor the additional Duties, becauſe theſe were granted to the King in Contemplation of what the King loſt by the Want of the Cuſtom due to Him upon Goods now prohibited. *Vide* Gimnaſ. *de vectig.* *P.* 76. where it is told us, That by the Laws of *Germany*, *Illuſtres & generoſi ſunt immunes pro his quæ ſunt pro victu & cultu ſuo. Vide L. omnium C. de Vectigal.*

XII. *VIDE Annot. Act.* 66. *Parl.* 14. Ja. II.

XIII. *VIDE Annot. Act* 67. *Parl.* 14. Ja. II.

OBSER

ACT XIV.

OBSER. I. This Act appoints all Ships to have Charter-parties; and becauſe there was no Penalty againſt theſe who had no Charter-party, therefore by the 109 *Act*, *Parl.* 14. Ja. III. the Penalty of 20 Pounds is adjected; and yet both theſe Acts are in deſuetude: For within the Kingdom no Charter-parties are uſed, nor are they found neceſſary even for theſe who ſail abroad.

*OBSER.* II. That tho' it be ſaid in this Act, that *when any Debate happens betwixt Maſter and Merchant, that they ſhall underly the Juriſdiction and Ordinance of the Burgh to which the Ship is fraughted, without any Exception*; yet by the Cuſtom now obſerv'd, ſuch Purſuits may be intented againſt the Defender, wherever he dwells, or before the Lords, even in the firſt Inſtance.

*OBSER.* III. That tho' by this Act it be ordain'd, that no Merchant Goods be riven or ſpilt with unreaſonable ſtowing, or the Maſter's Fault, under Pain of tinſel of the Fraught, and amending of the Skaith; yet the Skipper is liable if the Goods be ſpilt, tho' without his Fault, & *ex caſu fortuito*, as by Water from a Pomp, tho' the Pomp had a Stellage about it, and was proven to have been a ſufficient Pomp before the Ship ſet forth; ſo that this Danger could not have been foreſeen, & *quamvis locator non tenetur ex caſu fortuito.* And the Words in a Bill of Loadning obliging the Skipper to reſtore the Goods well conditioned, can only bind *ad exactiſſimam diligentiam. Vide* Peckium, *Page* 34. yet the Lords thought, that if ſuch Defences were allow'd, Merchants could have no Security; for they were neither obliged to know, nor could they prove the ſecret Frailties of Ships, *November* 7. 1677. *Lawrie* contra *Angus*.

THIS Act, in ſo far as it appoints a Seck-Fraught to be paid to the Chaplain of the Nation, is in deſuetude: And by the *Chaplain of the Nation*, here is meant the *King's Almoner*, which was to be given to him for the Uſe of the Poor; for in the next Line it appoints a Tun Fraught to be paid to the Kirk-work of the Town, to which they are fraughted. But I know there are ſome who ſay, that *capellanus noſter*, mentioned among the Witneſſes, to the King's Deeds, is meant the Director of the Chancellary: The Chancellary being call'd in all our old Writs, *Capella Regia*.

XVI. BRUGES was the firſt Staple of this Nation, but 'tis diſcharg'd by this Act to be the Staple for the future; and our Ships are allow'd to go to the *French* Ports by the following Act, becauſe of the Alliances we had with *France*, and that *France* and *Flanders* were then entring into Wars. *K.* Ja. III. *Parl.* 3.

XVII. STAPLE Goods are, by this Act, to remain in Staple, and not to go to Mercats; for clearing of which Act, it is fit to know that Kings and Commonwealths allow ſome Goods only to be ſold at particular Places, and theſe are call'd *Staple Goods*; and the Place is call'd the *Staple Port*. *Jus ſtapuli eſt poteſtas ſiſtendi in ſuo foro reſtringendique merces ſpeciali emporii beneficio certis civitatibus competens Loccen. de Jur. Marit. Lib.* 1. *C.* 10. *Num.* 3. *Poteſt enim Rex ob bonum publicum in hoc caſu diſpenſare, L. ult. C. de Leg.* But this Privilege of Staple is not competent except it be ſpecially granted, and Strangers, as well as Natives, may be forc'd to obſerve that Privilege; for they are here *tanquam ſubditi temporarii*, Grot. *de Jur. Bell. Part.* 2. *Num.* 11. and 5. But yet this Act, diſcharging the carrying of Staple Goods by Sea from *Simeon* and *Jude*'s Day till *Candleſmaſs*, is in deſuetude; for our beſt Trade is now in Winter. But the Reaſon why Winter Trade was then diſcharg'd, was becauſe our Veſſels were ſmall, and our Seamen ignorant, ſo that many periſhed by Winter-Voyages.

XVIII. and XIX. ARE explain'd in the *Acts* 67, and 68. 8. *Parl.* Ja. III. and by the 36. *Act*, *Parl.* 8. Ja. II. as is alſo the laſt Act of this Parliament.

XX. *VIDE Annot.* on *Act* 59. *Parl.* 3. Ja. I. *ſupra*.

# *PARLIAMENT* IV.

XXIII. THIS Act is conform to *Iter. Camer. Cap.* 30. And the laſt *Act* ordain'd to be put to Execution by this Act, is *Act* 73. *Parl.* 14. Ja. II.

ACT XXV. THIS Act is in deſuetude; for it is now lawful to carry any kind of Cattle out of the Country, without Hazard of Confiſcation. It is clear from this Act, that the Warden might then have granted Licences for Goods prohibited; but this the Commiſſioners of the Borders cannot now do.

# *PARLIAMENT V.*

XXVII. VIDE *Act 76. Parl.* 14. Ja. II. But it is to be obſerv'd from theſe Words in this Act, *It ſhall be lawful to the King's Highneſs to take the Deciſion of any Cauſe that comes before Him, at His Empleaſance, likeas it was wont to be of before,* That the King Himſelf may be Judge as He pleaſes; but tho' the King did call an Action to be judg'd before Himſelf, that was depending before the Lords; yet His Majeſty was thereafter pleaſed, upon a Repreſentation of the Inconveniencies that would ariſe, to refer it back to them; and ſome interpret this of the King's Power, when He is ſitting in His Judicatures, tho' I think the Act will not bear that Gloſs: But certain it is, that at firſt all Maſters were Judges in their own Families, and that Kings themſelves judg'd in their own Kingdoms, as we ſee in the Inſtance of *Solomon* and others, *Vide Ch.* 16. *Stat.* David II. where there is a Deciſion of the King's inſert amongſt his Statutes. And the Doctors are of Opinion, that *princeps habens cauſam cum ſuo ſubdito poteſt ipſe judicare ſi vult. Peregr. de jure fiſci Tit.* 2. *Num.* 7. And this ſeems founded on *L. & hoc* Tiberius 41. *ff. de hær. inſtit. & L. proxime ff. de his quæ in teſt. delent.* And tho' thereafter they did diſburden themſelves of that Charge by electing other Judges, yet they did not debar themſelves from that Power; and therefore we uſe to ſay, that all Juriſdiction in *Scotland* is cumulative and not privative. But if the King take the Cognition of any Cauſe, He will try it according to the Forms of that Court where it ſhould have been decided; and therefore if He be to try a Criminal, the Pannel will be allow'd to hear the Witneſſes depone againſt him, and the Matter of Fact will be judg'd by an Aſſize. If it be alledg'd, the Meaning of this Act is only that the King may try any Action He pleaſes in His Council, that is to ſay, His Seſſion, (for of old, the Seſſion was call'd His Council, and yet they are call'd His Council and Seſſion.) To this it may be anſwered, This Act appoints that Cauſes ſhould be firſt try'd by the Judge Ordinary; and if he either refuſe to judge, or judge wrong, the Council is to judge, not the Cauſe, but him; and this induc'd ſome to urge, that the Abſence from the Hoſt could not be purſued before the Council, tho' the Puniſhment was reſtricted to an arbitrary Puniſhment. For which they brought theſe Reaſons, 1. That this would confound the Nature and Limits of all the Judicatures, which are the great Foundations of our Law, and which is contrary to this Act. 2. It is the great Security of the People, that when they are try'd for Crimes, they ſhould be judg'd not only by the learned Judges, as to Relevancy, but by their Peers, whom they may judge again as to the Probation. 3. Advocates are to be heard before the Criminal Court, but not before the Council; and the Debate is to be there in Writ, which obliges a Judge to do juſtly; and the Probation is to be led in Preſence of the Pannel. 4. Before the Council the Crime may be referr'd to Oath, which is not ſuitable to the Criminal Law, even where the Puniſhment is arbitrary, except the Party be by Act of Parliament oblig'd to depone, as in the Caſe of Conventicles. 5. There are no Exculpations before the Council, which are neceſſary in Crimes. 6. Several Acts of Parliament appoint, that Caſes may be purſu'd before the Criminal Court, or Council, when that is intended, and which were unneceſſary, if all Cauſes might naturally be purſu'd before either.

IT being likewiſe debated from this Act, That a Judge, for giving an unjuſt Decreet, might be purſued before the Council in the firſt Inſtance for Oppreſſion; the Council did in *January* 1682, find, That a Sheriff, or other inferior Judge, could not be purſued before the Council, until his Decreet were firſt reduced before the Judge Ordinary: And that becauſe the 105 *Act Parl.* 14. Ja. III. appoints all Actions to be firſt purſued before the Judge Ordinary, and the Lords of Seſſion are Judges Ordinary to Reductions, and are there appointed to cognoſce the Wrongs done by inferior Judges: and if this were ſuſtained, the Privy Council ſhould become the Seſſion: Nor would any Man be a Sheriff, ſince he might every Day be purſued before the Council. And whereas it was pretended, That the Council were Judges to Oppreſſion, and there might be great Oppreſſion committed by inferior Judges, *ſub figura judicii.* It was anſwered, That when the Decreet was reduced, they might then be puniſhed as Oppreſſors, if there was no Colour of Juſtice for their Deciſion, as the ſaid 105 Act provided,

ACT

vided, Sheriff of *Bamff* contra *Arthur Forbes*. *Vid. Obſ.* on the 16 *Act* 6 *Parl.* Ja. II. and 16 *Act* 3 *Parl.* Ch. II.

XXVIII. WE ſee that the granting Reverſions by the Wadſetters, were but new Inventions *in Anno* 1469; and Reverſions were only perſonal, and did not oblige ſingular Succeſſors before that Act: But by this Act they affect ſingular Succeſſors, providing they be regiſtrated. And though this *Act* ſpeak only of Reverſions, yet Eiks to Reverſions, and Obligations to grant Reverſions, are alſo real Rights, if regiſtrated. 2. A Reverſion, though not regiſtrated, is by our Law valid againſt ſingular Succeſſors, if it be incorporated, and contained in the Body of the Wadſet itſelf; for then the ſingular Succeſſor muſt know the ſame, ſince it is incorporated in his own Right.

XXIX. BY this *Act* perſonal Rights are ordained to preſcrive, if no Diligence was uſed thereupon within Fourty Years, as heritable Rights do preſcrive by the *Act* 12. *Parl.* 22. Ja. VI. And though this *Act* appoints only Obligations to preſcrive, and that the Word *Obligation*, does properly ſignifie only Bonds and Contracts; yet this *Act* extends to Teſtaments and Decreets, *July* 26, 1637. And this Preſcription is alſo extended to all perſonal Actions for moveable Goods; and ſo it did defend againſt an Action for a Kirk-bell, *December* 7, 1633. For in Effect all theſe are Obligations.

WHEREAS the *Act* ſays, *except Document be taken thereupon*; The Meaning is, that Diligence upon the Writ that is to preſcrive, interrupts Preſcription; and thus Horning upon a Bond, or Citation upon an Action interrupts, *July* 6. 1671. *McRae* contra *McDonald*: And Payment made by the principal Debitor, interrupts as to the Cautioners. It is obſervable, That Preſcription upon this *Act*, runs not againſt Minors, *& contra non valentes agere*, though neither of theſe are excepted in this *Act*; becauſe theſe Exceptions are warranted by the Common Law: And it may be alledg'd, that it runs not againſt furious Perſons, ſince they are in all Things compar'd to Minors, albeit there is this Difference, that a Man may feign himſelf to be furious, to the End Preſcription may not run againſt him: But yet Preſcription runs againſt Things left, *ad pios uſus*; nor is the Time of War and Peſtilence, when there is no Judicature nor Seſſion, to be defaulked, *June* 30. 1671.

PRESCRIPTIONS run only againſt perſonal Bonds, from the Term of Payment, and not from the Date of the Bond, becauſe till then the Creditor cannot purſue, *February* 19. 1680. *Lutefoot* contra *Glencorſe*.

XXX. IT is pretended that this *Act* is in *Deſuetude*, and that Magiſtrates may be continued for many Years; or at leaſt, that this *Act* muſt be ſo interpreted, as to infer only a Neceſſity of a new Election yearly, but not of yearly changing the Perſons elected; for ſometimes there are few to be chooſed, as in ſmall Burghs: And in great Burghs a forced Alteration might prejudge the Town's Intereſt, becauſe there are few worthy to be elected in theſe little Towns; and the Lords inclined to this Gloſs, in the Town of *Edinburgh*'s Proceſs againſt Sir *Andrew Ramſay*.

THE Burrow Law here related to is, *Cap.* 77. *Leg. Burg.* It appears by this and many other *Acts*, and old Evidents, that *Alderman* was the ſame of old with our *Provoſt*, and they are ſtill placed above *Bailies*; it comes from the *Saxon* Word *Ealdor Senior*: Thus we ſay, *For Age*, or, *For Eeld*.

XXXI. NOTARS are now only choſen by the King's Authority, and are examined by Three Lords of the Seſſion, and get their Protocals marked at their Admiſſion by the Clerk to the Notars, who is one of the Regiſter's Depute Clerks: Nor are the Notars to be admitted by the King, to be examined by the Biſhops, as this *Act* appoints; and yet our Stile retains to this Day, ſo much of the old Form, that the Notars expreſs ſtill in all the Inſtruments and other Papers ſigned by them, that they are Notars of ſuch a Diocie.

XXXII. BY this *Act* all Woollen Cloth is to be met by the Rig, and not by the Selvedge; but by the 43. *Act*, 1. *Parl.* Ch. II. Linen Cloth is ordained to be taken up by the Selvedge, and not by the Rig; becauſe Woollen Cloth ſtretches, when meaſured by the Selvedge, but the Selvedge of Linen hinders it to ſtretch.

XXXIII. THOUGH this *Act* appoints only Heritable Sheriffs, or Sheriffs in that Part, that is to ſay, any ordinary Perſon who executes the King's Letters, to put their Stamp to the Execution; yet by the 74. *Act*, 6. *Parl.* Ja. V. *The Execution of all Letters muſt be ſtamped*: And though here the not ſtamping makes the Executions to be only null, yet by that *Act*, ſuch as omit to ſtamp are puniſhed by Deprivation. *Vid. Obſerv.* on that *Act*.

ACT XXXIV. OPPRESSION of the King's Lieges in Fairs, by taking more Cuſtom from them than is due, is by this *Act* puniſhed only arbitrarily, as to the Offenders Perſons, and by a Year's Suſpenſion from their Offices; and what Cuſtom is allowed in ſuch Caſes is expreſt, *Act* 60. *Parl.* 13. Ja. II. How far arbitrary Puniſhments may be extended, is doubted. Theſe who have Fairs, had not Power to exact Toll, *Gl. in l. un. C. de Nundinis*; becauſe Fairs enrich the Place, and Toll wrongs Commerce.

XXXV. THOUGH removing of Tenents, and poinding their Goods, be appointed by this *Act*, to be Three Days after *Whitſunday* or *Martinmaſs*; yet by the 39. *Act*, 6. *Parl.* Q. *Mary*, all Warnings againſt Tenents are to be uſed Forty Days before *Whitſunday* only. The old Form of Removing was, *That the Maſter did* only intimate to the Tenent that he was to remove, and broke a Lance before the Tenent's Door, as the Symbol of breaking their Tack; and within Three Days ejected the Tenent, as *Craig* obſerves: But now the Tenent muſt be warned Forty Days before the Term, and a Decreet of Removing muſt be had, whereupon he muſt be charged and denounced, before he can be ejected; and after that Letters of Ejection are directed to the Shcriff.

XXXVI. ALL Murders committed by fore-thought Fellony, that is to ſay, upon Deſign, or *per inſidias* (called *Aſſaſſinium*) are denied the Protection of a Sanctuary, or Girth by this Act: But it appears that the Crime of Aſſaſſination was here excepted expreſly; becauſe it not being expreſt in the very Text of the Canon Law, there were ſeveral Debates about it; *vid. Covar. Variar. Reſult. cap.* 20. For though it be ordinarily proved, *per cap.* 1. *de homicidio ſi quis per Induſtriam occiderit proximum ſuum & per inſidias ab altari meo avellet eum ut moriatur*; which Text ſeems to be meant by theſe Words in this Act, *For the which the Law grants not the Immunity of the Kirk*; and in which our Law has followed the common Opinion, that Aſſaſſinators are denied the Privilege; yet *cap. inter alia* gives Immunity to all, except *publicus latro & depopulator agrorum*; and that *cap. de homicid.* excepts only Church-men, who have aſſaſſinated *proditorie*, and who indeed ſhould have leſs Immunity than others: But now the Churches being a Sanctuary or Girth, is in Deſuetude, ſince Popery was aboliſhed; though the King's Palaces are ſtill Sanctuaries in all Nations, if Princes be dwelling therein; and yet I think they ſhould not be Sanctuaries if they dwell not there, except that Allowance be granted them, either by expreſs Conceſſion or Preſcription; but theſe gave not Protection to ſuch as were notorious Criminals, *Novel. Juſtin*, 17. *cap.* 5. *verb. Neque homicidis, neque adulteris, neque virginum raptoribus, delinquentibus terminorum cuſtodies cautelam, ſed etiam inde extrahes & ſupplicium iis inferes: non enim talia delinquentibus parcere convenit, &c.* And now I find not that any of the King's Palaces are Sanctuaries as to Crimes with us, and in no Caſe ſhould they be a Sanctuary againſt ſearching for, and apprehending Malefactors; as is clear, *l.* 3. *ff. de fugitiv. Div.* Marcus *facultatem dedit ingrediendi tam* Cæſaris *quam Senatorum prædia volentibus fugitivos inquerere.* The Conzie-houſe pretends alſo to be a Sanctuary with us.

THIS Privilege of a Sanctuary was only granted to holy and conſecrated Places, and amongſt Proteſtants, no Conſecrations are in Uſe; but yet according to the Canon-Law, Churches even before Conſecration, are generally thought by Lawyers to have that Immunity, *vid. Covar. variar. reſolut. cap.* 20. *num.* 4. And albeit this Privilege be properly a Canonical Privilege; yet it cannot be denied, but that the very Churches of the Gentiles had this Privilege, as is clear by *Theucid. lib.* 7. and was approved of by Councils and Fathers, who are cited *cap.* 17. *Queſt.* 4. *Præſertim cap. Miror & cap. pen. & fin. de Immunitate Eccleſiaſt. vid. num. cap.* 35. *Joſhua cap.* 20. *Deuter. cap.* 19. *Exod. cap.* 21. But though by the Canon-Law, 40. Paces about the Mother-Church, and 30. about other Churches had the ſame Privilege of Immunity, albeit *Skene* ſpeaks only of the 30 Paces in his Annotations, *ad cap.* 6. *Statut.* Alex. II. Yet I read of no ſuch Privilege to either the 30, or the 40 Paces, nor to the Palaces of Biſhops, nor to Hoſpitals, *vid. Covar. ibid.*

XXXVII. BEFORE this Act the Tenent might have been poinded by the Brief of Diſtreſs, for all the perſonal Debt owing by his Maſter; but by the firſt Part of this Act, it is appointed, That the Tenents ſhall be poinded only for as much as they owe their Maſter, which did hold only in poinding for moveable Debts; for in Decreets of poinding the Ground, the Creditor might have poinded all he found upon the Ground, and all *invecta & illata*, though the Tenent owed not ſo much to the Maſter; yea, though he owed him Nothing, as was found 11 *July* 1628. and though the Tenent's Term of Payment were not come, if the Term of Payment of the Annualrent were by-paſt; and they who were ſo poinded, had their Relief off the Heretor, for whoſe Debt they were poinded; but now the Lords extends this Act ſo, as to defend Tenents againſt poinding upon Infeftments of Annualrent granted by the Maſter, ſo that Execution cannot paſs againſt them for more than they owe their Maſter, as to which only they can be perſonally liable, and their Goods or

*invecta*

ACT XXXVII.

*invecta & illata* can be only poinded; but yet this was not properly an Extenſion, for *debita fundi* are the Heretor's or Lord's Debt, ſince the Heretor is perſonally, and the Land is really liable therefore. This Act extends only to Tenents of Lands, but not to Tenents of Teinds, who cannot be poinded for their Maſter's Debt, 14 *January* 1556.

The ſecond Part of this Statute preſcribes the Way of appriſing Lands from Debitors, and it is the original Statute whereupon Appriſings are founded in our Law; and it ſeems ſtrange, that ſo material a Part of our Law ſhould not have an entire Statute, but ſhould have been brought in at the cloſe of another and leſs important Caſe.

The Form preſcribed to Compriſings, by this Statute, is, That if the Creditor cannot recover Payment by poinding the Moveables, the Sheriff ſhall cauſe ſell the Land to the Avail of the Debt; and from this Act it is, that to this Day the Moveables muſt firſt be ſought, and though the Appriſing will be null for Want of this Solemnity; yet the offering to prove that there were as many Moveables upon the Lands as might pay the Debt, will not reduce the Compriſing, except theſe Moveables were offered to the Meſſenger, when he was executing the Appriſing, and when the Scheduls of Appriſing were laid on upon the Ground of the Lands; *tantum creditur nuncio referenti ſe feciſſe executionem in ſtabilibus quia non extabant bona mobilia debitoris quod non auditur volens probare contrarium ad annullandam executionem. Surd. Concil. Num.* 1. *Lib.* 1. This Solemnity deſcends from *L.* 15. § 2. *de re Jud.* by which Moveables were firſt to be poinded, and then Immoveables failing of theſe, and was formerly introduc'd into this Nation by the *Cap.* 9. *Stat.* 2*d.* Rob. I.

By this Act it is appointed, that the Lands be appriſed to the Avail of the Debt: This Proportion was long obſerved, and much was referred to the Arbitriment of the Judge and Inqueſt. *Balfour*, who collects the oldeſt Deciſions, and ſuch as were about the Time of the Inſtitution of the College of Juſtice, in his Title of Compriſings, *Chap.* 3. gives this for a Rule, That ilk Twenty Shilling Land of old Extent was compriſed to Twenty Merks, 4. *July* 1533. *James Heren* contra *Henry Livel*; and ilk Merk-Land of yearly Profit was to be compriſed to Twenty Merks of Stock, which anſwered to Five for the Hundred, *penult May*, 1589, *Adam Dickſon* contra *John Carbattel*, *penult March*, 1539. But I have ſeen divers old Compriſings led about this Time, at the Inſtance of *George* Lord *Seton* and Lady *Jean Hepburn* his Mother, againſt ſome Vaſſals and Wadſetters in the Barony of *Weſtniddery* in *Linlithgow* Shire, where more than Five of the Hundred was allowed, as will appear by Computation. One of theſe Compriſings, dated 18. *March* 1523, bears 21 Acres, with 12 Shilling *Scots per* Acre, to have been appriſed in payment of 240 Pounds of Principal, due to the ſaid Lord *George*; and a ſecond Compriſing alſo led at his Inſtance, dated 17. *December* 1541, bears 25 Acres and Two-parts of an Acre of infield Land, to have been appriſed in Payment of 240 Pounds of Principal, due to the ſaid Lord *George*: And a Third Compriſing alſo led at his Inſtance, dated 17. *December* 1541, bears 25 Acres and Two-parts of an Acre of Infield, to have been appriſed for payment of 342 Pounds of Principal, each Acre being valued to a Merk of yearly Rent. A Fourth Appriſing at his Inſtance, dated 6. *February* 1544, bears 20 Acres and an Half to have been appriſed for 244 Pounds of Principal, ilk Acre being valued to 15 Shilling of yearly Rent. And a Fifth Compriſing, dated 5. *May* 1547, bears 18 Acres to have been appriſed in Payment of 220 Merks Principal, and the Rent of an Acre to be valued to a Boll of Victual, and the Price of the Boll to have been valued to 18 Shilling *Scots* yearly; and this was by and attour the Sheriff-Fee, for which the like Proportion of Lands was appriſed, as the ſeveral Appriſings bears. And for the better making of the Proportion, they alſo bear, That the Sheriff and Inqueſt came to the Ground of the Lands, and meaſured off the Acres, and ſet a conſtant Price on the Victual; but by one of the Deciſions cited by *Balfour* later than theſe, 'tis like that 5 *per Cent.* has been thereby appointed to have been the Rule in Time coming, as he ſays.

When Annualrents out of Lands were appriſed, the Inqueſt did never exceed 5 *per Cent.* without a Diſpenſation from the Lords of Seſſion, or elſe they were prejudged, ſays *Craig*, *Page* 332. and the Compriſings were reducible, but Diſpenſations were eaſily granted. And *Craig* ſays, they were ſought to free the Inqueſt from Hazard of Perjury; but upon what Ground it was, that the Inqueſt ſcrupled more in compriſing of Annualrents than in compriſing of Lands, where they allowed a Rent anſwerable to more than 5 *per Cent.* I cannot conjecture, except for one or two Reaſons, 1. That Annualrent is a Thing odious and unlawful by the Opinion of many Divines, and therefore not to be ſtretched. 2. Annualrents were free of public Burdens, to which Lands were ſubject, and therefore a greater Allowance might have been given of Land-Rent than Annualrent.

When Liferent Rights, ſuch as Conjunct-Fee, Simple-Liferent, Terces or Curiality, were compriſed, the Eſtimation was made according to the Age of the Liferenter or Liferentrix, when within 40 Years, the Eſtimation was 5 Years Purchaſe, that is as much as the Fruits and Rents had yielded for 5 Years preceeding, or might yield in 5 Years thereafter; and when the Liferenter exceeded 40 Years of Age, and was not of the Age of 50 complete, 4 Years Purchaſe was the Eſtimation; and if 50 Years of Age was exceeded, and the Sixtieth not attained, the Eſtimation was three Years Purchaſe; and if the Liferenter was weak or

ACT XXXVII. ſickly, or that there was any other Cauſe that might interrupt the Liferent-Right, the Inqueſt did value, as the *Circumſtances determined*; Craig, *pag.* 331. *in fine.* & *dict. pag.* 332. *in princ.*

AND when any Servitude was appriſed, the Inqueſt did alſo value as they thought the Servitude profitable, Craig *loco citato.*

THIS was the Way of Procedure in old Compriſings, in making a Proportion betwixt the Debt and the Thing appriſed.

THE Form and Stile of Decreets of Compriſings of old was ſhortly thus: The Clerk of the Compriſing, who was ordinarily the Sheriff's Clerk, did extend a Writing upon Parchment, containing all the Particulars of the Procedure, to wit, That the Creditor having obtained a Sentence before the Sheriff, decerning his Debitor to pay a certain Sum, and there being no Moveables to pay it, the Sheriff came to the Ground of the Land with an Inqueſt of moſt knowing Perſons within the Shire ſelected for that effect, and there meaſured off ſome Acres for the Money, and Sheriff-Fee correſponding, each Acre paying ſo much Victual, and the Victual being valued to a ſuitable Rate, redeemable always by the Debitor within the Time contained in the Act of Parliament; and which Writing is ſealed with the Seals of the Judge, and of the Inqueſt.

II. Tho' this Statute appoints the Sheriff to ſell, yet upon Deliverance of the Lords of the Seſſion, they will appoint the Compriſing to be led before Meſſengers, or Macers, whom they will make Sheriffs in that Part.

IT being debated, whether a Compriſer's Marriage fell to the King, where the Compriſer was paid within the Legal, tho' he was not paid when the Marriage fell, but was paid thereafter, and before the Legal expired. It was urged, that it did fall, becauſe the Compriſer was Vaſſal, and ſo as all Caſualities due by other Vaſſals ſhould fall; and that the King ſhould rather have this Caſuality from Compriſers, than from any Vaſſals, becauſe a Compriſer could, by a ſpecial Statute, be entred by the King, tho' a ſingular Succeſſor. 2. If the King were ſeeking this Caſuality by the Debitor's Death, the Compriſer would exclude him, by alledging that the Debitor was denuded; and it were unjuſt, that by this Means the King ſhould want his Caſuality from both. 3. The King falls all other Caſualities by the Compriſer, ſuch as Recognition, Liferent-Eſcheat; and the Compriſer, by being entred, can do all Deeds that other Proprietars can do, and therefore ſhould be liable in all other Caſualities as they are. 4. If this were not allow'd, the King might be ſtill defrauded of this Caſuality; for the Compriſer might ſtill ſecure the Debitor, and if his own Marriage fell, he might thereafter cauſe redeem himſelf. And whereas it was pretended, that a Compriſing is but *a pignus prætorium & in pignoribus non transfertur dominium*, and ſo the Debitor being ſtill Proprietar, remained ſtill Vaſſal. To this it was replied, That tho' a Compriſing reſemble *pignus prætorium*, yet it is truly an Alienation, and this Statute appoints the Land to be ſold to the Creditor; and by the whole Tenor of Compriſings, it is clear that it is a judicial Vendition made under Reverſion, and ſo reſembles more a legal Wadſet: And therefore as in Wadſets the Wadſetters Marriage would fall, ſo ought the Compriſers; and its being a legal Vendition and Alienation appears from this alſo, that it falls under Recognition, and Recognition preſuppoſes ſtill *alienationem dominii.* The Lords upon this Debate (which clears much the Nature of Compriſings) preferr'd the King; for they found that the Compriſer being Vaſſal, the Marriage fell by his Death, he having died before the Compriſing was redeem'd; and therefore it may be doubted, whether the Compriſer will have his Relief for the Damage incurr'd by this Caſuality from his Debitor before the Lands can be redeem'd from him, ſince it fell by his Fault in not paying him. Nor is the Debitor much prejudg'd; for if the Lands had not been compris'd, this Caſuality might have fallen by his own Death, and the Inconveniency urged from the Multitude of Marriages that would fall by the great Number of Compriſers, is of no Weight, ſince if a Man had ſold his Land, and divided it amongſt his Creditors, all their Marriages had as well fallen in that Caſe, as in this.

III. WHEREAS by this Act, the Legal is to extend to Seven Years only, ſo that if there be One Shilling reſting after Seven Years, the Compriſing expires; yet by the 62. Act, 1. *Parl.* Ch. II. *Anno 1661.* this Legal is extended to Ten Years, but both the Seven and Ten are to be counted from the Date of the Decreet of Appriſing, and not from the Date of the Allowance, by our Practic.

IV. THO' Superiors be not oblig'd to receive ſingular Succeſſors, yet they are bound to receive Compriſers upon payment of a Year's Duty of the Lands compriſed; and this Singularity is introduc'd in favours of Commerce, and of poor Debitors: But to ballance this Speciality, the Superior is allow'd to retain the Land compriſed to himſelf, upon Payment of the Sums compriſed for; becauſe he is alſo Proprietar of the Lands, having *dominium directum*, as the Vaſſal who is Debitor has *dominium utile*, *Vide* 5. *March* 1634. *Black* contra *Pitmedden.* But it was lately found, That the Superior could not redeem after Seven or Ten Years, no more than the Vaſſal; for tho' the Legal, as to the Superior, be not limited, yet he comes but in place of the Vaſſal, and ſo ought to have no more Privilege, and this General muſt be reſtricted by the other Parts of the Act.

ACT

V. Tho' the Superior be bound to receive the Compriſers, and that without producing their Author's Right, becauſe it is not preſumable that their Debitors, from whom they compriſed, will produce their Rights to them; yet where Adjudications are led for completing Diſpoſitions, or other Rights, the Superior is not obliged to receive ſuch Adjudgers until they inſtruct the laſt Vaſſal's Right: For ſuch Adjudgers as theſe are not ordain'd by the Act of Parliament to be received, *June* 24. 1663. *Mackneil* contra *Mackdougal*. But it may be doubted, what an Adjudger, who has done ultimate Diligence to recover his Debitor's Writs, ſhall do if he cannot obtain them, it being very hard that he ſhould ly out of his Right, becauſe of the Contumacy of the Perſon who is oblig'd to complete the Right. *Vide Obſer.* on the 19. *Act*, *Parl.* 3. *Seſſ.* 3. Ch. II.

XXXIX. Tho' it is ſaid here, that Juſtice-airs need not be continued, yet Juſtice-courts are declar'd peremptor; ſo that if Actions before them be not call'd the Day to which the Citation is given, the Citation is null, & *perit inſtantiâ*, *Act* 79. *Parl.* 11. Ja. VI. *Vide Obſerv.* on that *Act*.

XL. By this Act it is declar'd, *That the Rolls and Regiſters be put in Books, and have the ſame Strength that the Rolls had*: For underſtanding which, it is fit to know, that both in Parliament and Exchequer there were no Regiſters, but Rolls. And by this Act the Rolls are ordain'd to be turned into Books, and theſe Books are declar'd to be as authentic as their Originals, and the Clerk is yet deſign'd Clerk of the Council, Regiſter, and Rolls.

XLI. This is the only Act by which Counterfeiters of Money are puniſh'd by Death; and yet this Act properly ſtrikes againſt the Counterfeiters and Coiners of Copper-money only, which in our Law is call'd, *Black Money*.

It has been doubted, whether the Officers of the Mint could coin Copper-Money without expreſs Permiſſion; but it was lately found they could not, becauſe Coining is *ex ſua natura inter Regalia*. 2. There have been ſeveral Warrants expreſly granted to the ſaids Officers themſelves, for coining Copper-Money, and determining the Quantity to be coined, and the Rates to be follow'd, which had been needleſs, if this could have been done without a Warrant. 3. There is ſo great Profit to the Coiners, and ſo great Loſs to the People, by coining Copper and black Money, that it was neceſſary the Coining ſhould have been determin'd. 4. It had been unneceſſary and abſurd to have diſcharged the Counterfeiting and Currency of black Money by this *Act*, if it had been lawful to have coin'd without a Warrant. And whereas it was alledged, that black Money was coin'd in *England* without Warrant: To this it was anſwer'd, That ſuch Farthings, &c. paſt only in the Place where they were coin'd, in *England*; but what paſſes in one Place of *Scotland*, paſſes through all. *Vid. Annot.* on *Act* 28. *Parl.* 6. Ja. II. *ſupra*.

# PARLIAMENT VI.

XLII. The Deſign of this *Act* is to ſhew, that in Reductions of Decreets of inferior Courts before the Parliament, the Defender is not allowed to propone Defences that were competent and omitted in the firſt Inſtance; and yet in Reductions of Decreets of inferior Courts before the Seſſion, Alledgances, though competent and omitted at the Time of the firſt Decreet, are receivable by the Lords, eſpecially if the Decreets be in Abſence.

*NOTA*, That Dilators might have been then proponed *ſeparatim*; but now, after a Dilator is repelled, all the other Dilators muſt be propon'd together.

*NOTA* 2. It is clear by this *Act*, that Decreets of inferior Courts were reduced before the Parliament; but theſe Lords were then not what our Seſſion is now, the Seſſion being then a Committee of Parliament, as is alſo clear by this Act.

*NOTA*, 3. That *Brieves of Mort-anceſtrie* (which are now call'd *Brieves for ſerving of Heirs*) were then led and expede in Juſtice-airs, though it was ſtill by an Inqueſt, as this *Act* bears; and if then Difficulties did occur in ſerving of Heirs, it is clear that ſuperior Courts might give their Opinion upon theſe, though they cannot ſerve an Heir: And thus Two ſeveral Perſons having raiſed *Brieves* for ſerving themſelves Heirs to Captain *Roſs*, they were advocated from the Macers; and it was debated before the Lords, what Probation was ſufficient to exclude the King as *ultimus Hæres*, albeit it was alledg'd, That this was only proper to be debated before the Inqueſt: And yet though the Lords may determine how a Thing

ACT may be proven, & *ipſum modum probandi*, as in that Caſe where the Debate did run, Whether the being habit and repute Couſins, was ſufficient *in agnatione antiquâ*; yet the Lords, in the Caſe *Forreſter* contra the Heirs of the Laird of *Wrightſhouſes*, refuſed to conſider the Probation itſelf, and the Objections againſt the Writs produc'd; but remitted the ſame to the Inqueſt, though it was alledg'd, That it being objected here, that the Writs produc'd for Probation were vitiated, the Lords could only judge this as being *ſpecies falſi*: But withal, the Lords declared, That if the Inqueſt deſired to know whether the Papers were vitiated, they would give them their Opinion therein. The Lords of the Seſſion themſelves have been ſometimes the Inqueſt, as in ſerving King *Charles* the Firſt, Heir to Queen *Ann* his Mother, and King *Charles* the Second, to the Duke of *Lennox*, though it was alledged that this was inconvenient, becauſe no other Judge could reduce their Verdict: But certainly, either the Parliament might have reduc'd it, and found them guilty of Error, or the Lords of Seſſion might have reduc'd their own Verdict upon new Probation; for in this Caſe they proceeded, not as ſupreme Judges, but as Members of Inqueſt. The Parliament has been ſometimes the Inqueſt, as in ſerving the Earl of *Mar* Heir to his Mother.

**XLIII.** BY this *Act* the Party put to the Horn for Slaughter, is to find Caution before he be relax'd, not only to compear to underly the Law, but to pay Twenty Pounds for his Eſcheat Goods; and this is to this Day expreſt in all Relaxations.

**XLIV.** *VIDE Obſerv.* on *Act* 38. *Parl.* 4. Ja. IV.

**XLVII.** BY this and by the firſt Act of this Parliament, it is clear, that that Parliament did delegate ſome of their Number, not only in ſome particular Caſes, but with a general Power to repreſent them in all Things, which ſeems hard; for that were to make and create a new Parliament: But here their Power was delegated only as to debateable Caſes; for theſe Lords were then in Place of the Seſſion: And I have heard it debated, If the Council could delegate their Power to any of their Number, as to all Things, for that were to make a new Council; and ſince the King impowered only Nine to be a *Quorum*, they might not impower a fewer Number: Nor were it fit for the People to have the ſupreme Power committed to ſo few, *nec poteſt delegatus delegare*; nor can the Juſtices, nor Commiſſioners for Teinds, make ſuch Committees, though they are as ſupreme as the Council. *Vide Obſerv.* on the laſt *Act*, 10. *Parl.* Ja. III.

**XLVIII.** BY this Act it ſeems that the Council may reduce the Verdicts of Inqueſts, and Sentences of the Juſtices, though the regular Way of queſtioning Aſſizers, who aſſoilzie, be by a Summons of Error before the Juſtices, and a new Inqueſt of Forty Five Perſons; and *de facto* the Council do cancel ſuch Verdicts and Sentences before themſelves, as they did in *George Graham*'s Caſe; and ordinarily they mitigate the Sentences of the Juſtices.

*NOTA*, The Books of *Regiam Majeſtatem* are by this Act called *His Majeſty's Laws*, and the Place here related to is *Lib.* 1. *R. M. Cap.* 14.

**XLIX.** BECAUSE the Riches of this Realm conſiſt chiefly in our Fiſhing, therefore Buſhes are ordain'd to be made, ſince theſe are able to ride out in Storms, which leſſer Veſſels cannot do; and it is beſt Fiſhing when the Waters are troubled: This is renewed by the 49. *Act*, *Parliament* 4. Ja. IV.

**L.** THOUGH by this Act, he who tines his Action is to pay Forty Shilling of Expences; yet the Modification is left arbitrary to the reſpective Judges, conform to the Civil Law, which appoints *Condemnationem in expenſas & litium damna contra temere litigantes, Inſt. hic. depen. temere litigantium*, §. 1. And by the 43. *Act*, *Parl.* 11. Ja. VI. the Defender pays Twelve Penies out of every Pound to the Lords, and the Defender's Expences at the Lords Modification.

# *PARLIAMENT* VII.

**LII.** BY the Civil Law, he, who is to ſucceed as Heir, is ſtill to be Tutor of Law; but becauſe this could not well be, where the immediate Heir was himſelf under Twenty Five Years: And therefore by this it is appointed, That the Age of a Tutor of Law, or *Tutor legitimus*, ſhall be the Age of Twenty Five Years, though the Age of Majority be Twenty One, becauſe it requires greater Experience to govern other Mens Affairs than our own; and if the immediate Heir be not of that Age, the next Heir who has attain'd to that Age, is to be Tutor. And by the Civil Law, no Man could be a Tutor, even by a Teſtament, till he attain'd to that Age, *Inſt. qui teſtament. tutor.* § 2.

By this Act alſo, the neareſt Agnate, that is to ſay, the neareſt of the Father's Side, is to be Tutor, which was conform to the old Civil Law; but *Juſtinian*, by the *Nov.* 118. did take away this Difference betwixt Agnates and Cognates, both as to Succeſſion and Tutories, and we in both follow the old Law, and not this *Novel*.

BY this Act, the Laws called *Leges Burgorum*, bound in with *Reg. Maj.* are declared a Part of our Law, and the *Chapter* particularly related to is *Cap.* 125. LIV.

THOUGH this Act appoints only the Heirs of *Barons, Gentlemen and Freeholders to have Heirſhip-Moveables*; yet by our Law, all Prelates, Barons and Burgeſſes may have Heirs, and theſe Heirs have Right to the beſt of every Thing that belong'd to their Predeceſſor, as their Heirſhip-moveable, conform to a Roll, expreſſing what is Heirſhip-moveable; a Copy of which Roll may be had from the Clerk of *Edinburgh*. The Reaſon why moveable Heirſhip was allowed only to Prelates, Barons and Burgeſſes, ſeems to be either becauſe theſe being the only Three States of Parliament, they only ought to be allow'd ſuch conſiderable Pleniſhing, as Heirſhip-moveables; or elſe becauſe in thoſe Days none but Perſons of theſe Qualities could have ſuch Moveables. Under the Word *Prelates* are comprehended all benefic'd Perſons; by Burgeſſes, are underſtood all Tradeſmen, and others, trafficking or working within Burghs, but not honorary Burgeſſes; by Barons, are underſtood all who are infeſt in Lands, though not erected in a Barony, and that Maxim, *ſemel baro, ſemper baro*, is to be interpreted preſumptive; ſo that he who is infeſt in Lands is preſumed to die infeſt: But if he was deveſted before his Death, either by Compriſing, Reſignation, or otherwiſe, he cannot be counted a Baron, and have an Heir, *January* 27. 1636. *Straton* contra *Chirnſide*. Theſe Words (*of the beſt of ilk Thing*) muſt be interpreted *de corporibus*, but not *de quantitatibus & rebus fungibilibus, quæ pondere, numero vel menſurâ conſtant*, as Money, Cloth, *&c.* and ſo the Stool of a Salt-pan, which was out of Uſe, was accounted but Iron, and fell not under moveable Heirſhip, *Had.* 1497. *Reid* contra *Thomſon*. *Item*, Where there are a Dozen of Spoons, or moe, the Heir ſhall have a Dozen, if they be fewer, he gets but one Spoon, *Dict. Cap.* 125. *L. Burg.* which Cuſtom hath extended, not only to other Things that go by Dozens, but likewiſe ſo as theſe Things that go by Pairs, and are of one Uſe, muſt belong to the Heir; and thus the Heirſhip of Oxen was found to be a Yoke, *July* 20. 1610. *Black* contra *Kincaid*. *Dubitatur*, 1. If the appearand Heir of a Man, who has only a Diſpoſition, but is not infeſt, may have moveable Heirſhip? *Dubitatur*, 2. If the appearand Heir of him who has an Aſſignation to a Reverſion of Lands, may have moveable Heirſhips, ſince Aſſignations to Reverſions are real Rights?

BY this Act it is declar'd, That the Act ordaining perſonal Obligations to preſcrive in Forty Years, was to be interpreted ſo as to extend to all Obligations prior to that Act, which ſeems hard; for theſe who had theſe Obligations, were *in bona fide* not to do Diligence: And therefore ſome Time ſhould have been allowed to do Diligence, as Thirteen Years were allowed in the Act of Preſcription 1617. And therefore it would ſeem that the *Act* 29. *Parl.* 5. Ja. III. ordaining perſonal Obligations to expire in Forty Years, rather declares what was Law before, and that ſuch Preſcriptions have been formerly allow'd here, upon the common Law, or ſome old Act; for this Statute likewiſe ſays, *The Time of the making of the ſaid Acts*: So that it appears there have been other Acts beſides that One, to which this relates. LV.

RETOURS to this Day expreſs the old and new Extent: By the *old Extent* is meant, that to which the whole Lands of *Scotland* were valued by the Firſt general Valuation; and by the *new Extent* is underſtood the Second Valuation, which was long after the former. The *old Extent* is ſaid in all Retours to be *tempore pacis*, and the new *tempore guerræ*, or *belli*; the Reaſon of which ſome think to be, that the new Extent being made in Time of War, there was a Neceſſity to highten the Valuation for maintaining the War; theſe Caſualities being the greateſt Part of the King's Revenue: Whereas the old Extent is very inconſiderable, being in Time of Peace, when there was no Neceſſity for any Addition to the Revenue, and when the Value of the Money was very mean. LVI.

BY this Act, Four of the old Council are to ſit with the new Council: But this Act is now innovated by the poſterior different Conſtitutions of private Burghs; *Edinburgh*, and many other Burghs having far more, whilſt others have but the Numbers here preſcribed, or fewer. And as to *Edinburgh*, the Manner of chooſing the Magiſtrates and Council thereof, is regulated by King *James* the Sixth his *Decreet-arbitral*, commonly call'd the *Sett. Vide* Ja. III. *Parl.* 5. *Act* 30. LVII.

ACT LVIII. THE Superior not entring to his Superiority, to the Effect he may enter, his Vaſſal tines his Superiority for his Lifetime: And though this Act determines not for whoſe Lifetime the Superiority is to be loſt; yet by an Act of *Sederunt, Anno* 1634. it is ordain'd, *That the Superior tines his Superiority for his own Lifetime, and not for the Vaſſal's Lifetime*; and declares this to be the Meaning of the Act.

LX. BY this Act, it is clear that ſtealing of Dogs, Hawks, and the like, is not to be puniſh'd as Theft, but only by a Fine or Penalty of Ten Pounds; and in Effect this is not *Contrectatio rei alienæ lucri faciendi cauſa*, theſe Beaſts being rather uſeful for Sport than Gain: But it may be doubted, if a Fowler, who makes it his Trade, & *ita lucrum facit*, may not be puniſh'd as a Thief, for ſtealing another poor Fowler's Dog, who lives by that Trade, and whoſe Dog is his Pleugh; and eſpecially ſince ſuch Dogs are now bought and ſold.

LXI. THIS Act containing the Pains of ſuch as break Dovecotes, Cunninghares, &c. is altered, and the Penalty hightned by ſubſequent Acts of Parliament, *viz.* by the 84. *Act*, 6. *Parl.* Ja. VI. and by the 3. *Act, Parl.* 19. Ja. VI. But theſe Acts are without Prejudice of putting all former Acts to Execution, made againſt the foreſaid Crimes.

LXII. THIS penal Statute againſt Ferriers not making Bridges, is in *Deſuetude*, as are the Prices here expreſt. *Vide Act* 39. *Parl.* 3. Ja. I. *ſupra*, and *Act* 20. *Parl.* 4. Ja. III.

## *PARLIAMENT* VIII.

LXIII. IT would ſeem by this Act, that all ordinary Actions muſt be firſt purſued before inferior Courts, which is likewiſe appointed by the 105. *Act*, 14. *Parl.* Ja. III. But now any Action may be purſu'd before the Seſſion or Parliament in the firſt Inſtance: But there can no Action be raiſed before the Parliament, without ſpecial Warrant firſt paſt in the Articles, for bringing the ſame before the Parliament. *Vide Not.* on *Act* 16. *Parl.* 6. Ja. II. *Act* 76. *Parl.* 19. Ja. II. and 27. *Act*, 5. *Parl.* Ja. III. *ſupra.*

LXIV. BY this Act, which is in preſent Obſervance, ſuch Aſſiſers as aſſoillie a Pannel unjuſtly, are to be purſued for Error; but ſuch as condemn him unjuſtly, are not: The Reaſon whereof ſeems to be, That the Lawgivers preſum'd, that no Aſſiſer would condemn unjuſtly, but that probably they might ſhew Favour in abſolving; and if Aſſiſers were puniſhed for condemning, they would never condemn; and ſince they get no Salaries, they ſhould not be ſeverely uſed. But tho' we have no Law allowing Aſſiſes of Error againſt ſuch as condemn; yet it may be alledg'd, that Aſſiſers may be purſued, if they condemn a Man without any Shadow of Probation.

2. THIS Act appoints, That the Aſſiſers who are to judge of the Error, be noble Perſons; for theſe that are to judge of the Error of others, ought to be more judicious than they: But by a *Statute Seſſ.* 1591. *C.* 117. it is declared, that by noble Perſons is meant only *Landed-Gentlemen.*

3. THE Error muſt be inferred upon Principles and Grounds, which were repreſented to the Aſſiſe at the Time of the Verdict, tho' the Retour may be reduc'd upon other Grounds than ſuch as was then repreſented, as is clear by the *Act* 13. *Parl.* 22. Ja. VI. It is alſo appointed by this Act, That tho' the Verdict be reduced, yet the Perſon aſſoillied unjuſtly cannot thereafter be puniſh'd; there being *jus quæſitum* to him by the Verdict, and upon the ſame Principle. By the 91. *Act, Parl.* 11. Ja. VI. if any ſpeak to the Aſſiſe after they are incloſed, the Verdict is declar'd null; but the Pannel being thereby acquit, cannot thereafter be accuſed.

4. THE Place of *Reg. Maj.* cited, but not expreſt in this Act, is *Lib.* 1. *C.* 14. where an Aſſiſe of Error is ſaid to conſiſt of *Twenty four leil and lawful Men*, tho' they are call'd here Twenty five noble Perſons.

5. IT may be doubted from this Act, whether, tho' the Pannel be not aſſoillied, yet if any or moe Aſſiſers who voted to aſſoillie, notwithſtanding of the clear Evidences to the contrary, may not be purſued as *temere jurantes ſuper Aſſiſam*, ſince he is guilty of Perjury; and Perjury is inferred from an unjuſt Oath, and not from the Effect. And though it may be pretended that he follow'd his private Knowledge, yet that cannot defend, ſince this may be

urg'd for all of them, if all ſhould aſſoillie; nor could any Thing deter each particular Aſſiſer more, than that each may be found guilty: Whereas if they thought that they would not be liable, except the major Part aſſoillied, they would adventure upon Aſſoillieing as an uncertain Event. But yet the Juſtices inclined not to this Opinion, ſince no Error was ever purſued, except where a Perſon guilty was freed, this being the *vindicta publica* allow'd in that Caſe.

It is likewiſe obſervable from this Act, That the Aſſiſers committing wilful Error, ſhall firſt be called before the King and His Council, who ſhall give them a great Aſſiſe; and therefore His Majeſty's Advocate having purſued an Aſſiſe of Error in *July* 1681, He firſt called the Perſons who had committed the Error before the Privy Council, and asked at every Man judicially, whether he owned his Verdict or not; and theſe that owned not the Verdict, were not inſiſted againſt criminally: But when this Cauſe came to be called before the Juſtices, it was alledged for them, 1. That the Verdict bearing only, that the major Part had aſſoillied, & *non conſtabat* who had aſſoillied, and who condemned, which ſhould hold much more after the Act of Regulations, in *Anno* 1672. by which it is appointed, that the Aſſiſers ſhould mark in their Verdict, who aſſoillied or condemned, to the End it might be known who ſhould be purſued for Error. But this was repelled; becauſe the King being prejudged by the Verdict, their giving in the Verdict, made all Criminal, and ſuch as were free ſhould prove their Innocence; for elſe it ſhould be impoſſible for the King to be able otherwiſe to prove the Guilt, which ſhould hold much more now, becauſe the Aſſiſers had, by the Regulations, an eaſy Remedy for preventing this, & *ſibi imputent* who did not mark who aſſoillied, and who condemned; and though theſe Regulations introduced that, as a further Remedy for clearing this Matter, yet that was not neceſſary; for there were Aſſiſes of Error before Aſſiſers were ordained to be ſo marked. 2. It was alledged, that this was not willful, nor by partial Means, which Partiality behoved neceſſarily to be proven by the Words of the Act. But this was repelled; becauſe the Error being clear, the Error behoved neceſſarily to be wilful, and by partial Means; nor was it poſſible to prove theſe occult Qualities otherwiſe than *ab effectu*. 3. It was alledged, That there being Fourſcore upon the Pannel, the Difficulty of differencing the Probation might excuſe from wilful Error: but this was repelled; becauſe the Probation adduced was ſo clear. 4. By this Act, Aſſiſes of Error are only to be allowed, where the *Perſons indited are ſhown before the Aſſiſe*, in the Aſſize of Error; but ſo it is, the Perſons aſſoillied by the former Aſſiſe were forefaulted in Abſence, and were neither then nor now ſhown to the Aſſiſe; and the Reaſon of this Speciality is, becauſe if the Perſons aſſoillied were preſent, they might prove their own Innocency, and ſo clear likewiſe theſe who aſſoillied them. But this was repelled; becauſe by theſe Words, *Shown before the Aſſiſe*, is only meant, that their Deſignations and not their Perſons ſhould be ſhown to the Aſſiſe of Error; for elſe there could be no Aſſiſe of Error in Forefeitures in Abſence; and though the Perſons were preſent, yet they would not be admitted *hoc ordine*, to clear their own Innocence, and the Aſſiſers ſhould have aſſoillied, or condemned according to the Probation then led.

FOR Explication of this *Act*, *vid.* Note on *Act* 143. *Parl.* 13. Ja. I. LXV.

THIS *Act* is explained in the *Obſerv.* on the 17. *Act* 1. *Parl.* Ja. VI. LXVI.

BY this *Act*, Deeds done, and Rights made by furious Perſons, or Idiots are reducible, not only from the Date of the Brieves, but from the Time that theſe Perſons were found to be Idiots or Furious; for the Verdict of the Inqueſts upon ſuch Brieves is declaratory, and finds that theſe Perſons were ſuch from ſuch a Time. LXVII.

*Obſerv.* THAT albeit, from the Stile of the Brieve, of old a Furious, or Idiot's Deed could only be reduced from the Date of the Brieve, and that by this *Act*, ſuch Deeds be only declared to be reducible from the Time that the Inqueſt found that the Granter was Furious or Idiot; yet the Granter himſelf being convaleſced, may reduce Deeds done by himſelf, though there was neither Brieves nor Inqueſt, finding him Furious, the Fury being clearly proven, there being no Reaſon that the Negligence of *Agnats* or Friends in not raiſing Brieves, ſhould prejudge the furious Perſon, 21 *Feb.* 1632. and which ſeems yet harder, the Heir of the furious Perſon will be allow'd to reduce, though there was no Brieve nor Inqueſt in his own Lifetime; and it is very hard to know his Condition after Death, *July* 26 1638. for *ſententia aut decretum judicis non facit furioſum ſed declarat*; but there is this Difference, that if the furious Perſon was declar'd by an Inqueſt, that Verdict proves *per ſe*, as to all Deeds done after; but if this Idiotry or Furioſity, was not found by an Inqueſt, it muſt be proven by Witneſſes, and when the furious Perſon is re-convaleſced, Deeds done by him after that are valid, though there be no Declarator. And if there be only lucid Intervals, the Deed is preſum'd to have been done in the Fury or lucid Interval, according as the Deed it ſelf is reaſonable or unreaſonable. And for clearing of this, the Lords in a Caſe, *Stewart* contra *Stewart*, ordain'd Witneſſes to be led before Anſwer, to clear what Condition the Granter

ACT ter was in at the ſubſcribing of the Deed contraverted; and it would ſeem that the Preſumption lies for its being done during the Fury, and not during the lucid Interval, if the Granter was found furious by an Inqueſt; becauſe this Act of Parliament ſays, *That frae it may be known by the Inqueſt, that the Perſons are Fools or Furious, all Alienations made by them ſhall be null.*

*Obſerv.* 2. This Act of Parliament ſtrikes only againſt natural Fools and Idiots; and therefore where Men become Idiots, by doting or old Age, though they cannot recover; or by Sickneſs where they may recover: It was thought that they could not be found Idiots by an Inqueſt. And indeed this were very dangerous; for many who have been very famous and great Men, might have been thus affronted in their old Age or Sickneſs; or at leaſt the Exchequer will not grant Tutories dative to the neareſt Agnates, until their Condition be firſt try'd by an Inqueſt, though the Cravers offer to prove the ſame by Witneſſes, beyond all Exception: And thus it ſeems, that though Deeds done by Idiots or furious Perſons, may be declared null by Way of Action; yet themſelves cannot be declar'd Idiots otherwiſe than by an Inqueſt.

*Obſerv.* 3. That though all Deeds done by furious Perſons, are here declared null; yet ſometimes they may oblige themſelves validly as Abſents, and Pupils may be obliged, *L. furioſus ff. de act. & oblig. & L. ſi a furioſo ff. ſi cert. Pet. vid. Act* 18. *Parl.* 10 Ja. VI.

*Obſerv.* 4. From theſe Words, *and though it be known by the Inqueſt*; that the Inqueſt may find a Perſon Idiot or furious upon their proper Knowledge; for they are both Judges and Witneſſes by our Law. *Vid. Obſerv.* on the 18 *Act* 10 *Parl.* Ja. VI.

LXVIII and LXIX. By the Act 68, Money and Gold being cry'd up, that is to ſay, the Value of Coins being raiſed by the Parliament here, which is now uſually done by the Council (both as to foreign Coins and our own) the Parliament did by the 69 *Act*, ordain *that all Debts ſhould be paid with ſik Money, and of the ſame Price as the Money had Courſe before this Proclamation and Act*; which was only to take place, where the Terms of Payment were by-paſt before the Act; which makes me think, that the Reaſon of the Act was, becauſe the Parliament thought it juſt, that no Man's Breach of Obligation & *mora,* ſhould be advantageous to him; and if the Creditor had got his Money in *ſpecie,* he might have made other Uſe of it, by carrying it abroad, *&c.* But yet now all Debts may be paid, according to the Courſe that Money has the Time of the Payment; for as the Money may be cry'd up, ſo it may be cry'd down, and to bring both to an Equality, the Debitor and Creditor run an equal Hazard; for whatever Difference may be as to the taxing the Price of other Things, *ſi æſtimatio rei creditæ creverit aut decreverit*; yet in Money *perpetua eſt æſtimatio, L.* 1. *ff. de contrahend. Empt.* For clearing of which Queſtion, *vide Vin. Queſt. Select. Lib.* 1. *Cap.* 39. and ſo this Act is in *Deſuetude, vide Act.* 19. Ja. III. *Parl.* 3. But tho' Debts upon private Obligations were to be paid with Money, at the ſame Avail that the Money was at the Time of the Contract, and not the Time of the Payment; yet the King's Taxations and publick Dues were by the King's own Conceſſion, to be paid according to the Value of the Money at the Time of the Payment, and are not to be exacted in Money, according as the Money was worth before it was cry'd up. *Vide* laſt *Act Parl.* 3. Ja. III.

It has been much doubted, whether it was true Policy to cry up Money; for tho' this ſeems to be an Encouragement to Foreigners to export our Commodity, of which we have too much, and to import Money of which we have too little; yet it is urg'd on the other Hand, that in crying up Money we do but undervalue our own Commodity and our own Land, and raiſe the Value of Money, which is the Commodity of a foreign Country, ſuch as *Spain,* and other Places who have Mines. As for Inſtance, if we have Uſe for carrying our Money abroad, Foreigners will only give us Commodities conform to the intrinſic Value, for they will not conſider our raiſing of it; and ſo he who got the Money which was ſo raiſed, is cheated in as much as the Money is rais'd above the intrinſic Value. 2. As to our own Commodities at home, either they are rais'd to the ſame Proportion with the Money, and then foreign Merchants will not bring in Money for our Commodity, becauſe they can gain nothing by bringing it in, and ſo we loſe the Deſign of raiſing our Money, or elſe the Commodities are not rais'd in Value to the Money, and ſo the foreign Merchant does only cheat us. As for Inſtance, if our Money be rais'd a Tenth Part, the foreign Merchant gives us only Nine Pieces for Ten. 3. This raiſes the Exchange to our great Loſs; for he who draws the Bills upon *London* or *Paris,* conſidering that our Ten Pieces are but Nine, there he will add the Value of a Tenth Piece to the Exchange. 4. If foreign Princes find we have Advantage by this raiſing of our Money, they will either raiſe their own to the ſame Proportion, and then we ſhall have no Gain; or to a higher, and then we ſhall have Loſs. And at beſt, different Raiſings of Money will occaſion but great Variation, and Uncertainty in Coins.

LXX. COURTS of *Guerra* here forbidden, ſeem to have been Courts holden upon Neighbour-feud and Riots, and *Skene* founds them upon § *ult. Tit.* 17. *de pac. tenend. Lib.* 2. *de Feud. Si miniſteriales alicujus domini inter ſe Guerram habuerint, comes ſive judex in cujus regimine eam fecerint per leges & judicia ex ratione proſequatur.*

# PARLIAMENT IX.

LXXI. THIS Act is ratify'd by the *Act* 30. *Parl.* 11. Ja. VI. *Vide Obſerv.* on that Act.

# PARLIAMENT X.

LXXIII. THO' all Men be allow'd to bring in Victual from foreign Countries by this Act, yet the Importation of Victual from *Ireland* is prohibited, by *Act* 3. *Seſſ.* 3. *Parl.* 2. Ch. II.

LXXIV. THE Act concerning Cruives, is explain'd in the *Act* 11. *Parl.* 1. Ja. I. which is the Act here related to.

LXXV. THIS Act appointed the taking more than juſt Fraught to be a Point of Dittay, becauſe it was Oppreſſion, and irregular Exaction; and this is ſtill taken up as Dittay in Circuit Courts; yet the Council does alſo puniſh it; and I think, the Maſter of the Ground where the Ferry is, may puniſh ſuch irregular Exactions.

LXXVI. THE Unlaw of ſuch as burn Muirs is by this Act Five Pounds, which is renew'd *Act* 71. *Parl.* 6. Ja. IV. but by the 11. *Act*, *Parl.* 4. Ja. V. the Puniſhment is Five Pounds for the firſt Time, Ten for the Second, and Twenty for the Third Time; and theſe Penalties are ratify'd *Act* 84. *Parl.* 6. Ja. VI.

LXXVII. THE uſing other Barrels than the *Hamburgh* Meaſure is made Point of Dittay, becauſe other Barrels were look'd on as falſe Meaſure; but our Barrel now is Ten Gallons for Salmon, and Eight and an Half for Herring.

LXXVIII. THE Act here related to, is *Act* 7. *Parl.* 1. Ja. I. where this Act is explained.

LXXX. P*URPRUSION is the uſurping and appropriating our Superiors Lands or Highways*, and *Purpreſture* is much now in *Deſuetude*. The ordinary Remedy now being Actions of Moleſtation, or Declarators of Property; but Purpruſion is not abſolutely in Deſuetude: For by the 5. *Act*, 16. *Parl.* Ja. 6. it is ordain'd, *That ſuch as till the King's Parks, or Commonties, ſhall be liable in Purpruſion, and puniſh'd according to the old Laws, the ſame being try'd either by way of Moleſtation, or before the Lords of Seſſion.* And the old Puniſhment was an arbitrary Puniſhment, and the Loſs of his Lands which he held of the King. And the Reaſon why that Act did appoint the Trial to be by Moleſtation before the Lords was, becauſe of old it was only try'd by an Aſſiſe before the Juſtices, *Vide L.* 1. *Cap.* 5. *Num.* 4. & *Lib.* 2. *Cap.* 74. *R. M.* it is doubted whether Vaſſals of Regalities, building upon the Streets of Burghs of Regality, may be puniſh'd for Purpreſture, or whether the Building a Foot or Two further than formerly, even in Burghs Royal, would infer that Puniſhment.

FROM theſe Words of the Act, That *nae Vaſſal, nor Sub-vaſſal, or other Tenent under the Baron, has Power or Juriſdiction to hold a Court*; it is fit to obſerve, That this holds not only

ACT only in Purpruſion, tho' that be the Caſe mentioned in this Act; but generally, Vaſſals nor Sub-vaſſals cannot hold Courts, except they be infeft *cum curiis*; and even then they have only Power to hold Courts for Payment of their own Rents, or ſuch other Things as neceſſarily follow the labouring of Land, except the Vaſſal be a Baron; in which Caſe he has Power to judge Riots, and unlaw for Bloodwits, as Sheriffs do. This Act is not to be found in the *Black Impreſſion*.

THERE is an Act omitted by *Skene*, which is the laſt in the *Black Impreſſion*, whereby the Parliament delegates their full Parliamentary Power to ſome of their Number, for hearing ſome *Ambaciators*, and deciding ſome Cauſes, *licet delegatus non poteſt delegare*; and ſuch Delegations of the Supreme Power may be dangerous.

# PARLIAMENT XI.

LXXXII. THO' this Act appoints Barons and Lords, who led their own Men or Vaſſals at that Time to the Hoſt, to be liable for the Skaith they do in coming to the King's Hoſt; yet this Act is now, upon the Parity of Reaſon, extended to all Officers, who are now come in place of theſe. It may be alledged from this Act, that it is not lawful for ſuch as go to the King's Hoſt to take free Quarter, or Meat and Drink *gratis*, which we call Free-quarter; which may be further clear from *Cap. 5. Stat. 1.* Rob. I. where theſe that come to the Hoſt are ordain'd to be ſerv'd for their Money, and that they take nothing but at the Sight of the Bailies and others there mentioned, under the Pain of being puniſh'd as Robbers. But it is ſtill doubted whether the Country may be put to be the firſt Advancers, when the Militia is rais'd in ſuch Haſte; that theſe who are remote cannot provide preſent Money, and the Country into which they are ſent have, by their Irregularities occaſioned their Coming, it being unjuſt that innocent Shires, who ſend in their Militia, ſhould be put to Expences in levying and entertaining Men to repreſs the Irregularities of others.

LXXXIII. IT is obſervable from this Act, that it is not the Parliament but the King, without mentioning Conſent of Parliament, who commands the Proprietars of Caſtles to furniſh them for Defence againſt the Enemy, with Victual and Artillery; and the Reaſon of this is, becauſe there was no Fort nor Strength, or *turris pinnata*, call'd *Tower-houſes*, allowed to be built in *Scotland*, without an expreſs Warrant under the King's own Hand; this being one of the Effects of his Prerogative, in the ſole diſpoſing, and making of Peace and War. And ſince Arms cannot be born without His Licence, much leſs ſhould Strengths be built. And from theſe Grounds, and the Practice of other Nations, it was contended lately, That the King may garriſon any Man's Houſe, when He and His Council find the having a Garriſon in that Place, for maintaining the Peace of the Country, is neceſſary. But *Craig* is of Opinion, that it is Treaſon, or at leaſt Purpreſture, to deny the King the Uſe of our Caſtles, or Towers in ſuch Caſes, *Jure Anglorum turres omnes, quia ad defenſionem, ſeu munitionem, regni extructæ tantum præſumuntur, ad regem pertinent, ad quem & regni defenſio; quod ſi idem & jure noſtro obſervari quis dicat, non, ut opinor, aberrabit: cur enim qui turrim ſive fortalitium ſuum regi denegat, crimen læſæ Majeſtatis incurrit, magis quam ſi equum, aut ædes, aut rem aliam, nulla alia ratio probabilis reddi poteſt, niſi quod negatio hæc ex jure feudali, regem & dominum videtur privare jure ſui dominii, & ſpecies quædam purpreſturæ eſt; & alias res noſtras principi poſcenti poſſumus negare ſine perduellionis periculo.* Which agrees with the Opinion of foreign Lawyers, who treat of the Power of Kings in general. Fritz. *de jur. præſidii, penes quem Monarchia, is urbes, arces occupare poteſt, iiſque pro tuenda ſecuritate publica præſidia imponere poteſt.* But in this, as in all ſuch Caſes, the Prerogative ſhould not be made uſe of, except in Caſes of extreme Neceſſity; and even then the Heritor is to be repaid if he muſt hire another Houſe; as at Sea in Storms, all the Parties concern'd in the Ship are to contribute for repairing his Loſs, who for lightning and ſecuring his Ship, is forc'd to throw his Goods over board.

LXXXIV. IF a Woman who has a Conjunct-fee, alienate it during her Marriage, the Alienation is quarrellable, except ſhe ratify the ſame judicially outwith the Preſence of her Husband upon Oath, never to revoke it; and then the Alienation is valid: But though this Act ſuſtains a judicial Inſtrument under the Seal of the Judge, as a ſufficient Probation; yet now ſomething muſt be produc'd under her own Hand, or by two Notars; and the Lords would not ſuſtain the Act of Renunciation, though under the Hand of both Judge and Clerk, *February* 15. 1678. *Gordon* contra *Maxwel.* The Reaſon of which Deciſion I conceive to be, not becauſe this Act, to which the Deciſion is contrary, is only ſet down as a Memorandum, and relates a Deciſion of Parliament, without ſtatuting any Thing thereupon for confirming the ſame; for the mere ſetting down this Deciſion among the Acts of Parliament, gives it the Strength of an Act; but becauſe the Time of that Act, one Notar was ſufficient; but now, either a Woman muſt ſubſcribe herſelf, or two Notars for her.

*Obſerv.* I. THAT Deciſions of Parliament bind as Laws, though they be not ſet down as general Laws; for the inſerting them amongſt Laws, make them equal to Laws. Sometimes Deciſions by the King, are inſerted amongſt the Acts of Parliament, as *Cap.* 16. *David* II.

*Obſerv.* II. THAT though an Oath is ſufficient to confirm the Renunciation of a Jointure *ſtante matrimonio*; yet it is not ſufficient to confirm a perſonal Obligation granted by a Woman, *ſtante matrimonio,* as is decided, *November* 8. 1677. *Sinclare* contra *Richardſon* and his Spouſe: The Reaſon of which Diſparity ſeems to be, that in Conjunct-fees ſhe is *domina*, and the Obligation is not to take Effect till after her Husband's Death: But in other Obligations, where the Deſign is to bind herſelf, the Obligation is invalid; becauſe ſhe being *ſub poteſtate mariti,* cannot oblige herſelf: And upon the ſame Ground it is, that Diſpoſitions granted by Heretrixes *ſtante matrimonio,* will be ſuſtained, they having therein *plenum dominium,* as to the Property; and even perſonal Obligations for Sums of Money granted by a Woman, who was an appearand Heir; there being a Back-bond granted to her, declaring that ſhe ſhould not be thereby perſonally oblig'd, was ſuſtain'd to be the Foundation of a Compriſing; for as ſhe might have diſpon'd her own Heritage expreſly, ſo ſhe might have lawfully granted an Obligation, whereby the ſame might have been adjudg'd, *January* 23. 1678. *Pringle* and *Bruce* contra *Paterſon. Vid.* Stockman. *Deciſ.* 59.

BY the Canon Law, Laics have no Power of chooſing or electing Churchmen, *C. Quiſquis* 43. *C. Maſſana* 56. *de elect.* & *elect. poteſt.* So that the Privilege here granted, ſeems contrary to the Canon Law: But as the King of *France* had Power by the *Concordata* with Pope *Leo* X. to nominate Biſhops and Abbots, ſo our King had the Nomination of Biſhops and Abbots, and the Proviſion of them belong'd to the Pope, as is clear by the 125. *Act,* 7. *Parl.* Ja. V. Which tho' this Act ſays, *did belong to our Kings by the Privilege of their Crown,* (for Prerogative was then call'd Privilege) yet it is confeſs'd, that they deriv'd this Privilege from the Pope, *Act* 53. *Parl.* 5. Ja. IV. For underſtanding this Act it is neceſſary to know, that if the Kings, who had theſe Privileges, did not nominate within Six Months, the Pope might confer the Benefice as he pleaſed: And if the King did nominate an unfit Perſon, the Pope might refuſe him, and the King was obliged to name another within Three Months. *Vide paſt. de benefic. Cap.* 8. But our Kings not acknowledging this Power of Precluding, it is ſtatute by this Act, *That our Kings may preſent at all Times, till the Prelate named by the Pope ſhow his Bulls of Proviſion to the King and Chapter.* And tho' the King ſhould admit to the Temporality a Prelate before ſhowing of his Bulls, it will not be prejudicial to the King's Privilege of Preſentation; that is to ſay, that tho' the King had admitted a Perſon whom the Pope had rejected as unfit, he might yet of new preſent, and the Pope ſhould not have Right, *jure devoluto.* LXXXV.

FOR underſtanding this Act it is fit to know, that *regulariter beneficia vacatura* could not be purchaſ'd; and yet the Pope had reſerv'd a Power to confer even theſe, *ex plenitudine poteſtatis, Cap. propoſuit de confer. præbend.* 6. *decret.* But this Act is made to annul all ſuch Proviſions to Benefices not yet vacant. LXXXVI.

# *PARLIAMENT* XII.

THIS Act, giving the Warden Power to continue his Courts, ſhews, that the Continuance of Courts is not of its own Nature lawful; and therefore no Judge may continue his Courts except he have an expreſs Warrant for it, ſince ſuch as are cited may be thus prejudged by Delays. But ſince the King is the Fountain of Juriſdiction, it is thought the King may grant ſuch Warrants, tho' there be ſome Caſes wherein the King has reſtricted himſelf by expreſs Statute, as in Criminal Courts, which are declared to be peremptor by the 79. *Act,* 11. *Parl.* Ja. VI. where it is obſervable, that theſe Courts are declared not to be continuable by the LXXXVII.

King's ſpecial Will and Direction, to ſhew that Continuations of Courts depended upon him; and generally it is by the Will of the Letters, that it is known what Actions abide Continuation or not. And tho' the Wardens Courts be Juſtice-Courts, yet it is thought they may be continued, notwithſtanding of that poſterior Act.

LXXXVIII. BY this Act, the Breakers of the King or Warden's Safe-Conduct are puniſhable by Death, which is conform to the Civil Law, *L.* 1. *ff. ad Leg. Jul. Majeſt.* and to the Practice of other Nations, *Chriſtin. Tit.* 4. *Art.* 8. What Difference there is *inter pacem, ſecuritatem, ſalvagardiam & ſalvum conductum. Vide afflict. Lib.* 3. *Tit.* 16.

LXXXIX. THO' the ſelling or buying of corrupt Wine, after it is found to be ſuch, be declar'd puniſhable by Death; yet the ſelling corrupt Wine willingly, even before that, is puniſhable. And tho' ſelling corrupt Wine in the general be puniſhable, yet this muſt be reſtricted to the Caſe of Knowledge; for he who ſells or buys without knowing of it to be corrupt, or to have been found ſo, is not puniſhable by Death.

# *PARLIAMENT* XIII.

XC. OF old every Heritor brought his own Men to Weapon-ſhowing, and to the King's Hoſt, as is clear by the 81. *Act, Parl*, 11. Ja. III. and all theſe were commanded by the Sheriffs, Lords of Regalities, and the King's other Officers, and were called together by Letters patent under the Privy-Seal, directed to theſe Officers, as is clear by this Act; but now the Militia is commanded by Colonels, and choſen by the King, and are call'd together by Proclamation and Letters from the Council, ſubſcrib'd only by the Chancellor or Preſident of the Council. From this and other old Writs it is clear, that the Privy Seal was then the Seal of the Privy Council, but now they have a Seal peculiar to themſelves, which is call'd the Signet of the Privy Council. *Vide Annot.* on *Act* 30. *Parl.* 3. Ja. IV.

XCI and XCII. THE King's Rents of old were govern'd by the King's Maſter-houſhold and Comptroller, and the Council, but now by the Exchequer; and the Maſter-houſhold has no Intereſt in them *ratione officii,* that Office belonging heritably to the Earl of *Argile*, is now extinct by his Forfeiture; but the Office of Comptroller is ingroſſed in the Treaſurer's Office. By this Act, ſuch as detain the King's Rents are to be diſtrainzied, that is to ſay, purſu'd in the ordinary Way, *viz.* by poinding the Ground for their *Reddendo*, by Hornings upon their Tacks: But though the uplifting the King's Feu-duties was deſign'd once to have been by Quartering, yet this was thereafter found illegal; nor could the Exciſe be ſo lifted, if that Way were not warranted by Parliament. There is no ſpecial Puniſhment expreſt here againſt the Officers who detain the King's Rents; but by the Civil Law, theſe who abſtracted publick Money, or converted it to their own Uſe, *erant rei peculiatus, qui olim pœnâ quadrupli poſtea deportatione puniebantur, Magiſtratus vero, qui durante officio publicas pecunias abſtraxerunt, capite puniuntur, L. un. C. h. t.* but this Crime only holds in the miſapplying of public Money, and not in the withholding the King's Rents.

*NOTA*, This and the next Act bear not to be made with Conſent of the Three Eſtates of Parliament, but only that the Lords think expedient; by which I think muſt be mean'd, the Lords of the Articles, or elſe this and the next Act being Conceſſions of the Barons, in what related to themſelves, they were not thought fit to be drawn as Acts of Parliament, but only as Conceſſions: But I incline rather to think, that by Lords here is mean'd the Lords of Articles; becauſe the Acts 95. and 96. of this Parliament bear *the Concluſion of the Lords of the Articles,* tho' ſometimes by the Word *Lords*, are meant the Three Eſtates of Parliament, as in the 30. *Act, Parl.* 7. Ja. II.

XCIII. BY this Act the Roſe-noble was made the Standart of all the Gold, and it was of Twenty two Carrets and Ten Grain Fineneſs; but now our Gold is only of Twenty two Carrets Fineneſs, that Gold being too ſoft, and conſequently ſubject to be waſted.

By this Act alſo the Wardens of the Coinzie-houſe were firſt inſtituted, for underſtanding of whoſe Office, it is fit to know, that the Maſter of the Coinzie-houſe has the Care of Coining, and as Checks over him, are for trying the Fineneſs, the Eſſay-maſter, and for trying the Weight are the Warden, who trones the Money, and the Counter-warden, who weighs after him, and is his Check, and over them all is the General of the Mint.

ACT XCIV. BY this Act Reſpites are diſcharged, whereby Juſtice is delay'd; and 'tis here ſaid, That *Reſpites are more againſt Juſtice than Remiſſions*: The Reaſon whereof ſeems to be, that Remiſſions are only granted after ſome Trial; but Reſpites are granted more eaſily, and may be ſought more frequently, and that before the State of the Caſe be examined; nor is the Party injur'd aſſyth'd here, as in Remiſſions: For the ſame Reaſon alſo, Precepts for continuing Juſtice-Courts are diſcharged, and the Juſtices allow'd not to reſpect them, *Act* 79. *Parl.* 11. Ja. VI. and by the 47. *Act* of that ſame Parliament, they are diſcharg'd alſo; for that Act ſtrikes againſt Reſpites, as well as againſt Protections.

XCV. THE Act anent Ferries is explain'd in the Obſervations upon the *Act* 75. *Parl.* 10. Ja. III.

XCVI. OBSERVE 1. from this Act, that the Silver of *Scotland* ſhould be 11 Peny fine; for tho' this Act ſays, That *it ſhall be the Fineneſs of* 12 *Peny fine*, yet the Meaning of that Act is, becauſe 12 Peny fine is the fineſt imaginary Value; but there muſt be ſtill a Twelfth Part allow'd of Alley to make the Silver malleable. And albeit the Puniſhment in the Act, againſt theſe who work not up to this Fineneſs, be arbitrary, yet it is declar'd to be puniſhable by Death, by the 56. *Act. Parl.* 6. *Q.* M.

*OBSERVE* 2. That the ordaining this Act to take Effect after Forty Days Proclamation, implies, that regularly *Acts* may be put in Execution ſooner, as by the 20. *Act. Parl.* 3. Ja. III.

# PARLIAMENT XIV.

XCVIII. THIS *Act* is only a temporary Statute, ending with theſe who ſwore to obſerve it; but the bringing Malefactors to the Bar in ſober Manner, without Aſſiſters, is commanded by many Acts: And tho' by this Act it ſeems, that the Juſtices cannot hinder ſome of the Pannel's Friends to ſtand with him upon the Pannel, that is to ſay, to ſtay at the Bar; and that Four Friends are allow'd to the Purſuer, and Ten to the Defender, by the 41. *Act*, *Parl.* 6. *Q.* M. yet the Juſtices do ſuffer few or none to ſtand with the Pannel, as they ſee Occaſion for it.

XCIX. THE Crowner of old receiv'd the Porteous Rolls, that is to ſay, the Names of ſuch Malefactors as were to be purſu'd at Juſtice-airs; but now the Juſtice-Clerk keeps it himſelf, and gives it to the Macers of the Criminal Courts, or Meſſengers who cite the Perſons to be purſued.

C. THE Defenders in Slaughter are by this to be cited upon Six Days to find Caution, or elſe are to be denounc'd Rebels; but now if the Criminals be not in Priſon, they are to be cited to find Caution upon Fifteen Days; but if they be in Priſon, they may get an Inditement to anſwer upon Twenty four Hours.

CI. BY this Statute it is clear, that a Perſon apprehended and incarcerated, muſt firſt be maintain'd upon his own Expences; and if he be not able to aliment himſelf, the Sheriff is to aliment him upon His Majeſty's Allowance: And by a late Act of the Juſtice-Court, the Keeper of the Tolbooth of *Edinburgh* is diſcharg'd to receive any Criminal Priſoner, till he who enters him Priſoner, find Caution to aliment; for before that Act, poor People were ſtarv'd and ruin'd by their Impriſonment.

CII. THIS Act is in *Deſuetude*; for nothing is due now to Crowners, becauſe they do not attach as formerly: And this was the Price of their Pains or Fee.

CIII. THIS Act is in *Deſuetude*; for no Sheriff tholes now an Aſſiſe, the laſt, nor no Day of a Juſtice-air, except he be purſu'd for ſome particular Crime, or for Malverſation in his Office.

CIV. BY this Act, if the Sheriff hear of any Convocations, he ſhould charge them to ceaſe; and if they refuſe, he ſhould continue the Court, and purſue them, and the Puniſhment is Impriſonment for a Year: From which Act it was argued juſtly in the Earl of *Caithneſs*'s Caſe, That tho' Men refuſed to diſſipate at the Sheriff's Deſire, he could not ſummarly

ACT fall on them, and kill them; for that were too dangerous a Power to be given to any Sheriff: And all that he could do by this Act, was to acquaint the King, and then purſue them.

CV. THIS Act ordaining the Cauſes of Widows and Orphans, Kirk-men, &c. only to belong to the Cognition of the Lords, is in *Deſuetude*; and theſe Actions do properly belong to the Commiſſariot Court.

CVI. THE Burrows of *Scotland* have Liberty to meet in Time of Parliament, and to propoſe, as a Body and Third Eſtate, any Overtures for Trade; but no other State of Parliament can lawfully meet, this being a Singularity indulg'd to them for the Good of Commerce: And the ſubſequent Acts are propoſed by that Eſtate to the Parliament, and by them turn'd into Acts, as appears by the Rubric itſelf.

CVII. *VIDE Act* 12. *Parl.* 2. Ja. III. *Vide Obſerv.* on 47. *Act, Parl.* 1. Ch. II. and on *Act* 66. *Parl.* 14. Ja. II.

CVIII. THE Act here ratified, tho' not expreſt, is *Act* 30. *Parl.* 5. Ja. III.

CXI. THOUGH this Act allows the Burrows to meet every Year at *Innerkeithing* only, yet thereafter they are allow'd to meet Four Times in the Year, at what Place they ſhall think moſt expedient, *Act* 64. *Parl.* 5. Ja. VI. and the Burgh of *Edinburgh*, with Six of the reſt, may conveen them, *Act* 119. *Parl.* 7. Ja. VI. Now they meet in *July* at *Edinburgh, Perth, Dundee, Aberdeen, Stirling*, and the Provoſt of the Town in which they meet, being always Preſident without Election. And tho' the Fine of each abſent Burgh be here Five Pounds, yet it is made Twenty Pounds, *Act* 119. *Parl.* 7. Ja. VI.

CXII. THIS Act adds to the ordinary Annexations, That the King ſhall be bound by His Oath at the Coronation, that He ſhall not alienate the annex'd Property; which Oath is given by all the ſucceeding Kings.

IT is obſervable alſo in this Act, that the King's great Seal, and the Seals of all the Prelates, Lords, Barons, and Commiſſioners for Burrows, are appended, which was uſual in theſe Days, in all Conceſſions granted in Parliament; and I have ſeveral Patents of Honour granted by the King in Parliament, wherein the King's Great Seal was appended, as now it is to the Patent; and the Seals of all the Eccleſiaſtics were appended upon the right Side, and theſe of the Laics on the left Side, each Seal hanging from a Label or Tag, on which the Owner's Name was writ: And *in anno* 1558. a Commiſſion to the Lord *Seton* to be Ambaſſador in *France*, was thus ſeal'd by the King, and ſign'd by the Nobility. And by the 191 *Act, Parl.* 13. Ja. VI. the Morning-gift of the Abbacy of *Dumfermling* is ſaid to have been under the King's Great Seal, and the Seals and Subſcriptions of the Eſtates in Favours of Queen *Anne*.

CXIII. THIS Privilege was granted by *Malcolm* II. *Leg. M. C.* 3. *Num.* 4. but both that Privilege and this Statute are now in *Deſuetude*; ſo that now the Crowner has none of the Malefactor's Horſes.

CXIV. THIS Act appointing that Strangers be well us'd; and that no new Cuſtoms, Impoſitions or Exactions be put upon them, ſeems to limit the King's Prerogative acknowledg'd by the 27 *Act Seſſ.* 3. *Parl.* 1. Ch. II. By which it is declar'd, That *the King may diſpoſe and order Trade with Foreigners as He pleaſes.* A Conſequent of which Prerogative is, That He may either diſcharge Trade with Foreigners, or burden it as He pleaſes; ſince by this Act no new Impoſition can be laid on. But the Anſwer to this is, That this *Act* relates to Strangers, and not to the King's own Subjects; ſo that tho' Strangers come, they ſhould be civily us'd by this *Act*; yet they may be debarr'd by that *Act*.

CXV. THIS Act granting a Commiſſion to examine the Laws, and put them in One Book, took Effect in *Skene*'s Edition of the *Acts of Parliament*, and *Regiam Majeſtatem*; in which many of the old *Acts*, yet to be ſeen in the Records of Parliament, are left out.

*Obſerv.* THAT the Acts of Parliament are call'd the King's Laws, and not the Acts of Parliament; for the King has only the legiſlative Power, and the Eſtates of Parliament only Conſent. The Books of *Regiam Majeſtatem* are likewiſe numbred amongſt our Laws: But what is meant by the Words (*Acts and Statutes*) added in this Act to the King's Laws, and *Reg. Maj.* I do not underſtand; except by theſe be meant the Burrow-Laws, and the Statutes of the Gildry, and theſe other Books that are bound in with *Reg. Maj.*

# King JAMES IV.

## *PARLIAMENT I.*

I. BY the Twelfth *Articl. Iter. Juſt.* the Burrows had Liberty to re-pledge their own Burgeſſes from being upon Aſſiſes; which Privilege is here regulated; but now the Privilege itſelf is in *Deſuetude*; for all Burgeſſes are oblig'd to paſs upon Aſſiſes, except the Chirurgeons of *Edinburgh*, who have a ſpecial Pivilege, becauſe of their neceſſary Attendance upon ſick Perſons.

III. BY this Statute all Ships muſt come firſt to free Burghs, and no Strangers can fraught Ships; but now by the 5 *Act* 3 *Seſſ.* 2 *Parl.* Ch. II. all Burghs of Barony and Regality, may Traffick in the Product of *Scotland*, as freely as Royal Burghs. *Vid.* that Act, and the *Obſerv.* thereon. That Part of the Act diſcharging Strangers to buy Fiſh that is not ſalted, is now in *Deſuetude*.

IT was argued from this Act, in the Caſe of the Town of *Linlithgow* againſt *Borrowſtounneſs*; That the Burghs-Royal had the only Privilege of having all Goods liver'd and loadned at their Ports; and which is likewiſe clear by *Act* 88. *Parl.* 6. Ja. IV. and by *Act* 152. *Parl.* 12. Ja. VI. 2. Without this Privilege, the Burrows were not able to pay the Sixth Part of the Burdens laid upon them, in Contemplation of their Trade; ſince a clandeſtine Trade without this might be carry'd on by the Burghs of Barony and Regality; who, ſince they may retail publickly, might have the ſame Privilege as they, if they had likewiſe Power to import publickly. 3. This was moſt convenient for ſecuring the King's Cuſtoms; becauſe whereever there is Livering allow'd, the King muſt have Waiters; and upon which Conſideration, the Magiſtrates of Burghs-Royal are by the *Acts* of *Parliament*, appointed to aſſiſt the King's Cuſtomers: And whereas it was pretended, that the Privilege of Commerce was *inter regalia*; and conſequently the King might grant a free Port to any Burgh he pleas'd. 2. The Privilege of a free Port, was different from that of Livering and Loadning. 3. The Acts of Parliament cited, did only diſcharge Strangers to Load and Liver; which is yet more clear by the *Act* 120. *Parl.* 7. Ja. VI. To which it was reply'd, That the King and Parliament, having formerly granted the ſole Power of Loadning and Livering to free Burrows, it was no Diminution of His Power to aſſert, that He could not give a new Grant of that to any, whereof He was formerly diveſted. To the *Second* it was reply'd, That the ſole Privilege of a free Port, granted by a King to a Burgh of Regality, or Barony, can extend no further, than that thereby they may have the Privilege of bringing into their Port, the Goods proper only to be ſold by them. To the *Third* it was reply'd, That this Act diſcharges Strangers and others to liver at any Place, except at the Ports of Burghs-Royal: And tho' in that 120 *Act*, *Parl.* 7. Ja. VI. this Act is repeated, as relating only to Strangers; yet in the next Line, Strangers and others, are in that 120 again diſcharg'd. Likeas by the Acts of Parliament, the ſole Privilege of *Loſing* and *Looſing*, is declar'd to belong only to Burghs-Royal; which in ſea-faring Terms, ſignifies *Loadning* and *Unloading*.

IV. BY the *Act* 85. *Parl.* 11. Ja. III. the Rents of Churches, or Benefices, whereof the King is Patron, are declar'd to belong to Him *ſede vacante*, by the Privilege of His Crown: And this was ſo formerly declar'd by the 7 *Cap. Stat.* 2. Rob. I. And *Skene* there obſerves, That *cum alicujus beneficii Eccleſiaſtici patronatus pertinet ad Regem terræ ſi quæ ſunt ei annexæ pertinent quodammodo ad Regem*: And therefore by this Act it is appointed, That

ACT it being declar'd by the beſt and worthieſt Clerks of the Realm, that *if any Church-man receiv'd, and purchas'd ſuch a Benefice at* Rome, *they ſhould be puniſh'd, and theſe who ſupplied them.* This Declaration from Clerks was requir'd; becauſe the Secular would not meddle with Church-men in theſe Days, till Church-men had ſome Way declar'd them guilty.

# *PARLIAMENT* II.

VII. THAT Part of the Act appointing the Intromiſſion with the Kirk Rents to be a Point of Dittay, (that is to ſay, to be a Crime) is now in Deſuetude; for they have no other Privilege here more than Laics: But to intromet with their Rents, either by Arms or open Force, is the Crime of Oppreſſion with us, and was puniſhed by the *Romans, Lege* Julia *de vi, per deportationem in liberos homines, & ultimum ſupplicium in ſervos.*

*Obſerv.* That by this Act Parſons and Vicars are founded *in jure*, as to Teinds; for it is declar'd a Crime to intromet without a Right from them.

IX. I Underſtand not how it is ſaid here, That the King could not diſcharge any Part of the Taxation granted to Him, tho' it was granted for a particular or public Uſe; for it is ordinary and lawful to Kings with us, to diſcharge private Parties their particular Proportions, except the contrary be expreſly provided, and the Offer be ſo qualified by the Parliament. But here the King was Minor, as appears by the ſubſequent Act, or rather this Taxation being granted originally for maintaining an Ambaſſador for the King's Marriage, as is clear by the Act; and ſo *ad particularem effectum*, it could not be diverted from that particular Uſe, leſt elſe the Embaſſy ſhould have fail'd. And from this we may obſerve, that what is granted for a general and public Uſe, cannot be otherwiſe apply'd or taken away.

X. IT is obſervable from this Act that the King was Minor, and that is the Reaſon why He could not diſcharge ſomething here expreſs'd, which falls not under His annex'd Property.

XI. THE Parliament here recommends only to the King, that His Majeſty ſhall cauſe His Wardens obſerve the Days appointed for Truce, and they meddle not with it, becauſe what concerns Peace and War belongs to the King, and not to the Parliament.

XII. THE Reſtrictions here put upon the King, proceeded from his Minority.

*Nota*, Counsellors are made accuſeable to the King and Parliament of their Counſel, till the next Parliament; for the Words are, *and ſhall be reſponſal and accuſeable to the King for their Counſel.* But this was in the King's Minority, and therefore there were greater Reaſon that they ſhould have been liable for their Counſel than when a King is Major; for then He may judge of their Advice; in which Caſe, *nemo tenetur de concilio niſi doloſo aut fraudulento.* But it may be inferr'd from this Act, that *regulariter*, Counſellors are not liable for what they do, elſe this Act had been needleſs, obliging them to be liable only till the next Parliament. But it is alſo obſervable, that this Act was made by theſe who had riſen in Rebellion againſt King *James* III. under Pretext of His Son's Command, tho' in effect they forced Him when he was a Child, to head them againſt His Father, and in this Act they force Him to make uſe of their Counſel; and yet the Act bears only, *That the King humbled Himſelf to abide at their Counſel.* The ſame Perſons made an Act, declaring *that Rebellion lawful*, which is yet extant amongſt the Black Acts, but was expung'd as moſt abominable and rebellious.

XIII. THO' this Act appoints, that *our Gold and Silver ſhall be of the Fineneſs of* Bruges, yet by the 96. *Act*, 13. *Parl.* Ja. III. and 56. *Act*, 6. *Parl.* Q. M. the Silver is to be 11 Peny fine, and the Gold 22 Carret fine; ſo that the beſt Money being but 12 Peny fine, and the beſt Gold 24 Carret fine, there is a Twelfth Part of Alley allow'd in either, and ſo our Silver Work and our Coin ſhould be of the ſame Fineneſs. But this Act has been in Deſuetude as to Silver Work, for which the Gold-ſmiths alledge, that the People are to be blam'd, and not they, ſince the People will not go to the Price; and they do the People no wrong, ſince they proportion the Price to the intrinſic Value. We obſerve both in our Plate and Coin, the ſame Standart with *England*; but the Standart of the *French* Plate is finer than their Coin, to diſcourage their Subjects from having much Plate, and encouraging them to bring it to the Mint for current Money. The Reaſon that is alledged why this Alley is allow'd to both Gold and Silver is commonly ſaid to be, becauſe they are not malleable without ſome Mixture of Copper; but the contrary will appear to theſe who uſe to refine Silver with Lead, and Gold with Antimony, by which Gold and Silver may be brought to the exacteſt Fineneſs without all Mixture, and they are then moſt malleable and ſoft. But the true Reaſon why the Copper is added, is, becauſe without it both Gold and Silver would be too ſoft, and ſo too much ſubject to wearing and Loſs, as appears in the *Engliſh* Roſe-Nobles, and the Double of *Hungarian* Ducats, and the *Venetian* Cequins; for which Cauſe the Emperor now adds more Copper to his Ducats; and the *Engliſh* make no more Roſe-Nobles or any other Gold ſo fine.

XV. IS formerly explain'd in the 11. *Act*, *Parl.* 1. Ja. I.

XVI. THE Prince of *Scotland* was Earl of *Cumberland*, whilſt that Country belong'd to this Crown; but when the *Stewarts* came to the Crown, which was in the Reign of *Robert* II. their Heritage, which was *Renfrew*, &c. was erected in a Principality. That there was ſuch an Erection, is clear from the Revocations made by King *James* V. and King *James* VI. where all Diſpoſitions of Lands annex'd to the Principality are revoked, but the Erection itſelf is loſt. However, to ſupply that, the Rights made by the King bear ſtill to be as Prince when there is no Prince, and as Adminiſtrator to the Prince when there is a Prince; and the Revenue of the Principality is manag'd *in cumulo*, with the reſt of the King's Revenue, when there is no Prince; but when there is a Prince, he has a Chamberlain, who receives and compts for the Principality apart.

IT was debated *January* 1680, whether, when there was no Prince exiſting, the Vaſſals who held of the Prince, were to be repute Vaſſals holding of the King immediately; or as Vaſſals holding ſtill of the Principality, and ſo holding of a Subject, the Principality being ſtill a diſtinct See, whereof the King had only the Adminiſtration. But it was found by the Lords, that when there was no Prince they held of the King; and therefore they found, that the Laird of *Luſs*'s Marriage fell to the King's Donator, tho' it was alledged that his Marriage of theſe Lands could not fall to the King, ſince he held other Lands Tax'd-ward of the King; and he who holds Lands of the King is not liable in a Marriage for Lands holden of a Subject; and conſequently, he being content to pay the Tax'd Marriage to the King, the ordinary Avail of his Marriage could not be crav'd for Lands which he held of the Prince, who was but a Subject. The Reaſons of which Deciſion were, 1. That Appanages given to Children, do in their own Nature imply to be only temporary, and whilſt the Child exiſts to whom it is provided for an Appanage; and therefore ſince we have not the Foundation of the Principality itſelf, we muſt conſtruct it to have been thus erected. 2. By this Act it is ordain'd, that when there is no Prince, the Vaſſals of the Principality ſhall come to Parliament, and none can come to Parliament but ſuch as hold of the King. And that ſame Act ſays, *till the King have a Son*, who ſhall be immediate betwixt the King and them; which clearly demonſtrates, that till there be a Son they hold immediately of the King. 3. This is yet more clear by the 16. *Act*, 1. *Parl.* Ch. I. and the 58. *Act*. *Parl.* 1. Ch. II. whereby Lands holding of the King and Prince are *æquiparate quoad* all legal Effects. 4. When the King comes to any Eſtate *jure privato*, by Succeſſion or Forfeiture, theſe Lands alter their Nature, and the Vaſſals hold of the King as King, and are not conſider'd as holding of a Subject as formerly; and therefore the ſame ſhould hold when the Principality, by the not exiſting of a Prince, returns to the Crown. 5. By an expreſs Deciſion obſerv'd by *Dury*, it is found, that whilſt there is a Prince, the Lands of the Principality hold of the Prince; but when there is no Prince, they hold of the King. 6. When there is no Prince, the King diſpones the Caſualities, and ſometimes the Lands, as He does theſe of his own Property. And it were abſurd to aſſert, that when there is no Prince the King diſpones as Adminiſtrator, for elſe He behov'd to be comptable. Nor can there be an Adminiſtrator where there is no Pupil. But the King is term'd ſometimes an Adminiſtrator *ex errore ſtili*, or *ad majorem cautelam*, or elſe the King is truly made to diſpone, both as King and Prince, to keep up the Principality as a diſtinct Fee and Erection, leſt otherwiſe the Knowledge of the Lands might periſh, the Erection being loſt. 7. This is clear by the Practice of foreign Nations, Perez. *ad Tit.* 1. *Lib.* 10. *Cod. Num.* 10. *Terræ quæ in Appanagium dantur penes domanium ſemper manent ſolo uſu-fructu proviſionaliter conceſſo, alias contingeret Regium Domanium ſenſim diminui.*

XVIII. and XIX. MEN uſed to give their beſt Horſe, or ſome other Acknowledgment to great Men, and eſpecially to Chiefs of Clans, for their Protection; and theſe are here diſcharg'd, and are a Kind of Black-Meal. They are now intirely in Deſuetude.

ACT *Nota*, POSSESSION paſt Memory of Man is not ſufficient in unwarrantable Exactions, *& oportet conſuetudo ſit rationabilis alias non tenet.*

XX. THIS Act is in Deſuetude; for Actions of poinding the Ground, are now purſu'd for recovering bygone Annualrents in the ordinary Form of Proceſs.

XXI. THE forcing the King's Tenents to do Service, is puniſh'd as Oppreſſion by this Act, but the Puniſhment is not ſpecified; and tho' Oppreſſion be puniſh'd by Death, *Act* 42. *Parl.* 4. Ja. IV. and by the *Act* 88. *Parl.* 11. Ja. VI. yet I think that here Oppreſſion could not reach that far; and tho' it be ordain'd to be a Point of Dittay (that is to ſay, a Crime) by this Act, yet ſuch Oppreſſions uſe to be purſu'd before the Council, tho' ſome Oppreſſions may be purſu'd before the Juſtice-Court, or Council, as is clear by the 2. *Act*, 1. *Parl. Ch.* I. And Oppreſſion is a general Name for Violence, as *ſtellionatus* is in *dolo.*

# *PARLIAMENT* III.

XXIII. THE Alliance betwixt *Scotland* and *France* is here ordain'd to be renew'd, and new Privileges to be deſir'd, which were accordingly abtain'd; and the Alliance here mentioned is inſerted in the 66. *Act*, 8. *Parl.* *Q.* M.

XXIV. THE Form of the Chancellary is not to be alter'd, except in the Brieve of the Summons of Error: The Reaſon of which Exception is, becauſe by the 35. *Act* of this *Parl.* the Form of the Summons of Error is alter'd in ſome Points. But by the *Act* 13. *Parl.* 10. Ja. VI. the Stile is to be alter'd in no Letters.

XXV. BY this Act the Superior of Ward-lands, or his Donator, are obliged to maintain the Heir during the Time he has the Ward-lands, if the Heir has no other Blenſh nor Feu-lands; and tho' he have Blenſh or Feu, yet if he have not as much of either as may entertain him, or if they be appriſed, in either of theſe Caſes the Heir will have Action *ex paritate rationis.* And by the ſame Parity of Reaſon, it may be doubted whether Donators to Liferent-Eſcheats are bound to entertain the Rebels whoſe Eſcheat they have purchas'd; and it may be argued that they are not, ſince a Man is only at the Horn by his own Fault. This Donator to the Ward is obliged to aliment the Ward-Pupil, by allowing him an Aliment, and not by keeping him in his Houſe; and the Donator's Aſſigney is bound to aliment, tho' he got no Mails and Duties, if he cannot ſhew why he was excluded from getting them. *Sibbald* contra *Falconer.*

THE Sheriff of the Shire, or Baillies are warranted to take Surety of the Superior or Donatar, that they ſhall not waſte nor deſtroy the Lands during their Right, which our Practic extends alſo to Liferenters, who are bound to find Caution to keep up their Liferent-houſes and others, in the ſame Condition wherein they found them; and this is conform to the common Law: And all this Matter is learnedly treated, *Chriſtin. ad Leges Mechlin. Tit.* 14. And the Way how this Caution is to be found, is fully cleared, *Act* 15. *Parl.* 4. Ja. V. where this ſhall be explained. This Act is founded upon *Cap.* 1. *L. Malcolm* II. by which there is a mutual Contract betwixt the King and his Vaſſals, in which that King *diſtribuit totam terram regni* Scotiæ *hominibus ſuis, & omnes Barones conceſſerunt vardam & relevium de hærede cujuſcunque Baronis defuncti, ad ſuſtentationem Domini Regis.* And tho' *Arniſæus de poteſt. Majeſti. Num.* 8. inveighs againſt this Law (for which he cites *Boethius* and *John Major*'s Hiſtory) as contrary to Reaſon, that being to add Affliction to the Afflicted: And becauſe Pupils may ſerve the Superior by a Subſtitute, or by allowing a Part of the Feu to him who ſerves; yet I know no Man would refuſe Land upon this Condition. And it is preſumable, that whilſt the Vaſſal is a Pupil, he will only need an Aliment; but yet I confeſs, that, according to the very Text of the Feudal Law, Pupils are neither oblig'd to ſerve by themſelves nor Subſtitutes, *Lib.* 2. *Feud. Tit.* 26. *Cap. Si minor,* § *ſi quis deceſſ.* 5. Tho' poſterior Cuſtom introduc'd the Neceſſity of Subſtitutes, *Gloſſ. in dict.* § *Si quis.* To which we by the foreſaid Contract have added, that the Superior ſhall have the Feu, and not be oblig'd to accept even of a Subſtitute.

IT is the receiv'd Practice of *Scotland*, that the Liferentrix ſhould entertain the Heir, if ſhe liferent his whole Eſtate, which is only founded upon a Conſequence from this Act, and

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the Parity of Reaſon; but, in my Judgment, this Practice is neither warranted by this Act *argumento Legis*, nor is it founded upon the Principles of, nor ſuteable to the Analogy of Law; for as to the Act of Parliament, it (being join'd with the *Act* 15. *Parl.* 4. Ja. V. whereby it is explain'd) ordains, that the Donatar to the Ward ſhall find Caution not to deſtroy the Biggings, *&c.* as alſo, that he ſhall entertain the Minor during the Ward; but when it comes to Statute anent Liferenters, it appoints only, that they ſhall likewiſe find Caution not to deſtroy the Bigging, but it appoints not that they ſhall aliment the Heir: *Ergo*, not only is there no Warrant for the Liferentrix alimenting the Heir from this Act; but on the contrary, the Parliament having both Caſes under their Conſideration, and not having extended the Caſe of Alimenting to Liferenters, it muſt be concluded, that they deſign'd not that Liferenters ſhould aliment, *nam caſus omiſſus habetur pro omiſſo.*

II. Laws ought not to be extended at moſt but *ex paritate rationis*; and therefore tho' Liferenters and Wardatars *æquiparantur* by theſe Statutes, *quoad* the finding of Caution, that was moſt reaſonable, becauſe there was *eadem paritas rationis*, ſince neither ſhould waſte that to which they had but a temporary Right: And by the common Law, Liferenters were liable in the ſame Way, which was call'd *Cautio uſu fructuaria*; but *quoad* the Alimenting, the Superior in the Ward, or his Donatar, ſhould be in a different Caſe from the Liferenter, becauſe the Superior in Effect is but Tutor *durante vardâ*, and therefore he ſhould aliment the *Minor*; but the Liferentrix is a ſingular Succeſſor.

III. In making Contracts of Marriage, there is no more allow'd for a Liferenter, than what may be a Competency for entertaining the Liferentrix, and ſuitable to her Quality; and therefore it is againſt Reaſon, & *contra illud quod agitatum eſt inter partes contrahentes*, to take away a Part of her Aliment to aliment another.

IV. She being made *Domina* of her Liferent by her Contract, and there being *jus quæſitum* to her thereby, *quod ejus eſt auferri ab ea, nequit ſine conſenſu ſuo.*

V. Tochers are oft-times augmented in Conſideration of the conjunct Fie; and therefore 'tis moſt unreaſonable and illegal, that what was given her for an onerous Cauſe, ſhould be taken from her, and applied to the Behoof of one who repreſents the Contracter, who was bound to warrant her Liferent, and who got good Deed upon that Account: And it is unjuſt that the Husband, by ſpending his Eſtate, ſhould burden her, or that his Heir ſhould not rather want than ſhe.

VI. Whatever may be ſaid to oblige a Mother *jure naturæ*, to entertain her own Children; and I think this Aliment has been at firſt founded on that Principle of Juſtice, whereby *Donatores, Patroni & Parentes*, were only liable *in quantum facere potuerunt*, called by Lawyers *Exceptio competentiæ*; yet there is no Reaſon that a Liferentrix ſhould be obliged to entertain an appearand Heir, who is a mere Stranger; and this *jus naturæ* obliges the Mother not only to entertain the appearand Heir, but all her Children; as was found in the Caſe of the Counteſs of *Buchan*: And albeit, the Act of Parliament ſpeaks only of Heirs; yet by our Law, even appearand Heirs will get an Aliment allow'd them, tho' thereafter they renounce: But it is leſs clear, if it will be allow'd them after they have renounced, *July* 16. 1667. *Hamilton* contra *Symington*. And yet in this Caſe they are but mere Strangers, and can no more be called Heirs or appearand Heirs, after Renunciation; as alſo, tho' this Act mentions only Ward-Lands, yet it is *ex praxi* extended to others who have no Ward-Lands, the 22 *Feb.* 1673. *Finnay* contra *Oliphant*: And tho' both the Rubric, and the Words of the Act, provide only Aliment for Minors, yet it is extended to appearand Heirs, who are Majors; as in the Caſe of *Rig contra* the Lady *Carberrie*; nor will it be ſufficient that the Liferentrix offer to entertain the appearand Heir in the Family with her, as *Durie* obſerves, the 14 *Feb.* 1627. *Noble contra* his Mother; nor is this only extended where the Mother liferents all; but it is even extended to the Caſe where all the Minors Eſtate, beſide what is liferented, is not ſufficient to pay the Debt, and is affected by legal Diligences; as was found 13 *Feb.* 1662. *Antonia Brown contra* her Mother: But it may be very well doubted whether this laſt Deciſion may be extended where the Debt is only perſonal, and I find the Lords did refuſe to decide this Point, in a Caſe debated, 1667, betwixt the Lady *Staniebil* and her Son: Though the Son there alledg'd that he ſold his Land to hinder Compriſing; and if it had been compriſed, ſhe would have been liable. And this Action for Alimenting the Heirs, was ſtill ſuſtained againſt both the Grandfather's Relict, and the Father's Relict *pro rata*, of their Liferents, which they had of the appearand Heir: Albeit, it was alledg'd, that the Mother having a nearer Relation, and being the Wife of him who ſpent the Eſtate, ſhould be only liable; or at leaſt, firſt liable, 12 *Decemb.* 1677. Laird *Airdrie contra* the Two Ladies: But yet I find the Grandfather was found liable in no Proportion with the Mother, where he had only reſerv'd a mean Proportion to himſelf, when he did infeſt the appearand Heir's Father, 7 *July*, 1629. It may be doubted, whether a Husband marrying the Liferentrix, having given her a Proviſion in Contemplation of this Jointure, will be liable to Aliment, ſince he is a mere Stranger: To which all that can be anſwer'd is, That he was oblig'd to know it was liable to this Burden; and if he will be found liable, it may be doubted if he will not be free from the Proviſion given in Contemplation thereof, ACT *tanquam cauſa data cauſa non ſequuta.* As alſo, it may be doubted whether the purſuing ſuch an Action as this, will infer a paſſive Title, ſeeing the appearand Heir is thus *lucratus*: But yet I think it will not, ſince he reaps thereby no Advantage which would have accreſced to the Creditors, to whom no Part of his Aliment would have belong'd; and even appearand Heir's renuncing, will have Right to an Aliment, as is obſerv'd before.

THE Civilians think that a Mother is oblig'd to aliment her Child till it be paſt Three Years of Age, *L. 3. C. de Patr. Pot. & ibid gloſſ.* and even after Three Years of Age, if the Father be not able to aliment the Child, the Mother is; becauſe the Child is oblig'd to aliment and reverence the Mother. *Vid. Surd. de Aliment. quæſt.* 14. *tit.* 1. But they make no mention of ſuch an alimentary Action as this, which we allow.

XXVI. THOUGH Buyers of Land be obliged to keep the Tacks, ſet by their Predeceſſors; yet the Superior is not oblig'd to keep them when the Land falls to him in Ward, during which Time he is Proprietar; nor are Liferenters, nor Conjunct-feers, oblig'd to keep them during their temporary Rights; but when theſe Rights expire, the Tacks revive: And yet by this Act, the Superior or Liferenter, cannot remove them till the next *Whitſunday* after the Ward or Liferents fall, the Tenents paying the Mails and Duties to the Superiors or Liferenters; but it may be doubted whether this will hold, when the Duty is only a ſimulate Duty, and not near the Rent of the Land; for this was deſign'd to ſecure the Tenents reaſonably; but not to prejudge the Superior or Liferenter: But certainly this Act will not defend theſe Tenents who have paid their Duties to their Maſters before-hand.

XXVII. THOUGH particular Pains be ſet down as to Law-Burrows, in Civil Caſes, by former Acts, yet in Criminal Caſes; becauſe of the Importance and Danger, it is left arbitrary to the Judges to cauſe the Parties find Caution under what Sums they pleaſe, and before the Council; likewiſe the Sum under which Caution is to be found, is, *de praxi* arbitrary.

SINCE this Act ſays, that *the Party complainand ſhall be harmleſs*, it would ſeem by this Act, the Council can oblige no Party to keep another harmleſs, except where the Party himſelf complains; in which Caſe he muſt give his Oath he dreads Bodily-harm, conform to the 129 *Act*, *Parl.* 9. Ja. I. *vid. Obſerv.* on that Act. But yet the Council is in uſe to cauſe Men find Caution to keep others ſkaithleſs, even where the Parties do not crave it: But this is only in Caſes where there have been previous Breaches of the Peace amongſt them: So that either a Party does complain, and then he muſt give his Oath; and if he complain not, there muſt be a previous Breach of the Peace; and in that Caſe there is no need of an Oath, or a Complaint that he does fear Bodily-harm. Tho' the Council or Juſtices, may by this Act exact Law-Burrows; yet by this Act it is only ordain'd where Complaints are rais'd before them; and by Complaints here is not to be underſtood Common Bills; for Law-Burrows upon Common Bills, are only rais'd in courſe before the Seſſion; and there is a particular Servant in the Bill-Chamber, whoſe Office it is only to write upon theſe Bills, and take the Bonds, and ſee that the Cautioner be ſufficient; but the Council and the Criminal-Court, only exact Caution of Law-burrows, when there are Proceſſes intented before them, and the Judges there do ſee that either Party has Reaſon to fear Bodily-harm; becauſe of what preceeded.

XXVIII. BY this Act Diſmembration is made equal to Slaughter, and it is to be try'd within Three Suns: and ſeems by this Act to infer Death, if it be upon forethought Fellony; but I have not obſerv'd it puniſh'd by Death, but only as Mutilation by an arbitrary Puniſhment, or Confiſcation of Moveable and Aſſythment to the Party. *Vid.* 118 *Act*, *Parl.* 7. Ja. V.

XXIX. BY this Act the King's Leiges are to aſſiſt at Juſtice-airs, under Pain of being puniſh'd as Favourers of the Treſpaſſers, and that Dittay is to be taken up againſt them for that Effect; but by our preſent Practice, tho' the Heritors of every Shire be by a Proclamation ordain'd to attend the Juſtices, whilſt they remain in their Shire, yet their Abſence is never made Point of Dittay. I find by the Regiſters of Council, that all the Southern Shires were cited to attend the Juſtice-airs in Q. *M.* Reign, and to bring with them Proviſion for Twenty Days.

XXX, XXXI, and XXXII. ALL theſe Acts are in *Deſuetude*: But 'tis obſervable that *Park* of *Foulfoordlies* being charg'd to wait upon *Hume* of *Wedderburn* his Superior, at the Hoſt, conform to his Charter, and being thereafter purſu'd for not attending him; the Lords found the Vaſſal fineable, tho' he pretended, That by this Act 31. he was to attend the Sheriff; for he ought to have waited upon his Superior to the Sheriff, or the King's Captain; and theſe Obligations were different and very conſiſtent, *July* 1680. *Vide Obſerv.* on *Act* 16. *Parl.* 6. and *Act* 76. *Parl.* 14. Ja. II. *ſupra*, for clearing the 30. *Act*.

ACT XXXIV. CONVOCATIONS in the Country are puniſh'd only by pecuniary Mulcts, or Impriſonment before the Secret Council; but Convocations within Towns are more dangerous; and therefore puniſh'd in this *Act* by confiſcating the Moveables of the Offenders, and their Lives are to be in the King's Will; ſo that their Lives may be taken: But by this Act, the riſing at the Command of their Magiſtrates, is declar'd no Crime; and therefore it may be doubted, whether if the Magiſtrates ſhould raiſe their Burgeſſes to invade their Neighbours, or to oppoſe His Majeſty's Forces, if in theſe Caſes they can be purſu'd for Convocation, ſince they are by this Act warranted to riſe at Command of their Magiſtrates; which certainly might defend them in dubious, but not in clear Caſes.

OBSERVE that by this Act, all Burgeſſes are ordain'd to obey their Magiſtrates, when, and in what Ways they ſhall be charg'd; either for the Defence of the Kingdom, or Common Good of the Burgh, under the Pains foreſaid: But the Magiſtrates uſe only to fine ſuch as refuſe to Ride with them: And I have heard the Lords demur, whether Burgeſſes were oblig'd to attend Priſoners without the Privilege of the Town, at the Deſire of the Magiſtrates, ſince Sheriffs were bound to receive Priſoners there; and Burgeſſes are only bound to Watch and Ward within their own Town and Territory.

XXXV. THE Rule laid down in this Act, *viz.* That *wherever the Defender may be puniſh'd by Infamy, he muſt compear perſonally*, holds not ſtill true; but wherever he is to be puniſh'd perſonally, he muſt compear perſonally; and therefore it is, that Defenders before the Criminal Court and Council, muſt compear perſonally.

XXXVI. THE Common Good of Burrows ought not to be Set without Conſent of the Deacons of Crafts; which is obſerv'd to this Day, *nam quod omnes tangit ab omnibus debet approbari*; and by the *Act* 181. *Parl.* 13. Ja. VI. It is ordain'd *that the Common-Good ſhall be rouped yearly*; which is alſo obſerv'd. And though that Act appoints it to be Set, by the Advice of the Magiſtrates and Council, without ſpeaking of Deacons of Crafts; yet that does not exclude them. By the Civil Law *Bona civitatum non poſſunt vendi ſine permiſſu principum propoſitis ſacro-ſanctis Evangeliis & inſinuato decreto apud præſidem provinciæ. L. ult. C. de reb. Civit. Vendend.*

BY this Act alſo the Rents of Burrows cannot be Set for longer Time than three Years allanery; but it it may be doubted, if they may be Set from three Years to three Years, for many three Years in one Paper; or if ſuch Obligations will force Magiſtrates to renew the Tacks; for if this were ſuſtain'd, the Act might be eaſily eluded: But the 10 of *February*, 1631. the Earl of *Galloway contra* Burgeſſes of *Wigtoun*, The Lords found that this Nullity was not receivable *ope exceptionis*, eſpecially not being propon'd by the Town. Theſe Tacks ſeem likewiſe to be valid, if reſtricted to three Years. *Vid. Annot. ad Act* 200. *Parl.* 14. Ja. VI.

XXXVII. VIDE *Act* 17. *Parl.* 2. Ja. IV. & *Act* 97. *Parl.* 6. Ja. IV. By all which, crack'd Gold is commanded to be taken, if it be of Fineneſs; all which renew'd Acts ſhew that the People were unwilling to receive ſuch Gold.

# PARLIAMENT IV.

XXXVIII. VIDE *Annot. ad Act* 85. *Parl.* 11. Ja. III. But for further clearing this Act, it is fit to know that the Pope was in Uſe, and pretended Right to confer by Prevention, Benefices which were elective; and ſome whereof, the Patronages belong'd to the King and Subjects. *Vid. Coraſ. ſpecimen. Jur. Eccleſ. Lib.* 1. *Cap.* 2. as appears by this Act, and by the 53 *Act*, *Parl.* 5. Ja. IV. And therefore by this Act, the Impetration of theſe in ſuch Caſes, is diſcharg'd under the Pain of Proſcription and Baniſhment; but by the 44 *Act*, 6 *Parl.* Ja. III. and the 4 *Act*, 1 *Parl.* Ja. IV. it is alſo puniſh'd as Treaſon.

ACT XXXIX. IT is againſt the Intereſt of the Church to unite Benefices, becauſe every Union extinguiſhes ſome Benefices, and leſſens the Care of the Souls; and yet Union is allow'd, when the Benefices to be united are impaired by Poverty, Hoſtility, or by Deſtruction of the People to be cared for: And leſt the Intereſt of Perſons ſhould be more conſider'd than that of the Church, it is by the Canon Law appointed, That all Unions of Benefices muſt be perpetual; but the Pope having reſerv'd to himſelf the Power of uniting any Benefices, *propter plenitudinem poteſtatis, Cap. 6. de prebend. in 6. Clem. 1. ut lit. pend. nihil innov.* Therefore the Subjects of this Kingdom went to *Rome*, and got Benefices united; and to prevent this, all Unions of Benefices are diſcharged by the 44. *Act, Parl. 6.* Ja. III. and the obtaining ſuch Unions and Annexations is declar'd Treaſon: And ſince our Biſhopricks and Abbacies were founded by our Kings, it was unjuſt that they could have been united without his Conſent; becauſe, even by the Canon Law, Benefices cannot be united without Conſent of the *Laic* Patron, *Bengeus de Benefic. Cap.* 3. § 3. *Num.* 7. Unions are now made by the Commiſſion of the Kirk; and the ordinary Reaſons upon which Churches are united with us, are, the Meanneſs of the Proviſion, the Meanneſs of the Two Paroches, and the Paucity of the Hearers: To the granting of which Unions, the Patrons muſt ſtill be call'd, becauſe of the above-cited Conſtitution of the Canon Law; but they may be united, tho' the Patron conſent not, if he ſhew no good Reaſon for his Diſſent.

THE Popes alſo uſed to value Benefices upon new Informations, whereby the Value was much hightned; and therefore by that Act it is ordain'd, That no Benefices be higher than they were in *Bagimont*'s Roll, which *Bagimont* was a Cardinal, who had made a Rental of all the Benefices in this King's Time, as *Skene de verb. ſig.* obſerves, *Verb. Bagimont*; and this Taxation of Benefices is founded on *Extravag. ſuſcepti Regiminis, Lib.* 6. It is therefore appointed, that none ſupply with Money thoſe who are to go to *Rome*, to make ſuch Purchaſes, *Act* 86. *Parl.* 11. Ja. III. But that Act ſeems unneceſſary; for the Purchaſers being declar'd Traitors, it was certainly Treaſon to aſſiſt them with Money; ſo that the ſaid Act was made to certifie and clear ignorant People, which the Law calls *ad majorem evidentiam.*

XLI. THIS Act is formerly explain'd, and that Part of it which appoints the Hoſts, with whom Strangers lodge, to be countable for their uncuſtomed Goods, is in *Deſuetude*, except they were conſcious to the Guilt. *Vide Obſerv.* on *Act* 3. *Parliament* 1. Ja. IV. *ſupra.*

XLII. CRAFTSMEN, who exact from theſe of their Craft, are to be puniſh'd as Oppreſſors; but I doubt what is the Meaning of theſe Words, And *ſhall buy their Life as common Oppreſſors:* And the moſt probable Meaning is, That they ſhall be bound to take Remiſſions for ſo doing, as for a capital Crime.

*NOTA*, Common Oppreſſion is capital by this Act; and ſuch Statutes or Impoſitions laid on by Craftſmen for extortioning the Leiges, are reprobated by the Laws of all Nations as a Species of Monopoly. *Vide Tritz. de Monopoliis, Cap.* 12. *Vide Obſerv.* on *Act* 21. *Parl.* 2. Ja. IV. *ſupra.*

XLIII. CRAFTSMEN leaving off Men's Work, if others refuſe to complete it, becauſe of Statutes among themſelves, forbidding them to undertake any ſuch Work, ſuch are puniſhable as Oppreſſors: But if they refuſe upon any other Account, they are not puniſhable; for this Act puniſhes only ſuch as make Uſe of ſuch unlawful Statutes: And if Craftſmen ſhould come in to cheat this Act, by a general Reſolution, not to ſuffer any to complete what another had begun, I believe that the Magiſtrate might puniſh this as a cheating Contravention of this Law.

*NOTA*, That Tradeſmen who make Statutes againſt the Commonweal of the Leiges, are puniſhable as Oppreſſors; for otherwiſe Craftſmen might extortion the People at their Pleaſure. This is alſo diſcharg'd, *L. un. C. Tit.* 59. *Lib.* 4. *de Monopoliis & nov.* 122. *Cap.* 1. *Ædificiorum quoque artifices vel Ærgolabi, aliorumque operum profeſſores penitus arceantur pacta inter ſe componere, ut ne quis, quod alteri commiſſum ſit, opus impleat. Vide Trith. Cap.* 12. and *Obſerv. on Act* 80. *Parl.* 5. Ja. I. *ſupra.*

XLIV. IT is free to ſell Victual in all Burrows any Day of the Week, tho' it be no Mercat-day, by this Act; yet now every Burgh has it's own Mercat-days for Corn, as well as for other Things.

XLVII. THOUGH by this Act the Uſers of falſe Meaſures and Weights be only puniſh'd as Falſaries, yet the Juſtices found, That the Havers of falſe Meaſures ſhould be alſo puniſh'd as Falſaries, though uſing could not be proven; ſince theſe who had them, are preſum'd to have had them only for Uſe, except the Preſumption were taken off, as by proving that the Weights were only borrow'd, or laid aſide upon Trial, *May* 1671. in the

Caſe of *Porteous* at a Juſtice-Court in *Jedburgh*: But by the 14. *Cap. Stat.* Dav. II. the Uſers of falſe Weights were only to pay Eight Cows to the King.

XLVIII. IT is clear from this, that the Maſter's commanding his Servants or Cottars to break Laws, ſuch as Muir-burning, ſpecified in this Act, does not free the Servants, but makes both liable, (albeit Ignorance and Command, when join'd, might ſeem to excuſe the Breach of a penal Statute, at leaſt *a pœnâ ordinaria*) but the Maſter's Command ſhould not excuſe from the Puniſhment, where the Tranſgreſſion is either againſt the Law of God, of Nature, Nations, or the Crime is atrocious in itſelf.

L. SOME of the Nobility having moſt rebelliouſly fought againſt King *James* III. upon a falſe Pretext, that he was bringing in the *Engliſh* upon the Kingdom, they advanc'd His Son King *James* IV. to be Leader, and having prevail'd, they ſecur'd themſelves by ſeveral Acts, yet extant in the Black Impreſſion, but which are omitted in this Impreſſion, except this One.

LI. THE King revokes all Taillies made to Heirs Male, in Prejudice of Heirs General; becauſe (as *Craig* obſerves) this is againſt Conſcience, and is defrauding of the righteous Heir: And I have ſeen old Licences granted by the Pope, to make ſuch Taillies and Alienations, for Reaſons expreſt in the Bull, and upon Conſideration whereof, the Pope diſpenſes with the Matter of Conſcience; and in the Act 50. the Eſtates, without the King, revoke all ſuch Rights, *quod notandum*.

*NOTA*, The King here revokes all Change of Holdings from Ward to Blenſh, and not from Ward to Feu; becauſe it was lawful at that Time to change from Ward to Feu, by the *Act* 71. *Parl.* 14. Ja. II.

*NOTA*, Union of Lands in Barony is revoked by this, and all the poſterior Revocations of our Kings, becauſe one Saſine ſerves after the Union, and the Proprietar is only oblig'd to anſwer at one Court; ſo that the King loſes ſeveral Caſualities. *Vide Act* 93. *Parl.* 6. Ja. IV.

# PARLIAMENT V.

LIV. BY this Act, Barons are to cauſe their Sons learn Latin & *jure*, that is to ſay, Law; becauſe the Act ſays, That they may have Knowledge of Law to prevent needleſs coming before the King's principal Auditor: For which Reaſon alſo Advocations are much diſcourag'd by many ſubſequent Acts. *Auditor* was not a proper Term for the Seſſion; for *Audientia* is properly allow'd only to ſuch as have not Juriſdiction, as is clear by *Gothefr. ad Rubr. C. de Epiſcopali Audientia.*

LVII. BY this Act all Actions of Error againſt Brieves, or inordinate Proceſs, are to be purſu'd within Three Years, elſe they preſcrive: And by the *Act* 13. *Parl.* 22. Ja. VI. it is declar'd, that the Preſcription ſecures only the Aſſiſers againſt wilful Error, but that the Retour may be quarrelled within Twenty Years, as to the Right of Blood prejudg'd by the ſaid wrongous Retour. And it is obſervable, that the Law favours ſtill Revenge leſs than Reparation.

*Obſ.* 1. NOTWITHSANDING of this Act, a Retour, or the Execution of a Brieve, or any other Piece of the Proceſs may be improven at any Time within Forty Years, and the Proceſs itſelf may be reduc'd *in conſequentiam*, by Reduction of any Writ whereupon it followed, *Hope Tit.* Reductions of Decreets.

*Obſ.* 2. THAT this ſhort Preſcription of Three Years runs not againſt ſuch as are Minors, or out of the Realm, in Imitation of the Civil Law, which allow'd *immobilia præſcribi inter præſentes decennio, inter abſentes viginti annis.*

*Obſ.* 3. THAT theſe Words (*be rais'd and purſu'd*) imply not that the Proceſs muſt be ended, but that it muſt be begun within Three Years; and the Proceſs is ſaid to be purſu'd when the Summons is executed. *Vide Obſerv.* on *Act* 64. *Parl.* 8. Ja. III.

# PARLIAMENT VI.

IT is obſervable, that tho' this Parliament is expreſs'd in the printed Acts, as held upon the 11. of *March*, and all theſe Acts are expreſs'd as paſt upon that Day; yet I find by the Records themſelves, that they were all paſt upon the 15. of *March*, which is alſo called *quinta dies Parliamenti*.

*Item*, It is obſervable, that all the Acts of this Parliament are only ſet down in way of Breviate, and thus the 62. *Act* is thus expreſs'd in the Original Record.

Item, *IT is ſtatute and ordained, That where any Perſon happens to get a Remiſſion in Time to come, that the ſaid Remiſſion ſhall not extend nor ſave the Taker for greater Crimes, be any general Clauſe, nor is contain'd eſpecially; and that the greateſt Action ſhall be ſpecified, or elſe it ſhall not be comprehended; and that the general Clauſe ſhall not include greater nor the ſpecial Clauſe.*

LVIII. THIS Act is formerly explained. In the *Obſerv.* on *Act* 65. *Parl.* 3. Ja. I. and *Act* 62. *Parl.* 14. Ja. II.

LIX. and LX. THESE Acts are uſeleſs, for all theſe Juriſdictions are now otherwiſe divided and eſtabliſhed.

LXI. THE Shires of *Inverneſs* and *Roſs* having been again after this Act united, they were, and are now disjoined. And whereas this Act makes the Town of *Thane* and *Dingwall* to be the Head Burghs of the Shire of *Roſs*, the Town of *Forteroſs* is added as another Head Burgh to the other Two, by an Act of Parliament, 1661.

LXII. IT is appointed that general Clauſes in Remiſſions, remitting all Crimes, ſhall not be extended to greater Crimes than the Crimes ſpecially condeſcended upon in the Remiſſion; but to evite this, Remiſſions do now expreſs ſpecially all the great Crimes, and then a General is ſubjoined. And upon this Law it was controverted in *Glenkindie*'s Caſe, whether a Remiſſion for Slaughter ſhould be extended to Murder, ſince Murder was pretended to be a greater Crime, as proceeding upon forethought Fellony. To which it was anſwered, That Slaughter was a general Term comprehending both Slaughter and Murder. It may be argued from this Law by a Parity of Reaſon, that Diſcharges granted for a ſpecial Sum, and thereafter diſcharging generally all Debts, ſhall not be extended to other Sums greater than that which is ſpecially diſcharged. But yet the 24. *February* 1636. it was found, That ſuch general Clauſes did cut off all Sums, even tho' greater than the Sum diſcharged in ſpecial.

LXIII. THIS Act ordains all Remiſſions for Slaughter to be null, if the Slaughter was premeditated, and upon forethought Fellony; nor is this Act temporary, being to laſt in all Time coming, till the King revoke the ſame ſpecially; but yet this excellent Law is not *de praxi* now obſerved, tho' it be moſt reaſonable, *Vide Act* 169. *Parl.* 13. Ja. VI. And the ſame Reaſon given here for it, (*viz.* becauſe many in Truſt to get Remiſſions did commit Slaughter,) is ſet down to the ſame Purpoſe, *Canon injuſta, Quæſt.* 4. *Nonne etiam cum uni indulget indigno ad prolapſionis contagium provocat univerſos, facilitas enim veniæ incentivum tribuit delinquendi.* By the *Cap.* 50. *Stat.* Dav. II. it is ordain'd, That no Remiſſion for Murder upon forethought Fellony ſhall be given, except in Parliament, and for a public Good.

OBSERVE here the diſcreet Stile wherein Kings are limited in the Exerciſe of their Royal Power; for here the King declares it is His Pleaſure that ſuch an Act be paſt, and deſires the Eſtates to paſs it; and ſince this Act is to laſt till it be revoked by the King, it may be doubted if the King alone may revoke it without Authority of Parliament.

THE like Act diſcharging Remiſſions for burning Corns, Ja. V. *Parl.* 7. *Act* 118.

LXIV. THO' Biſhops are, by this Act, to appoint and deprive Notars, yet they are now both tried and deprived only by the Lords of Seſſion.

THO' this Act appoints Biſhops and their Ordinaries to take Inquiſition who uſes falſe Writs, yet none but the Lords of Seſſion are now Judges to *Improbation*, which is the only Proceſs competent for trying Falſhood of Writs in the firſt Inſtance; and the Commiſſar, who is the Biſhop's Depute, can never judge of Falſhood now, except where the Falſhood falls in only *incidenter*, and by way of Exception: As if I were purſuing any Action before the Commiſſars, and it were alledged that the Execution of the Summons were falſe, there the Commiſſar would be Judgecompetent to try the Falſhood of the Executions, for elſe his Juriſdiction were uſeleſs; and all Sheriffs, Lords of Regalities, Stewards, and the like, have the ſame Privileges.

LXV. BY this Act Summons for recent Spuillies muſt be executed upon 15 Days, whereas all Summons were to be executed upon 21 Days, by the 6. *Act, Parl.* 1. Ja. III. which is the Act here related to, tho' not cited. And by an Act of Sederunt 21. *July* 1672. this Privilege is extended to recent Intruſions, which is a Kind of Spuillie in Immoveables.

*Obſerv.* I. That ſince the Parliament thought that the former Act of Parliament could not be derogated from without an expreſs Statute, it may ſeem ſtrange why the Lords do privilege any Summons by their own Power; or if they had Power, why they did not make Actions of recent Spuillie and Intruſions to come in upon 6 Days, as well as Exhibitions, poinding of the Ground, and other leſs favourable Cauſes? To which nothing can be anſwered, but that there was an old Cuſtom for the one, but not for the other.

*Obſerv.* II. That the laſt Words of the ſaid Act, *viz. That there ſhall be no Exception dilator admitted againſt that Summons, it being lawfully indorſed*, ſeem to imply, that the Judge ſhould grant no Continuation, tho' that properly cannot be called an Exception dilator, or elſe that the Judge ſhould reſtore *ſpoliatum ante omnia*, and admit no Exception upon Property nor Compenſation, &c. But theſe are not properly dilator Defences, or that the not Continuation of the Summons upon 21 Days Warning ſhould not be objected. But that is likewiſe unneceſſary, ſince the firſt Part of the Act did that ſufficiently, and ſo theſe Words with that Senſe had been ſuperfluous; and therefore I rather incline to think, that theſe Words were only deſigned to ſhow the Parliament's great Deſire to have recent Spuillies diſpatch'd, tho' ill expreſs'd. It may be doubted whether recent Spuillies being only ſuch as are raiſed within 15 Days after the Spuillie is committed, Sabbath or Feriot Days ſhould be counted amongſt the Fifteen.

*Obſerv.* III. That it may be argued that Spuillies regularly cannot be purſued before the Sheriff, or elſe why is it allowed here as a Privilege to recent Spuillies, that they may be purſued before the Sheriff. And it ſeems the Reaſon why Spuillies regularly ſhould not be purſued before Sheriffs, is becauſe the Damages in Spuillies muſt be taxed by an Oath *in litem*, and that is *nobilis officii*, and conſequently cannot be adminiſtrated by any inferior Judge, nor can theſe inferior Judges modify what is ſworn by an Oath *in litem*, that being yet *nobilioris officii*.

LXVI. BY this Act the Sheriff is to have 12 Penies of every Pound, as Sentence-money, which was called *Sportulæ* by the Civil Law; and this Sentence Money is ſtill in uſe.

LXXIV. THIS Act appoints every Lord and Laird to have a Cuninghare; but it may ſeem ſtrange why none are allow'd to have Dovecoats, except they have Ten Chalder of Victual in Rent; and yet Men are commanded to make Cuninghares, ſince Cunneys may prejudge Neighbours, as Doves do: Which makes *Craig*, as I conceive, doubt whether the Vaſſals may have a Cuninghare, except the ſame be granted to him. But tho' the Superior grant Cuninghares with the Clauſe *cum Cuniculis Cuniculariis*, the former Doubt remains, for the Superior cannot prejudge Third Parties. To which theſe Anſwers may ſatisfy.

I. That it was neceſſary by this Act once to invite Men to plant Cuninghares, whereas Dovecoats were frequent before the Act 1617. that reſtricts them.

II. This Command is only to Lords and Lairds, which implies Men of Eſtates, but is not given to all the Lieges; and I doubt not, but if an Heretor of 10 Chalders of Victual, or thereby, ſhould plant a Cuninghare, but his Neighbours might, by common Law, and an Argument drawn from the *Act* 19. *Parl.* 22. Ja. VI. force them either to incloſe their Cuninghare, or to give it over.

LXXVI. BEFORE this Act the Heir could not have been purſued for any Debt till the Executor was firſt diſcuſs'd; but by this Act the Heir is made liable to the Creditor after his *annus deliberandi* expires, both as to heretable and moveable Debts, which was very juſt, becauſe *quoad* the Creditor, they all repreſent the Defunct; but yet he will get his Relief of all moveable Debts from the Executor, as far as the Inventar extends; and if he be ſerved Heir within the Year, the Creditor will get Action againſt him for heretable Debts, even within the Year: For by entring Heir he renounces his Benefit of Deliberating, and if he poſſeſs the Eſtate, he ought to pay the heretable Debt; but tho' he enter Heir within the

the Year, he ſhould not be liable for moveable Debts by this Act till the Year expire, ſince as to theſe he has no Benefit by entring; and tho' he renounce the Benefit of Deliberating, yet he does not renounce the Benefit of this Act, *Hading. Tit.* Heirs.

*Nota,* Heirs are call'd in this Act Heretors, from the *French* Word *Heretiers.*

But *quaritur,* If the Executor be diſcuſt, and found inſolvent, may not the Heir *eo caſu* be purſued within Year and Day; and the Affirmative ſeems ſtrongly founded upon the Reaſon and Deciſion of this Act: And yet by the preſent Practice, the Heir enter'd is liable even for moveable Debts, tho' purſu'd within the Year.

*Item,* Tho' by this Act the Executor is bound to find Caution to relieve the Heir of all moveable Debts, yet there is no Law obliging the Heir to relieve the Executor of heritable Debts; but *de practica,* the Lords ſuſtain *ex paritate rationis,* Actions againſt the Heir for relieving the Executor of all heretable Debts, 7. *March* 1627. *Falconer* contra *Blair. Vide* Spotſwood, *Tit.* Executor *Carnouſſie* contra Laird *Meldrum,* which ſeems to be contrary to the Words of this Act, whereby it is more than inſinuated that the Father's moveable Goods ſhould pay his Debts. And by the Narrative of 106 *Act, Parl.* 7. Ja. V. is yet more clear. By the Civil Law, the Children that were in *poteſtate patris* were forced to enter Heir, but thereafter this was thought too ſevere, and therefore the *Roman Prætor* allow'd even to theſe Heirs a Liberty to abſtain, and a Year to deliberate whether they would be Heirs, which we have borrow'd from thence; but *jure noviſſimo* the Heir was to be only liable according to the Inventar, if he made one, & *non ultra vires inventarii,* which holds only with us in Executors who are Heirs in Moveables, for Heirs in heretable Rights are liable *in ſolidum,* if they once enter.

LXXVII. If the Marriage was not quarrelled by a Proceſs in the Husband's Time as unlawful, the Wife will have Right to her Terce, without Neceſſity of proving a lawful Marriage, and will poſſeſs her Terce till the Marriage be found to have been unlawful: For in the Common Law, and ours, an unquarrell'd Cohabitation is a valid Probation of the Marriage, *L. in libera* 24. *ff. de rit. nupt.* yet it cedes to a contrary Probation, as all *præſumptiones juris* do. *Vide Pacian. Tract. de prob. Lib.* 2. *Cap.* 3. And in our Law Baſtardy is not inferr'd, becauſe the Marriage cannot be proven; but it muſt be prov'd *poſitive* that the Defunct was reputed Baſtard, *Feb.* 19. 1669. King's Advocate *contra Craw,* and *June* 15. 1670. *Livingſton* contra *Burn.* And if that be proved, he who pretends to be Heir, muſt prove alſo that the Defunct's Father and Mother were lawfully married. By the ſame Parity of Reaſon, the Husband will have Right to the Courteſy of *Scotland,* till the Marriage be found null. And the Alledgance of Baſtardy is not receivable ſummarly againſt the Service of an Heir. *Vide infr. Obſerv.* on *Act* 94. *Parl.* 6. Ja. IV.

LXXVIII. All who did hold of the King were of old obliged to come to Parliament, till by this Act theſe whoſe Lands are within 100 Merks of new Extent are indulg'd not to come, except they be ſpecially called by the King. This Act ſeems obſolete, for none are ſpecially called now; whether the King may yet call any Barons he pleaſes, is dubious, both becauſe they were once bound, as well as impowered to come; and this Faculty was only remitted for their own Advantage, and after that, this Act allows the King to call them. And it ſeems reaſonable, that if there be any wiſe Baron in the Kingdom, the King, who calls Parliaments for conſulting the great Affairs of the Kingdom, ſhould have Liberty to call him, albeit the Shire chooſe him not, and the King may make any Man a Lord of Parliament. Yet by the conſtant Courſe of poſterior Acts of Parliament concerning Elections and Repreſentatives of Shires in Parliament, and by the conſtant Cuſtom acknowledg'd both by King and Parliament, none can repreſent Shires in Parliament, but ſuch as are actually choſen by the Shires whom they repreſent.

*Nota,* These who were then Members of Parliament could have ſent their Procurators, but now no Procurators are admitted for Abſents further than to excuſe their Abſence, which is done by a Letter to the Commiſſioner or Chancellor, or by a Member. *Vide Obſ. Act* 52. *Parl.* 3. *Act* 101. *Parl.* 7. Ja. I. *Act* 75. *Parl.* 14. Ja. II. *ſupra.* and *Act* 21. *Parl.* 3. Ch. II. *infra.*

LXXIX. This Statute is explained, *Act* 48. *Parl.* 3. Ja. I. but the Reaſon why it is here added, *That the Iſles eſpecially ſhall be govern'd by the King's Laws,* was, becauſe the Kings of *Denmark* pretended that the Iſles of *Orkney* and *Shetland* ſhould be govern'd by their Laws; for the King of *Denmark* renounced all Right to theſe Iſles in favours of King *James* III. his Son-in-law, in *Anno* 1461. *Vide* Skene *de Verb. ſig. verb. Annuel.*

LXXX. That all Officers ſhould be chang'd yearly, is formerly gloſs'd in the *Obſerv.* on *Act* 30. *Parl.* 5. and *Act* 5. *Parl.* 7. Ja. III. That none have Juriſdiction within Burgh, but ſuch as uſe Merchandice, is by ſome interpreted to be ſufficiently ſatisfied in thoſe who once uſed Merchandice, even as *ſemel Baro* is *ſemper Baro,* and few preſent Provoſts are actual

Traders; and therefore it was doubted, whether one who has been a Merchant, but was thereafter a Senator of the College of Juſtice, might not be a Provoſt. *Vide infra, Obſerv.* on *Act* 26. *Parl.* 4. Ja. V.

LXXXI. IT is fit to know that the Dukes of *Burgundy* gave the *Scots* the firſt Privilege of Staples, which was transferr'd to *Camphire* at the Chriſtening of Prince *Henry*. The Conſervator is by a Right under the Great Seal, conſtituted Judge there betwixt Merchants, and he muſt have, by this Act, Six Aſſeſſors, or at leaſt Four, which is ſtill obſerv'd, and the Decreets run in his Name, with the Conſent of his Aſſeſſors, and of late by Articles with the Prince of *Orange*. The Conſervator has the ſole Criminal Juriſdiction, when Crimes are committed by *Scots* Merchants: He is likewiſe, by his Patent, conſtituted Agent for all Affairs relating to *Scotland*, as well as for Trade. By an Act of the Burrows at *Air* 1602. it is declar'd, That all Goods that pay Cuſtom, either when they are carry'd out from, or into the Kingdom, ſhall be accounted Staple Goods, and ſo being under the Protection of the Conſervator, he claims to have Fees for them; but *in Anno* 1612. there is a Liſt of Staple Goods made by the Burrows, and in 1647. they made a new Liſt, declaring and ratifying the former.

LXXXII. THIS Act is ſtill obſerv'd; for the Conſervator uſes to come or ſend in *July*; But by *Twenty Pounds Great* here expreſt, are meant Twenty Pounds *Fleems*.

LXXXIII. THIS Act forbidding Mercats to be holden on Holy-days, is in Obſervance; but this Part which forbids Mercats in Kirk-yards, under Pain of eſcheating the Goods, is not obſerv'd, tho' renewed *Act* 70. *Parl.* 6. Ja. VI. and Mercats are diſcharg'd in Churches, *Decret. pars* 1. *diſtinct.* 42. But I find them not diſcharg'd expreſly in Church-yards, tho' Church-yards had in other Things the ſame Immunity with Churches; and thus they were Sanctuaries, as Churches were, *Can. ſicut antiquitus Canon definivit* 17. *Queſt.* 4. and their Extent was to be Forty Paces in greater Churches, Thirty in leſſer. *Vide Obſerv.* on *Act* 36. *Parl.* 5. Ja. III.

LXXXV. THIS *Act* is uſeleſs; for no Taxation can be laid on, except either in Parliaments, or Conventions of Eſtates, and to theſe all the Three Eſtates muſt be call'd: But it ſhews, That of old Taxations were laid on in Conventions, which conſiſted of any the King call'd ſummarly off the Street; nor were the Burrows oft-times call'd: Therefore this Act was made, declaring that no Taxation or Contribution ſhould be given without warning the Burrows, as One of the Three Eſtates. Taxations are properly Burdens laid on by Parliaments, and Contributions are our voluntar Offers made by Conventions; but we uſe now the Word *Taxation* for both what Burdens are laid on by Parliaments and Conventions, tho' this Act requires indefinitely the Burrows to be call'd, yet by the 82 *Act*, 9. *Parl.* *Q.* M. it is only requir'd, that Six of the Burrows be call'd.

THE Burrows-Royal pay a Sixth Part of the Taxation of *Scotland*, and they divide their Proportion amongſt themſelves, according to 100 Pounds *Scots*, which is their *As*, or imaginary Total, according to which every Town pays their Proportion: And tho' any Burgh reſign their Privilege in Parliament, they muſt pay till they diſpone their common Good to the reſt, and then their Proportion is divided amongſt the reſt.

LXXXVI. THIS Act appointing no Burgeſs or Gild-brother to be made without Conſent of the Great Council of the Town, is in *Deſuetude*.

LXXXVII. V*IDE Leg. Burg. Cap.* 122. The Pain now is arbitrary and puniſhable, either before the Council or Criminal Court. *Vide Act* 27. *Parl.* 4. Ja. V.

LXXXIX. THIS Act is uſeleſs, becauſe of the *Act* 1617. ordaining all Saſines to be regiſtrated; and this Act is thereby in *Deſuetude*.

XC. and XCI. THESE Acts are but temporary, and yet they ſerve to clear the *Act* 71. *Parl.* 14. Ja. II. And the Lords found, That by Forfeiture in the Act 91. is meant, not only Recognition, which is ſometimes call'd a Forfeiture, but Forfeiture for Treaſon, *&c.* and by this we may ſee, that abrogated Laws, and Laws that are in *Deſuetude*, ſhould be read and conſider'd, and may be of great Uſe in Deciſions and Arguings.

XCIII. THE Reaſon of making this Act was, becauſe Lands united are *fictione juris* one and the ſame, and ſo ſhould properly anſwer to the Court, to which the principal Meſſuage anſwers; and therefore this Act was made to ſecure the Intereſt of the ordinary Judge, which declares, That notwithſtanding Lands are united in a Barony, yet they ſhall anſwer as formerly, to their own Juriſdictions; but the Baron, whoſe Lands are united, needs only

ACT compear by this Act in that Juriſdiction, where the principal Meſſuage by the Union is, and yet *de praxi* they are ſtill call'd in all the Sute-rolls of the other Shires, where any of their Lands lie, and are forc'd to ſend Attorneys, which ſeems contrary to this Act.

XCIV. THERE are Two Kinds of Brieves, One call'd a Brieve of Pley, which is our ordinary Summons; another call'd a Brieve of Inqueſt, which is yet in Uſe, as in Services of Heirs, Tutors, *&c. Vide* for clearing this *Act*, *Lib.* 3. *R. M. Cap.* 28. and 29. *& Stat.* Rob. III. *Cap.* 1. And becauſe the Service of Heirs is no Brieve of Pley, therefore no Exception is to be admitted againſt it, except it be inſtantly verified.

THIS *Act* appoints all Brieves to be executed upon fifteen Days; and the Lords have found, that all ſuch *Acts* as theſe, appointing Citations upon ſuch a Number of Days, do not require that both the Day of Citation and Compearance be free; but it is ſufficient that either of them be free, *July* 27. 1626. *Mackulloch* contra *Mackulloch.* If the Brieve be not proclaim'd upon a Mercat-day, then it muſt be proclaim'd before the Town-Officers, and Six honeſt Men to make it public: And thus it ſeems the Parliament thought theſe equivalent to a Mercat-day; but this holds not in other Caſes, where Proclamations are to be upon Mercat-days; nor even in Brieves is this now uſed.

*Nota*, BY this *Act*, if Perſons refuſe to paſs upon the Inqueſt, the Sheriff is authoriz'd to compel them: And this I think the Juſtices may do in Criminal Caſes alſo; for the Juſtices are higher Judges than the Sheriffs; and as the Public is more concern'd in theſe Caſes, ſo Men will be more unwilling to paſs upon them, except they be compell'd; and tho' there be pecuniary Penalties appointed againſt abſent Aſſiſers; yet that is but an ordinary Remedy and does not exclude this extraordinary One; even as the Penalties appointed againſt Witneſſes, does not exclude the taking them with Caption.

XCV. FALSING of Dooms are now in *Deſuetude* altogether; and to them have ſucceeded Reductions in our preſent Practice. *Vid. Obſerv.* on the 117 *Act*, *Parl.* 9. Ja. I.

XCVI. BY this Act it is ordain'd, that all meaſures and Weights be made the ſame thorow all *Scotland*, and the Standarts to remain at *Edinburgh*, and to be ordain'd by the Chamberlain and his Council; for then the *Chamberlain*, or *Camerarius Scotiæ*, was Judge in all Things that concern the Burghs of *Scotland*; and was in Uſe to hold a Council, who with him judg'd in Matters that concern'd all the Burghs in general; as the Dean of Gild and his Council judge in every particular Burgh; and his Statutes of old concerning Weights and Meaſures, are to be ſeen, *Iter. Camer. Cap.* 30. But this Office and Juriſdiction over the Burrows, is now obſolet; and the Rectification of Weights and Meaſures is only conſider'd by the Parliament, or by the Council in Proſecution of the Acts of Parliament.

THOUGH by this Act all the Standarts of Weights and Meaſures, are ordain'd to remain at *Edinburgh*; yet by Act of Burrows they have been divided thus; The Standart of the Stone-weight remains at *Lanerk*; becauſe the chief Commodity of old that was weighed by the Stone-weight, was Wool; which was paid in to the King at *Lanerk*; and was therefore call'd *Lanæ-Arca.* The Standart of the Pint or Jug, was left at *Stirling*, becauſe the King's Court reſided there. The Standart of the Furlot remains at *Linlithgow*, becauſe the King had no other Reſidence in the three *Lothians*; which were the chief Countries for Corns. And *Edinburgh* had the Ell; which is the chief Inſtrument for meaſuring Silks, or other foreign Stuffs. I find likewiſe, that the Town of *Wigtoun*, and other particular Burghs, have an Acknowledgment paid them, for meaſuring the Jugs within particular Brewaries within their Territory; and theſe who agree with them to pay this, are ſaid to have a *free Stallage*; and the Impoſition is call'd their *Deanrie*, becauſe it is taken up by their Dean. When the Shire reſolv'd to quarrel this Impoſition, it was anſwer'd, That it was juſt; becauſe they inſpected the Meaſures for the good of the Lieges; and that it was confirm'd by immemorial Poſſeſſion.

I have here ſet down the Foundations of all Meaſures and Weights, for what was ſet down in the *Cap.* 22. *Stat.* Rob. III. is not exact.

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## *Of the Weights, and Foundation thereof.*

A CORN, or Pickle of Wheat, taken out of the midſt of an Ear of Wheat, is the Foundation of a *Grain's-weight.*

EIGHTEEN of theſe Grains make the *Half-drop-weight.*

THIRTY ſix Grains make *a Drop-weight.*

FOUR Drop-weight is *a Quarter of an Ounce.*

Four Quarters make *an Ounce-weight*.
Eight Ounces is *a Merk-weight*.
Two Merk-weight is *a Pound-weight*.
Sixteen Pound-weight makes the *Stone-weight* of *Lanerk*.

There was alſo a *Trone* Stone-weight, which did weigh Nineteen Pounds and Eight Ounces of *Paris* Weight; wherewith the Butter, Cheeſe, Wool, Tallow, and ſuch other Country Commodities as carry Refuſe was weigh'd.

There are other Quantities whereof the Weight is here ſet down, to give ſome Contentment to the Reader; as a *Tun-weight* of light Goods; which is the common Fraughting of all Merchandiſe betwixt this Country and *France*, *England* or *Spain*; which Tun is eſteem'd to weigh 600 Pounds Weight.

A *Sack* of Goods, which is the common Fraughting of all Merchandiſe from this Country to the Low-Countries, eſteem'd to weigh 40 Stones, or 640 Pound weight.

The *Sirplith* of Goods, which was the common Fraughting of Merchandiſe betwixt this Country and the Eaſtern Countries, is eſteem'd to weigh Eighty Stone-weight, or 1280 Pound-weight.

The *Laſt* of Goods is eſteem'd to weigh 120 Stone-weight, or 1920 Pound weight of light Goods.

The *Laſt* of Metal, and other heavy Goods, is 2850 Pound weight.

The *Fodder of Lead* is 126 Stone, or 2000 Pound weight.

## *The Weights following are us'd by* Apothecaries, *in Mixture of their Medecines; wherein the Leaſt is a Grain.*

Twenty Grains make *a Scruple*.
Three Scruples maketh a *Draghm*.
Eight Draghms maketh *an Ounce*.
Sixteen Ounces maketh *a Pound*.
The Medicinal Pound is Twelve Ounces.
A *Sheckle-weight* mentioned in the Bible, is half an Ounce.
A *Talent* is counted One Hundred and Twenty Pound Weight.
A *Talent of Money* is Six Hundred Crowns.

The Weight of all Quantity of Wheat Bread, at every Price of Wheat, is ſet down in a Table hereafter following.

In all our Neighbour Countries, the Fleſh is ſold by Weight.

If the Meal were ſold alſo by Weight, it might prove profitable to the Leiges.

The Twelve Ounces *Troy Weight* of *England*, weigh Twelve Ounces Three Drop Twenty One Grains *Scottiſh* Weight.

Now of theſe our Weights, are made other Meaſures, both for Corns and liquid Stuff.

## *The Foundation of the Liquid Metts, proceeding from the Weight.*

The *Scottiſh Pint*, or *Standart Jug* of *Stirling*, is found to contain Three Pound Seven Ounce Weight of the *Water of Leith*.
Every Pint is divided into *Two Chopins*, or *Four Mutchkins*.
Two Pints maketh *a Quart*.
Four Quarts, or Eight Pints is *a Gallon*.

The *Herring-barrels* contains now Eight Gallons and an Half; tho' by the 57 *Act*, *Par.* 4. Ja. VI. it is to contain Nine Gallons: Twelve of theſe go to a Laſt, and Eight to a Tun.

The *Salmon-Barrel* contains now Ten Gallons and a Quart, tho' by the 110. *Act*, *Parl.* 14. Ja. III. it ought to contain Fourteen Gallons; and by the 57. *Act*, *Parl.* 4. Ja. VI. it ſhould contain Twelve Gallons; but by an Act of Council, *July* 15. 1619. it is to contain Ten Gallons.

Two Barrels, or Seventeen Gallons, is the full of *Bourdeaux-Hogſhead*.

ACT

THE *Puncheons* of High-Country Wines, are of Thirteen or Fourteen Gallons.

THREE *Paris* Puncheons make a *Tun*, or Four *Hogſheads* make a *Tun*.

TWO *Pipes*, or Two *Butts*, is a Tun.

SIX *Barrikins*, or *Terces*, make a Tun.

SIX *Engliſh Buns* of *Bear* is a Tun.

SIX *Salmon-Barrels* is a Tun.

EIGHT *Herring-Barrels* is a Tun.

TWELVE *Barrels* make a Laſt.

OUR *Scotiſh* Pint contains, being fill'd to the Top, very near Four Pints and an Half of *Engliſh*.

NOW, if the Ground be true, that the Pint doth weigh Fifty Five Ounces, then conſequently the Tun ſhould weigh One Hundred and Sixteen Stone Fourteen Pound. The Puncheon full Twenty Nine Stone Three Pound and Eight Ounces. The Barrel being full, Fourteen Stone Nineteen Pound Twelve Ounces. The Gallon ſhould weigh One Stone Eleven Pound Eight Ounces. The Quart full, Six Pound Fourteen Ounces. The Pint Three Pound Seven Ounces. The Chopin One Pound Eleven Ounces and an Half. The Mutchkin full, Thirteen Ounces Twelve Drops.

BY our Cuſtom there is a Plouk in every Jugg or Stoup, and the Wine is only meaſured to the Mark or Plouk, but Ale and Strong Waters are meaſur'd to the Top.

BY the 14. *Cap. Statut.* Dav. II. The Pound of *Caithneſs* is ordain'd to be the common Meaſure, but that Weight is not ſo much as known now; but it is clear by the *Cap.* 22. *Stat.* Rob. III. the Pound then contain'd Fifteen Ounces, but now it is Sixteen Ounces.

## *The Foundation of the Dry-Mets.*

THE Firlot of *Linlithgow*, which is the Standart for the whole Country for metting of Wheat, Rye, Beans, Peaſe, Meal, and White Salt, contains Twenty One Pints and a Mutchkin of Water; which Firlot is divided in Four Pecks, and the Peck is divided in Two Half Pecks, or Four Fore-parts.

THE Firlot for metting of Bear, Malt, or Oats, which were call'd heaped Corns, contains Thirty One Pints of Water.

FOUR Firlots make the Boll.

SIXTEEN Bolls is a Chalder.

EIGHTEEN Bolls and an Half is counted for a Laſt of Rye.

THE Half Boll Mett of the Water Meaſure of *Leith*, contains Nine Pecks of the ordinary Meaſure.

THE *Engliſh* Quarter of Corn contains near-by Two Bolls of *Scotiſh* Meaſure.

THE Boll of Wheat will weigh Fourteen Stone and Three Pound.

THE Firlot of dry Wheat Three Stone, Eight Pound, Twelve Ounces.

THE Peck will weigh Fourteen Pound, Three Ounces.

THE Half Peck Seven Pound, One Ounce and an Half.

THE Meaſure for Coals is declar'd to be the *Culroſs* Chalder, by the 17. *Act*, 3. *Seſſ. Parl.* 1. Ch. II.

## *The Foundation of Meaſures for Length, Breadth, and Thickneſs.*

THREE Barley Corns fair and round, lying in Length, without the Tails, make an Inch.

TWELVE Inches maketh a Foot.

THREE Foot is an *Engliſh* Yard.

THREE Foot and an Inch, or Thirty Seven Inches, make the Ell of *Edinburgh*, which Ell is parted in Four Quarters, and every Quarter in Four Nails: Which Meaſure of a Foot having fallen in Deſuetude, is renew'd by the 18. *Act*, 3. *Seſſ.* 1. *Parl.* Ch. II.

Fourty Five Inches is the *Engliſh* Ell.

Twenty Seven Inches is the *Flemiſh* Ell.

In *France* every Town hath a divers Meaſure. The Foot wherewith the Glaſſen-wrights meaſure their Work, is ſometimes of Nine Inches, and ſometimes of Eight Inches.

## *Of the Rood of Work.*

A Rood of Land contains 240 Ells of Meaſure; but a Rood of Work wrought by Maſons or Sclaiters, contains but Thirty Six Ells, that is, if any Piece of Work be found to be Eighteen Ells in Length, and Two Ells in Breadth, it makes a Rood.

Twelve Ells in Length and Three Ells in Breadth, is a Rood.

Nine Ells in Length and Four in Breadth, is a Rood.

Eight Ells in Length, and Four Ells and an Half in Breadth, is a Rood.

Six Ells in Length, and Six Ells in Breadth, is a Rood.

A Rood of Land within Burgh is eſteemed of old to be Twenty Foot, that is, Five Foot in Length, and Four in Breadth.

## *The Foundation of an Acre of Land.*

Six Ells of the Standart of *Edinburgh*, makes a *Lineal-Fall* wherewith Land is meaſured.

Six Ells long and Six Ells breadth, make a *Superficial*, or *Square-Fall*, wherewith Land is reckoned.

Fourty Lineal Falls makes a Rood.

Ten Falls in Length and Four in Breadth, makes a Rood.

Eight Falls in Length and Five in Breadth, makes a Rood.

Four Roods is an Acre.

So an Acre contains One Hundred and Sixty Lineal Falls, or Nine Hundred and Sixty Ells.

Eighty Falls in Length, and Two Falls in Breadth, makes an Acre.

Fourty Falls in Length and Four in Breadth, makes an Acre.

Thirty Two Falls in Length and Five in Breadth, is an Acre.

Twenty Falls in Length and Eight in Breadth, is an Acre.

Sixteen Falls in Length and Ten in Breadth, is an Acre.

Four Acres are counted for a Miniſter's Gleib.

Six Acres arable Land for a Husband-Land.

Thirteen Acres is counted an Oxen-Gate.

Four Oxen-Gate is eſteem'd a Pound Land of old Extent.

*VIDE Obſerv.* on *Act* 17. *Parl.* 2. Ja. IV. *ſupra.* XCVII.

XCVIII. THIS Act is only conceiv'd in prohibitive Terms, without any penal Sanction; and tho' this be forbidden, yet it is not declar'd a Crime; and yet it was found a Crime to poind labouring Oxen in Time of Labouring, and puniſhable by a pecunial Mulct, *January* 1666. Lord *Renton contra* the Sheriff-depute of the *Merſs*.

The Time of Labouring is not determined by this Act, and therefore the Lords have ſpecial Regard in this to the Cuſtom and Seaſon of each reſpective Country, as was decided *November* 15. 1627. So that tho' they were labouring, yet if it was not the Seaſon of Labouring, they have not the Privilege.

But if the Debitor's Labouring be ended, tho' the Seaſon of Labouring be not generally ended in the Country, yet his Labouring-Goods may be poinded, *November* 22. 1628. *Spotſwood h. t.* tells us, That *a paritate rationis* this Privilege was extended to a going Salt-pan; *ſed Leges in privilegiis non ſunt extendendæ.*

If the Debitor have no other moveable Goods, the Creditor may poind even labouring Goods, by the Words of this Act; for it ſeems the Parliament thought it not juſt that a Man ſhould loſe his Debt altogether: And though the Privilege here granted may ſeem only a Delay, yet by abſtracting the Goods during that Suſpenſion, he may be totally fruſtrated.

ACT The Common Law to which this *Statute* relates, is *L.* 8. *C. Quæ reſ. pigr. obl. poſſunt & authent. Agricultores ibid.* but by that Law the Perſons of the Labourers could not be apprehended; nor made that Law any Diſtinction, whether there were other Goods poindable. *Vide Tract. Crim. Tit.* 31. where this Act is more fully explain'd.

XCIX. THIS Act is explain'd, *Act* 117. *Parl.* 9. Ja. I.

C. THE former Acts of Revocation revoke not expreſly all Things done in Hurt and Prejudice of the Kirk; but this was implied under the general of what was done in Hurt of the King's Soul and Conſcience; but in this Latin Revocation, which appears has been ordain'd to be in Latin, that a Church-Man might draw it, the King revokes all that has been *in detrimentum ſeu læſionem Eccleſiæ Catholicæ*; and to ſhew the King and Parliament *unica voluntas*, all ſuch Deeds are ordain'd to *be raz'd out of the Books of Parliament.* The Word *Kirk* comes from the Greek Word Κυριακη; for ſo the Houſe of God was nam'd amongſt the Chriſtians who were *Greeks*, as the *Latines* nam'd it *Domus Dei. Vide Monſ. Fleurii des moeurs des Chriſtiens*, who gives this Origination for the Word *Kirk*.

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# *PARLIAMENT* VII.

CI. BY the *Act* 73. *Parl.* 6. Ja. IV. ſome Places were ordain'd to anſwer at Juſtice-airs, in other Places than the Head-Burghs of their own Sheriffdoms, which is here reſtricted only to Juſtice-airs and Sheriff-courts; by which I think is meant *taking of Dittay*: But now both theſe Acts are in *Deſuetude*; for every Place anſwers to Juſtice-airs, according to the Diviſion of their own Shires.

CII. IT is moſt obſervable from this Act, that it was made in a *Scottiſh* Parliament or Council, holden within *England*; which refutes that Opinion, That our Kings cannot hold Parliaments nor Councils without their own Territories, upon the miſtaken Principle, That *Judex extra Territorium jus non dicit.* It is likewiſe obſervable, that this Act is made only by the King, with the Advice of his Lords: And it is probable that this Act, like a *Teſtamentum militare in procinctu*, muſt have ſome Allowance given to it againſt the common Rules, and that it imported only a Diſcharge of the Wards and Marriages of ſuch as died in this Hoſt, and was only valid, becauſe the King and Lords remitted only therein a Caſuality due to themſelves; ſo that this Act was but a general Diſcharge by the King and His Subjects then preſent, who were Superiors. But why then is it inſerted amongſt the Acts of Parliament? Or how could it have oblig'd Abſents? And the Rubric calls it, *An Act made by our Sovereign Lord King* James *the* IV. And yet this is not properly an Act of Parliament; for this Parliament is held *in Anno* 1509. whereas this Act is made *in Anno* 1513. and it may ſeem only an Act of Council, made by the Advice of the Lords, that is to ſay, the Lords of Council, which Judicature then govern'd the King's Property by it's Acts; and it has been thereafter inſerted amongſt the Acts of Parliament, for the greater Security of thoſe who had hazarded their Lives at this Time; and therefore by the 3. *Act*, *Parl.* 2. Ja. V. this Favour is extended to the Vaſſals holding of Subjects.

# King JAMES V.

## PARLIAMENT I.

II. THE Maſter by this Act is bound to deliver up his Servant, who is attach'd or challeng'd as a Thief, or Robber, *vid. Stat.* Alex. II. *Cap.* 21. *Stat.* Will. *Cap.* 15. *Stat.* Da. II. *Cap.* 1. and *Act* 6. *Parl.* 3. Ja. V. And in the Regiſters of the Council there are many Bonds given by Maſters in thoſe Terms. *Vid. Obſ.* on the ſaid 6 Act.

## PARLIAMENT II.

III, and IV. THESE Two Acts diſcharging the Wards of thoſe who were killed in the King's Hoſt, or prorogating for five Years the Tacks of Tenents, were very reaſonable, but being temporary, are not now in Obſervance; for the Wards of theſe who died in the King's Hoſt at *Worceſter*, or elſewhere, fell without any Privilege. That the 3. Act is temporary only, appears from theſe Words, *That are now killed in purſuing or defending in Time of Weir, againſt our auld Enemies of* England; for that Enmity ceas'd by the Union.

*Obſerv.* FROM both theſe Acts, that the receiving a deadly Wound, is *equiparated* to the being killed.

## PARLIAMENT III.

V. BY this Act the Porteous Roll was to be deliver'd to the Crowner, but now it is deliver'd to the Sheriff when Juſtice-airs are to be held; tho' theſe who are Crowners do ſtill proteſt againſt this Innovation.

WHEN the Crowner got the Porteous Roll, containing the Names of thoſe who were to be cited to the Juſtice-airs, he was oblig'd to cite them at their dwelling Houſes, and Paroch Kirks, by this Act; for by the Word *Arreſtment*, in this Act, and many of our old Laws, is meant Citation; but if they can be apprehended perſonally, this Manner of Citation is unneceſſary, tho' that be not here expreſt. By the preſent Practic, if they cannot be apprehended perſonally, they are to be cited at their dwelling Houſes, and at the Mercat-Croſs of the Head Burgh of the Shire where they live.

II. BY this Act, if the Perſons to be cited can be found, the Crowner is to take Surety of them for their Appearance, which the Sheriff yet does; but if they be not *Strenzieable*, that is to ſay, if they cannot be apprehended, then the Crowner was to arreſt their Goods, like to the *annotatio bonorum* in the Civil Law.

ACT III. If they have no Goods to be arreſted, they were to be put in the King's Caſtles, that is to ſay, the King's Priſons.

IV. If the King has no Caſtles within that Shire, they were to be delivered to the Sheriffs, who are bound to keep them ſecurely.

By this Act the Crowner is to be anſwerable for the Caution he takes; for the Act ſays, *That they ſhall take ſicker Surety, ſik as they will ſtand for to the King's Grace*; and it is pretended that the Clerk of the Juſticiary is not bound for the Surety he accepts, tho' the Crowner and Sheriff be; becauſe the Crowner is oblig'd to know who are *Solvendo* in the Shire, which the Clerk of the Criminal Court cannot know through all *Scotland*; but I think that both are equally oblig'd, *viz.* To do exact Diligence to know the Solvency of theſe they take; and ſince the Puniſhment of taking inſufficient Caution is not here expreſt, it ſeems to be arbitrary, and in effect to take Surety that is notorly inſufficient, ſeems the ſame Guilt with letting a Malefactor eſcape.

VI. THE Maſter here is only oblig'd to preſent ſuch Tenents as dwell within the Shire with him; but by the *Act* 2. *Parl.* 1. Ja. V. if the Complainer would attach the Tenent, and the Maſter be requir'd to deliver him up, whether he liv'd in the Shire with the Tenent, or not, he was to be puniſh'd as Art and Part, in caſe he refuſed to deliver him up; and by this Act he is only to pay the Unlaw. But this laſt Act is not well obſerv'd, for now no Man is liable for his Tenent, except Highland Heretors, and Chiefs of Clans, who are to find Caution to the Council for that effect, *vid. Acts* 92, 93, 94, *&c. Parl.* 11. Ja. VI. But by this Act it is clear, that the King may make Maſters ſtill liable for their Tenents who live upon their Ground, and that in any Court, tho' this Act appoints them to be preſented to Juſtice-airs, ſince *eadem eſt ratio*; and this Act was adduc'd for juſtifying the Proclamation that appointed Maſters to be liable for their Tenents, *vid. Act* 2. *Parl.* 1. Ja. V. And the Acts there cited, where Maſters are liable for Servants, *vid. tit.* 55. *Lib.* 2. *Feud.* where Vaſſals are oblig'd to preſent their Servants to their Superiors, if they have offended them: But ſince by this Act, Maſters are only to be liable for the Tenents unlaw, if he preſent them not; it may be doubted what this Unlaw is, ſince in Juſtice-airs if the Tenent was abſent, he was ordinarly denunced fugitive; for the Juſtice Court does not unlaw an abſent Defender; and therefore by this Unlaw may be meant what the Tenent would be unlaw'd in, if he had been preſent, *vid. Stat.* Will. *Regis*, *Cap.* 7. & 8.

VII. BY this *Act*, theſe who are Surety to the Party injured, for Aſſythment, may be called before the Lords of Council, either in Seſſion or out of Seſſion: But this is now abrogated by the late Conſtitution of the Seſſion, who are come in place of the Lords of Council who then were.

The Meaning of theſe Words in the *Act*, (*And as for Slaughter and Mutilation, to keep the Order of the* Act *made thereupon of before*) is, That Slaughter and Mutilation are not comprehended under this Act; becauſe by the 63 *Act*, *Parl.* 6. Ja, IV. no Remiſſion can be granted for theſe Crimes, and therefore there can be no Aſſythment

VIII. THIS Act is further explained in *Crim. Pract. Tit.* Fire-raiſing: But it is fit here to obſerve That in theſe Words, *That particular Juſtice-Courts ſhall be ſet thereto, as ſhall pleaſe the King's Grace, His Council, and the Juſtices*: The Word (*And*) is taken *disjunctivè*, as is often in the Civil Law, and our Statutes. *L.* 66. *ff. de Hæred. inſtit.*

*Nota*, The killing of Thieves is declared no Crime.

# PARLIAMENT IV.

IX. EXCOMMUNICATION is here called *The Proceſs of Curſing*: And Excommunication, us'd in time of Popery to be granted for not Payment of civil Debt, or not performing of Contracts, or not reſtoring of ſpuillied Goods, is now in deſuetude: (for all theſe were held to be mortal Sins) And by this Act, Letters to poind or apprize were to be granted thereupon; and by the 7 *Act*, *Parl.* 4. *Q.* M. their moveable Eſcheat falls to the King, if they lie under the Proceſs of Excommunication for a Year, the Creditor being firſt paid: Which Acts are further enlarged by the 3 *Act*, 20 *Parl.* Ja. VI By which their whole Rents and Revenues are to be applied to the Uſe of the Public; and all Gifts of Eſcheat granted to the Behoof of the Wife, Children, or Confidents of ſuch as are excommunicated for Popery, are declared null, *Act* 197. *Parl.* 14. Ja. VI. It may ſeem ſtrange, that Excommunication repels *ab agendo, ſed non a defendendo*; and yet Horning debars from both, tho' the Perſon excommunicated be the greateſt Delinquent, being at *God's Horn*, 8 *July*, 1636. *Colſtoun* contra *Cranſtoun*, *Vide Obſerv.* on *Act* 11. *Parl.* 6. Ja. II. *ſupra*.

X. THIS Act is innovated and enlarged by the 1 *Parl.* Ch. II. *Seſſ.* 1. *Act* 41.

XII. THIS Act is in Obſervance to this Day, but it holds only in Foreſts notorly known to be ſuch: For if there was probable Reaſon of doubting whether it be a Foreſt, the Goods feeding in it will not be eſcheat for Bygones, *Vid. Leg. For. C.* 2. § 2. & *ſequen.* Becauſe this Act ſays, *If any Perſon be found putting their Goods in Paſturage in the King's Foreſt, they ſhall eſcheat the ſame*; therefore it ſeems reaſonable, that if Goods be only found there, this is not ſufficient to eſcheat them, ſince they might have ſtrayed there, *& dominus non tenetur ad pœnam ſi animal ex ſeipſo ingrediatur in locum prohibitum ut eſt Foreſta. Borel. de Magiſtrat. Edict. Lib.* 4. *Cap.* 6. *Num.* 18.

XIII. *VID. Annot.* on *Act* 61. *Par.* 7. *Ja.* III. *ſupra.*

XIV. THIS Act relates to *Act* 88. *Par.* 14. Ja. II. whereby Hares are not to be kill'd in Time of Snow: And *Act* 59. *Par.* 11. Ja. VI. and *Act* 266. *Par.* 15. Ja. VI. whereby Hares are not to be kill'd at any Times by Guns, Girns, Nets, or Croſs-bows; which laſt is yet in Obſervance, and all theſe Acts are reviv'd by a Proclamation of Council, in *February* 1680.

XV. BY the 25 *Act*, 3 *Par.* Ja. IV. it is ordain'd, That *the Superior of Ward-Lands, or his Donatar, ſhall find Caution to leave the Houſes, Orchards, Woods, Stanks, Parks,* &c. *in as good Condition as they found them, they taking their Suſtentation, or uſing them in needful Things, without Waſte or Deſtruction*; which is extended to all Liferenters and Conjunct-fiars, who are ordain'd to find the like Caution by this Act. By which alſo, all *Sheriffs, Stewards, Magiſtrates* within Burgh, and Spiritual Men within their Bounds, are alſo commanded to exact this Caution.

THESE Acts are alſo extended to all ſuch as have Liferent Tacks from the Heretors, without Payment of any conſiderable Duty, tho' the Words of this Act run only againſt ſuch as have Liferent Infeftments; but this Act ſhould not be extended to ſuch as have Liferent-Tacks, for Payment of an equivalent Duty, *Qui ſunt conductores & non uſufructuarii*; for the Heretor is rather oblig'd to entertain the Houſes to ſuch Tackſmen, than they to him, *January* 23. 1635. Laird of *Laidly* contra *Boyd*. But this is to be underſtood of ſuch Tackſmen, as pay a Duty equivalent to the Rent, for elſe Relicts would in Place of Liferents, take Tacks during their Life for any imaginary Duty, which ſhould not free them from the finding of Caution. In that Caſe it was alſo found, That this act did oblige Donatars of Liferent-Eſcheats, to find Caution to maintain the Houſes, Orch-yards, *&c.* which fall under his Gift; but *quid Juris*, if the Fisk retain Liferents ſo fallen in his own Hands, *& Peregr. de Jur. Fiſc. Tit.* 1. *Num.* 35. is of Opinion, That *uſufructu Fiſco legato Fiſcus non ſatiſdat de utendo fruendo Arbitrio boni Viri*; but it is hard that the Heir ſhould be in a worſe Caſe by the Crimes of the Liferenter, or their going to the Horn, ſo that his Eſtate ſhould be thereby expos'd to Miſ-management: And albeit where a Liferent is left to the Fisk, Caution may ſeem to be remitted by the Intention of the Party, yet that ſhould not be extended to the Caſe of its falling to the Fisk, without his Conſent; and it rather ſeems, that ſince a Donatar is ty'd to find Caution, that therefore the Fisk ſhould.

*Nota*, THERE needs no Precognition to be taken by an Aſſize of the Condition the Houſes were in, conform to the 226 *Act Parl.* 14. Ja. VI. For that Act only ordains ſuch Precognitions to be taken when Houſes are ruinous within Burgh, and the Liferenters refuſe to concur in Re-building them, in which Caſe the Heretor is allow'd to repair, he finding Caution to pay the Liferenters the Deuty that theſe Houſes pay'd formerly, *March* 23. 1626. *Foulis* contra *Allan*.

THOUGH this Act ordains the Sheriffs, and others who refuſe to exact this Caution, to be lyable to the Heretor of the Ward-lands, without mentioning that they ſhall be liable to Liferenters, or Conjunct-fiars; yet doubleſs they are liable to them alſo for the Damage ſuſtain'd in not exacting this Surety.

THOUGH in ſome Caſes *Cautio juratoria* be allow'd, yet it would not be allow'd here, *Gail. Lib.* 2. *Obſ.* 47. For that Caution cannot ſecure the Heretor, and there is as little Reaſon to receive it in this Caſe, as in Removings. But *Perez* is of Opinion, That *Cautio juratoria* is receivable *ſi offerens ſit probatæ & honeſtæ Vitæ*.

THERE was likewiſe *Cautio uſufructuaria* by the *Civilians, & introducta eſt per Senatus Conſultum in ijs quæ uſu conſumuntur*, §. 3. *Juſt. de uſufruct. & L.* 1. *ff. de uſufructu earum Rer. quæ uſu conſum.* But all this Matter is learnedly treated by *Chriſtin. ad Conſuetud.*

*Mechlin. Tit.* 14. where he determines, That the leſſer and temporary Expences are to be beſtow'd by the Liferenter, but that ſhe will get Repetition from the Heretor of theſe Expences, *quæ perpetuam Rei Utilitatem concernunt*; if ſhe advertiſe the Heretor, that they were neceſſary, and firſt deſir'd him to repair, but that ſhe cannot by her Reparation alter the Form of the Thing, though for the better, nor uſe it otherwiſe than the Proprietar himſelf did.

By the former Act Ja. 4. *Parl.* 3. *Cap.* 25. to which this relates, the Liferenters are to find Caution, That they ſhall not deſtroy the Orch-yards, Woods, &c. From which it may be obſerv'd, That where Woods are upon liferented Lands, the Liferenter as well as the Conjunct-fiar, may make Uſe of as much of the Wood, or Coal, as is neceſſary for her own Uſe, ſince ſhe is only reſtrain'd by this Act from waſting; and by the Cuſtom of ſome Countries, ſhe cannot pretend Right to Trees fallen by Winds or Accidents, if the Trees be ſuch as are fit for Sale, & *in Sylvâ Cæduâ ita Inciſionem facere poteſt ut ad Fructum pertineat non vere ad Deſtructionem, vid. L. ex Sylvâ* 10. *ff. de uſufruct.* which agrees with our Law, by which the Liferentrix has only Right to as much of the Coals or Trees as are neceſſary for her own Uſe; but even this Right is only due to her, whilſt the Land is the Fiar's, but does not hinder the Fiar to ſell his own Land, *Craig. Pag.* 189.

XXI. FORESTALLERS are *theſe who buy Goods before they come to an open Market*; and *Regraters* are properly only theſe *who buy up all Goods, that they may ſell them again at dearer Rates.* But our Law has uſed theſe two Words promiſcuouſly, though by this Act ſuch as buy any thing before it be preſented to the Market, or who buy it in the Market; but before the Market be proclaim'd, which is called here *the Time of Day of the Market*, are puniſh'd as *Foreſtallers*; yet there muſt be ſomething of Deſign proven, as if they ſhould ſtand in the Way upon a Market Day, or ſhould every Day cauſe buy up what were going to ſuch a Town, to hinder the Traffick of that Town; for it were hard to make generally all who buy Things going to a Town, or a Market, Foreſtalling; for that may be done either ignorantly, or neceſſarily.

Though the Puniſhment here be Impriſonment and eſcheating of the Defender's Moveables, yet by the 148 *Act, Parl.* 12. Ja. VI. the Puniſhment is ordain'd to be Forty Pounds for the firſt Fault, an Hundred for the ſecond, and eſcheating of Moveables for the third; and tho' ſeverals have been found guilty of Foreſtalling, as particularly upon the 9. of *June* 1596. and the 6. of *Auguſt* that Year; yet I find no Puniſhment follow'd

The Chamberlain of old was the only Judge in his Chamberlandair, *Cap.* 35. *Stat.* Will. *Reg.* But now the Juſtices are only competent Judges to this Crime: They were call'd *Dardanarii* by the Civil Law, and were puniſh'd *pœnâ extraordinariâ L.* 6. *ff. de extraor. crim.*

XXII. THIS Act is innovated and enlarg'd by the *Act* 16. *Seſſ.* 3. Cha. II. *Par.* 1.

XXVI. ALL Officers within Burgh are diſcharged to purchaſe Lordſhips out of Burgh, leſt they give Dreadure to their Neighbours; by which they are, as I conceive, diſcharg'd to be Lords of Seſſion, or Lord Barons, or at leaſt they loſe their Offices how ſoon they attain to theſe.

Each Burgh does to this Day count in Exchequer for their Feu-duty yearly, conform to this and other Acts.

It was thought, that a Purſuit againſt the Magiſtrates of *Edinburgh*, for counting for their Common-good upon this Act, was not competent at the Inſtance of a private Burgeſs, or of any ſave the Lord Treaſurer of the Kingdom, who comes in place of the Chamberlain-Air, tho' it was ſaid to be *actio popularis*, and a Species of *ſuſpectæ tutelæ*; but this would have given too great Occaſion to Faction, and would have diſcourag'd Magiſtracy too much; nor are ſuch popular Actions in Matters of Government to be eaſily allow'd under Monarchy tho' they are neceſſary in private Rights.

XXVII. THO' this Act appoint ſuch as trouble Burrows in uſing their Liberties, to be puniſh'd, in Juſtice-Courts, as common Oppreſſors; yet this is in *Deſuetude*, except the Oppreſſion be very atrocious: But the ordinary Remedy is now, either by Actions of Moleſtation, or Declarator of Property before the Seſſion, or by Actions of Riot before the Privy-Council.

XXIX. COLONEL *Borthwick* having gotten a Gift of this penal Statute, purſu'd the Maltmen criminally thereupon; which Purſuit was diſcharg'd by the Council 1672. upon a Bill, and theſe Statutes found to be in *Deſuetude*, and impracticable in this Age, wherein Malt cannot be ſold for Two Shilling more than the Price of the Boll of Bear, as this Act appoints.

ACT XXXII. BY our Law, all ſingle Eſcheats fall to the King; for *bona mobilia ſunt allodialia*, and hold not of the ordinary Superior, who has no Right *jure proprio*, to the Eſcheats of ſuch as dwell within his Territory: And thus Lords of Regality have only Right to ſuch Eſcheats by their Erection from the King: But the Liferent-eſcheats which fall either for civil or criminal Cauſes, belong to immediate Superiors *reſpective*; ſo that if a Vaſſal who is at the Horn, have Lands holden of many Superiors, each Superior will have Right to the Land which holds of himſelf; for Feus being given for Service, and the Vaſſal being *nullus in jure*, by his Rebellion the Feu returns to the Superior, except in the Caſe of Treaſon, in which it falls to the King.

OBSERVE from this Act, That the Lords of Articles are Judges to Proceſſes in the firſt Inſtance; but the Debate muſt be reſumed to the Parliament.

XXXIII. BY this Act, Juſtice-airs and Courts are peremptor at the ſecond Diet; but by the *Act* 79. *Parl.* 11. Ja. VI. they are peremptor at the firſt Diet: And Parties not appearing now, are unlaw'd, if Purſuers; and are declared fugitive, if Defenders, at the firſt Diet. *Vide Obſerv.* on *Act* 39. *Parl.* 5. Ja. III. *ſupra*.

THIS Act relates to another Act of Parliament, dated the 10 of *July*, 1625. but there is no Parliament amongſt our printed Laws, of that Date.

XXXIV. THO' by this Act *Depredations, Reiffs* and *Spuillies*, are ordain'd to be firſt civilly purſued; yet the Juſtices uſe to ſuſtain criminal Purſuits for theſe Cauſes in the firſt Inſtance, except a Defence be proponed upon Matter of Right, as if the Defender alledged he had a Diſpoſition, or other Right: And in theſe Caſes the Juſtices ſuperſede to give Anſwer to the criminal Purſuit, till the civil Right and Title be firſt diſcuſs'd; and this the Privy Council uſes to do in Riots purſued before them.

# PARLIAMENT V.

XXXVI. AFTER many Alterations obſerved by me in the *Annot.* on *Act* 65. *Parl.* 3. Ja. I. and *Act* 62. *Parl.* 14. Ja. II. at laſt the Seſſion was eſtabliſhed in the Way it now is by King *James* V. in this His Fifth Parliament; and is ordain'd to conſiſt of Fourteen Lords; Seven whereof were to be of the Clergy, or Spiritual; and Seven Temporal, with the Preſident, who was to be of the Clergy: But ſince the Abolition of Popery, they are all Seculars, or Laics, tho' ſometimes Biſhops were extraordinary Lords: And tho' this Act of Parliament appoints the Half to be Spiritual, and the Half Temporal, with a Preſident; yet by the 93 *Act*, 6 *Parl.* Ja. VI. it is declar'd it ſhall be lawful to the King to preſent any able Perſon, whether he be of the ſpiritual or temporal State.

XXXVII. *Vide Obſerv.* on *Act* 7. *Parl.* 3. Ch. II.

XXXIX. THE preſent Lords are ordain'd to have all the Privileges that the Lords of Seſſion (for ſo they were called in the Reign of King *James* II) had formerly: And therefore it is alledged, that ſince Appeals could not be received from them, that they cannot be received from the Lords of Council and Seſſion; as was formerly obſerved, *Act* 62. *Parl.* 14. Ja. II.

XL. THE Chancellor, when preſent, is to preſide, and becauſe he preſides, therefore he gives his Vote laſt; and becauſe it was controverted, Whether he was to be Preſident in the Parliament, therefore by the 1 *Act*, 1 *Parl.* Ch. II. he is declar'd to be Preſident in all Courts; and he did preſide by Virtue of this Act, in Exchequer, till he was diſcharged by His Majeſty, by a Letter *Anno* 1663.

THESE Words, *And ſiklike other Lords as ſhall pleaſe the King's Grace to ſubjoin to them of His Great Council, who ſhall have Vote, to the Number of Three or Four*, are all the Warrant that there is for nominating the extraordinary Lords of Seſſion, who cannot exceed Four. They are ſtill named by a Letter from the King, as the ordinary Lords are; but they are not examined like them; and theſe extraordinary Lords are marked in the Books of Sederunt, after all the ordinary Lords.

ACT XLI. THESE Words, *And the Lords to ſubſcribe all Deliverances, and none other*, is all the Warrant that was for the Lords ſubſcribing all the Bills for raiſing Summons before the Criminal Court: But I think theſe general Words ſhould be reſtricted *ſecundum ſubjectam materiam*, as all general Words in Law ought to be; for we ſee, that notwithſtanding of theſe general Words, the Warrants for raiſing Summons before the Privy-Council, are ſubſcribed only by Privy-counſellors; and now the Juſtices are only in uſe to ſubſcribe their own Bills, tho' the other Lords of Seſſion are not excluded from that Power.

XLIII. THIS Act is the Warrant that the Lords have for making *Acts of Sederunt*; which were ſo called, becauſe the Lords ſitting are marked, *Sederunt* ſuch and ſuch Men; but theſe Acts are to reach no further than the ordering of Forms of Proceſs, or the regulating their own Houſe; and therefore this Act ſays, *For adviſing and making of their Rules and Inſtitutes for the Order of Juſtice.* This ſame Power is almoſt allow'd by all Nations to their ſupreme Judicatures, Vin. *Comment. ad* § 9. *Inſtit. Lib.* 1. *Tit.* 2. Chriſtin. *Vol.* 2. *Deciſ.* 51. *Num.* 8.

XLIV. THIS Diviſion of the Kingdom in order to the calling Cauſes, is now in Deſuetude; for all Cauſes are now enrolled according to the Order of the Returns of the Proceſs. *Vide Act* 16. *Seſſ.* 3. *Parl.* 2. Ch. II. *Artic.* 1.

XLV. NO Seſſion ſits now on *Monday*, and ſo this Act is in Deſuetude. Suſpenſions are called on *Tueſday* and *Wedneſday*; and ordinary Actions upon *Thurſday*, *Friday*, and *Saturday*.

THE *Friday* was allotted for the Cauſes of the King and Queen, and the Actions of Miniſters and Strangers; but by the Regulations, the King's Cauſes may be called on any Day, the Party Defender being advertiſed, 14 Days before, of the particular Day on which it is to be called. It has been doubted before this Act, Whether the Queen's Cauſes ſhould enjoy the Privilege of the King's Cauſes; and the Privilege is by this Act extended to Her; & *ita Auguſti privilegia ad Auguſtam ſunt extendenda, L.* 31. *ff. de legibus.*

XLIX. NOW the Lords ſit from 9 to 12. and they ſit down ſometimes before 9. as Occaſion requires.

LI. *Nota*, BY this Act, Parties were allowed to plead their own Cauſe, and they needed not have Advocates except they pleaſed; but no other Party not contain'd in the Summons, can have Liberty to ſpeak: But the Lords can now hinder Parties to plead, or force them to have Advocates, to ſhun Confuſion and Nonſence. It ſeems alſo, that tho' an Action be to a Man's Behoof, he cannot be allow'd to ſpeak, except his Name be in the Summons.

LII. THE Order of tabulating Summonſes is now much altered; for no Summonſes are tabulated except Actions of Declarators, Improbations, Contraventions, and other Actions at the King's Advocate's Inſtance; upon the Back of which Summons he writes, *Tabuletur erga* Diem-veneris *proximè ſequentem*; and except this be written upon it, the Action cannot be debated: And ſome think, that if the Action be called without this, a Decreet thereupon pronounced would be null.

LIII. WITNESSES are now examined by One of the ordinary Lords, in the Afternoon, as here; and that Lord who ſat laſt Week in the Outer-houſe, does the next Week examin Witneſſes.

LVII. THE *Quorum* of the Lords, by this Act, is Ten, either Ordinary, or Extraordinary, for either make up the *Quorum*; but now Eight Lords with the Preſident make a *Quorum*; which Alteration proceeds from the 44 *Act*, 11 *Parl.* Ja. VI.

*Nota* I. BY this Act, that Adviſing of Proceſſes cannot be recommended to any particular Lord.

*Nota* II. THAT by this Act Publication of Witneſſes is allowed, elſe how is it ordained here, that Publication of Witneſſes ſhould be *before the hail Auditor?* And Advocates were allow'd to ſee the Depoſitions, and to debate againſt them, till the Year 1666. at which time this was diſcharged, upon Pretext that Advocates did ſpend too much Time in debating againſt the Depoſitions; and that Witneſſes Depoſitions were more to be credited when no Man was to ſee them, or know them, than when the Perſons intereſted were to ſee them; becauſe it was probable they would take Pains to pleaſe them: But we find great Miſtakes by not letting Advocates ſee the Depoſitions, ſince they might clear many Things that ſeem inconſiſtent, and which depend upon other Matters of Fact; and it is rather preſumeable, that Witneſſes knowing that what they ſay is not to be ſeen, will take Liberty to depone too liberally; the not Publication alſo of the Depoſitions tends much to make Judges arbitrary, ſince the Warrants whereon they proceed are not known; and Publication of Teſtimonies is a Kind of confronting Witneſſes with the Parties, which is oft-times very uſeful; and this Publication is for theſe Reaſons allow'd by the Civil Law, and in moſt Nations. *Vide* Marant. *de proceſſus publicatione*; and in *England*, in all Caſes; and is even with us allowed in ſome Caſes yet, as in *Falſhood*.

LIX. CLERKS *to the Signet* are now called *Writers to the Signet*; but their Fees ſpecified by the next Act are innovated by the Regulations. At firſt there was but one Clerk of Seſſion, who was called the Clerk of Council, as is clear by the *53* Act of this Parliament, and he was choſen *per vices*, out of the Writers to the Signet: but all the Writers to the Signet, or Clerks of the Signet were at firſt admitted to be preſent at the Deciſion of Cauſes, whereof this Act is a Veſtige: Thereafter there were Two Clerks of the Seſſion, and at laſt Three; but leſt their Number ſhould increaſe, by an unprinted Act of Parliament it was declared that they could not be more than Three; notwithſtanding whereof, in *Anno 1661.* the Regiſter appointed Six, whereupon the King, by His Letter in *Anno 1676.* reduced them again to Three, and now again there are Six Clerks, as before the Year 1675.

LXI. IT is appointed by this Act, that Deliverance upon Bills preſented to the Seſſion be only written by a Writer to the Council, (that is to ſay, a Clerk of Seſſion) and not by a Writer to the Signet.

LXIV. BY the laſt Words of this Act it appears, that an Advocate may be compelled to plead for any Man, except he can alledge that he has been employed for the other Party, or the like, &c. which is conform to the Civil Law, *L. 7. C. de poſtulando*.

LXVI. BY our preſent Practice, Advocates and all remove at the Adviſing of the Cauſe, tho' in *England* and *France* Cauſes are openly adviſed, which diſcourages very much all Arbitrarineſs.

LXVII. THAT Advocates ſhould propone all their Dilators together the Second Time, is ſtill ordered, but never obſerved; for where the Dilators are of Importance, or intricate, the Lords will allow them to be proponed ſeparately.

LXVIII. BY this Act, ſuch as miſrepreſent the Lords, or accuſe them unjuſtly, either by a formal Proceſs, or to the King, are to be puniſh'd arbitrarily by way of Action, for they are here appointed to be called before the King; but ſuch as diſhonour or lightly them, are to be puniſhed by the Lords themſelves. And the Lords are in uſe to ſend ſuch as contemn them or their Orders to the Caſtle, or Tolbooth, or to ordain them to crave Pardon upon their Knees, &c. ſuitable to the Offence.

THE Lords are to this Day free of Taxations, conform to this Act; but of late, if there be no Exception of them in the Acts impoſing Taxations, they are in uſe to get a Letter from the King, declaring them free, tho' this may ſeem needleſs, becauſe of 23. *Act*, *Parl.* 1. Ch. I. and the 23. *Act*, *Parl.* 1. Ch. II.

THO' the Precedency due to the Wives of Lords of the Seſſion, or Advocates, be continued with them after their Husbands Death, which we derive from the Civil Law, *L. fœmina 8. ff. de Senatoribus*, yet Immunity from Taxes is not extended to their Wives, Stockman. *Deciſ. 65.*

# PARLIAMENT VI.

LXIX. THO' regularly Crimes die with the Committers, and cannot be puniſh'd after their Death, yet by this Act it is ordain'd that Treaſon may be purſu'd after the Committer's Death, which holds only in Treaſon committed againſt the King's Perſon and Commonwealth, that is to ſay, in *Perduellion*, where there is a Deſign againſt the Kingdom, ſuch as raiſing War, bringing in Foreigners, &c. but holds not in ſimple Treaſon, or *læſe Majeſtie*, ſuch as are the keeping out of a Caſtle, or in offering to detain the King's Perſon Priſoner upon any private Account; for the Words, *againſt the King's Perſon or Commonweal*, are copulative. Neither

ACT does this Act hold in *Statutory Treaſon*, which are merely Treaſons by virtue of a Statute; ſuch as ſtealing in Landed-men, or Murder under Truſt, &c.

IN all Caſes where Treaſon is to be purſu'd after the Death of the Committer, it is neceſſary to call the appearand Heir, becauſe his Right as appearand Heir, is to be forfeited by the Sentence: But tho' it is ordinarily believ'd that the Bones of the Committer muſt be raiſed and brought to the Bar, yet this is not neceſſary.

*Nota*, THAT the Common or Civil Law is a ſufficient Warrant to ſuſtain Actions in this Kingdom, becauſe of its great Equity, except where the ſame is over-ruled by a contrary Law or Cuſtom.

THE Civil Law to which this Act relates, is, *L. ult. ff. ad L. Jul. maj. Extinguitur crimen mortalitate niſi forte quis Majeſtatis reus fuerit.* It has been much doubted amongſt Lawyers how far the Delict or Crime of the Predeceſſor ſhould infer Action againſt their Heirs, which may be reſolved in theſe Concluſions.

I. THAT all corporal Puniſhment expires with the Committer; *nam noxa caput ſequitur, Inſtit. Lib. 4. Tit. de nox. Act 8. per tot. & § 5.*

II. As to any Civil Concluſion, *& quoad intereſſe pecuniarium*; the Civil Law did only ſuſtain Reſtitution againſt the Heir in Two Caſes, *viz. If either Litiſconteſtation had paſt in the Defunct's own Time, or if the Heir had got Advantage by the Crime or Delict of his Predeceſſor*; as if for Inſtance, the ſtoln Goods, or the Money conceal'd by his Predeceſſor had remain'd with him, *§ Non autem omnes* 1. *Inſtit. de perpet. & temporal. Action.*

III. BY the Canon Law the Heir was liable to refound the Damage done by the Predeceſſor, tho' there was neither Litiſconteſtation paſt in his Time, nor did any Advantage remain with his Heir, *Cap. ult. ext. de ſepult. cap. in literis ext. de rapt.* And tho' the Opinion of the Canoniſts ſeem to the Lawyers of this Age more equitable, they thinking Litiſconteſtation but a Subtilty, yet I conceive that there was very much Reaſon for the Civil Law to require Litiſconteſtation, ſince if the Defunct himſelf had been purſu'd, he might have alledg'd many Things which might have defended him that were unknown to the Heir; as for Inſtance, he might have alledg'd, that the Sheep alledg'd to be ſtoln were intrometted with by the Owner's Warrant, and might have cited Witneſſes who were preſent, which the Heir could not know, and yet our Practice follows the Canon Law, as more conſcionable.

I find, that in the 5. Council at *Conſtantinople*, it was after Debate found, That *Origin* and *Theodorus* might be Anathematiz'd after their Death, tho' *Vigilius*, then Pope of *Rome*, maintain'd, *neminem poſt mortem condemnandum*, and this occaſion'd a great Schiſm.

THERE is interpos'd betwixt this and the next Act a diſtinct Act in the Black Impreſſion, whereby the King and Parliament ordain ſeveral Acts paſt in the laſt Parliament to be now pronounc'd and authoriz'd by his Grace and the Three Eſtates, which has been left out, becauſe the Way of authorizing Acts now, is only by His Majeſty's touching them with the Sceptre; and if they be voted in a former Seſſion, they may be touch'd without any new Vote or Act; but if they were paſt in a former Parliament, they muſt have a Vote, elſe they cannot be call'd the Acts of the preſent Parliament.

LXX. THE King here revok'd when He was in *France*, and His Revocation is ſubſcribed by a Notar, which was at that Time ſufficient; but His ſupplying the Solemnities by His Kingly Power, was unneceſſary: For the King cannot ſupply the Want of Solemnities, either in His own or other Men's Acts or Deeds. There is little in this Revocation different from what was in former Revocations, ſave that, 1. The King revokes all Tacks and Aſſedations made for longer Space than Five Years; which Article is alſo repeated in the 31. *Act, Parl.* 11. Ja. VI. and the Reaſon of it is, becauſe there is too great a Reſtraint laid upon the King by theſe long Tacks, hindring Him thereby to improve His Property or Caſuality: For which Reaſon likewiſe, long Tacks ſet by Tutors are not allow'd. And tho' this may ſeem only to extend to Tacks ſet by Kings in their Minority, yet by the ſame Reaſon, and upon the ſame Act, a Tack of the Cuſtoms, ſet by the King, in His Majority, to *Fleming* and *Peebles*, was reduced before the Exchequer, *November* 17. 1634. becauſe the Tack was ſet for Seven Years. 2. The King here revokes all Rights made by Him, by evil or falſe Suggeſtion, or by expreeming of a falſe Cauſe, tho' ordinarily falſe Narratives do not reduce Deeds betwixt Majors. This Lawyers term *ex ſuppreſſione veri & expreſſione falſi*; and this Article of Revocation agrees with the Civil Law, *Vide Tit. C. de precib. offerend. & Tit. C. ſi contra jus vel utilit. public.*

HIS Majeſty here revokes all Tacks and Aſſedations made in His Minority for longer Space than Five Years; which is likewiſe a Clauſe repeated in all the poſterior Revocations. And tho' it may ſeem, that no Deed done by a Minor in his Minority is revokable, except Leſion could be alledg'd; yet *Craig* is of Opinion, that the very ſetting of a Tack is a Leſion, tho' it be not ſet under the true Value, *Minorem enim lædi puto quod rei ſuæ libera adminiſtratione prohibentur, Lib. 2. Dieg. 10.*

ACT LXXI.

THE Three Head-Courts to be held by Sheriffs, *&c.* conform to this Act, are as follows: The Firſt is upon the Firſt *Tueſday* after the 14. of *January*, which is the Firſt *Tueſday* after the 12. Day of *Yule*. The Second Court is upon the Firſt *Tueſday* after *Law-Sunday*. The Third is upon the Firſt *Tueſday* after the 29. of *September*, which is *Michaelmaſs* Day; but now they need not write any Excuſe to the King or Council, if they be not perſonally preſent.

THIS Act makes a Difference betwixt ſuch as owe Suit and Preſence, and theſe who owe Suit only: All ſuch Barons and Freeholders as owe Suit and Preſence, ought to be preſent in theſe Head-Courts; but this Act determines not who owe Suit and Preſence. And tho' the 2. *Cap.* 2. *Stat.* Rob. I. ſtatutes, that none owe Suit and Preſence but theſe who are expreſly liable thereto by their Infeſtments; yet by our preſent Practice, Vaſſals of Ward-lands, and conſequently of tax'd Ward-lands, are alſo liable to compear in the Superior's Head-Courts, without any Citation, tho' they be not cited; and tho' this be not expreſs'd in their Infeſtment, for *hoc ineſt*, in the Nature of their Holding, but Vaſſals who hold Blenſh or Feu, are not oblig'd to compear without Citation, except they be thereto ty'd by their Infeſtment, *March* 12. 1630. Biſhop of *Aberdeen contra* his Vaſſals. And by this Act alſo, the Infeſtment is made the Rule of Compearance; theſe who owe Suit only, are only oblig'd to ſend an able Man to attend, and ſerve upon Inqueſts; and ordinarily Charters bear *tres ſectas curiæ*.

LXXIII. THIS Act, appointing Sheriff-deputes, and all other Deputes, to be ſworn yearly, is in Deſuetude.

LXXIV. THIS Act, appointing all Executions even of Letters, by Warrant of inferior Courts, to be ſtamped, was running in Deſuetude, till it was revived by a Deciſion in *January* 1681. where an Execution, proceeding upon a Warrant before an inferior Court, was found not ſufficient, becauſe not ſtamped; and Horning and other Executions before the Lords were always null by Way of Action, if not ſtamped, *July* 2. 1630.

THIS Act appoints, that all Mayors and Officers ſhall have a Signet, bearing the firſt Letters of their Name, or ſome other Mark that ſhall be univerſally known; and therefore, tho' the Executions bear *that they were ſtamped*, yet if they do not appear to be ſtamped, the Executions may be quarrell'd as null, eſpecially if they be recent, even as Teſtaments were null by the Civil Law, if they did not appear to have *formam inſculptamque ſigni imaginem, L.* 22. § 6. *qui teſtament. fac.* but on the contrary, if the Executions bear not *that they were ſtamped*, they will not be valid, tho' they appear to be ſtamped, becauſe another than the Meſſenger might have affix'd that Stamp. *Vide Obſerv.* on 33. *Act, Parl.* 5. Ja. III.

LXXV. ALBEIT this Act appoints all ſuch as execute Sheriffs or Barons Precepts, *&c.* to leave Copies; yet it has been found, that the Execution of a Baron's verbal Precept needs no Writ, but may be prov'd by Witneſſes; but this was betwixt a Baron and his Tenents, where there needed no written Precepts: Whereas this Act requiring written Executions, is only to be interpreted where there are written Precepts, becauſe it ſays, they ſhall *indorſe their Executions*; and there can be no Indorſation where there is no written Precept.

IT is required by this Act, that the Executor ſhould ſhow the Letters, which are his Warrant, and that he ſhould offer a Copy to the Servants, and yet both theſe are in Deſuetude.

THIS Act requires Six Knocks, and the affixing of a Copy upon the moſt patent Door of the Defender's Dwelling-houſe, which the Lords found was only in the Caſe where there could be no Entry; but found, that there was no Neceſſity of knocking when the Door was patent, and Servants found therein, *December* 11. 1679. Counteſs of *Caſſils contra* the Earl of *Roxburgh*. But it may be doubted ſtill, whether Six Knocks be neceſſary where the Door is patent, but no Servants within; and the Act ſays only, that *if they get no Entreſs, they ſhall knock*; tho' a Man may be cited in an ordinary Action, by a Copy left at the Inn where he ſtaid Forty Days; yet a Man cannot be denounc'd upon a Copy left at his Inn, which is ſo determined *in odium* of his Eſcheat, *November* 20. 1672. It has been doubted whether a Meſſenger's Execution, bearing *that he came to the Defender's Houſe, and was by Force keeped out*; ſo that he could not give a perſonal Citation: If in that Caſe the Defender ſhould be holden *pro confeſſo*, as perſonally apprehended, it being offered to be proven that he was really within; and ſome of the Lords were of Opinion that he ſhould be holden as confeſt, the Meſſenger proving that he was within; or if the Execution had born that he and the Witneſſes had given a particular Evidence of their Knowledge of his being within. Others thought that he ſhould be holden as confeſt, unleſs he could inſtruct that he was *alibi*, in regard of the Contumacy. But moſt reſolv'd, that *holding as confeſt*, being a ſolemn and important Certification, peculiar to *Scotland*, that the Aſſertion of the Meſſenger and his Execution ſhould not be ſufficient, nor put the Defender to alledge *alibi*, but that Warrant ſhould be granted to cite at the Mercat Croſs, with Certification to be holden as confeſt, *July* 5. 1670. *Lindſay* and *Swinton* contra *Inglis*. This Order of citing, firſt perſonally, and failing thereof, at the Dwelling-houſe, was allow'd by the Civil Law, *L.* 1. § 1. *ff. de Lib. adgno.* And all theſe practical Queſtions are much cleared by Chriſ. *ad leges* Mechlin. *Lib. primo. Tit.* 1. *Articulo* 14. *in fine*, where it will be found, that the being holden *pro confeſſo*, is not a Certification peculiar to our Nation; for other Places uſe it, as *Brabant*.

LXXVI. THIS Act, appointing all Notars to be examined by the Sheriff, and that the Sheriff keep a Book containing their Subſcriptions, is in Deſuetude.

LXXVII. THIS Act, appointing all Saſines upon Precepts out of the Chancellary, to be given by Sheriff-Clerks and their Deputes, is declared by the 15. *Act*, 18. *Parl.* Ja. VI. to extend only to Precepts paſt upon Retours, and not to Saſines paſt upon other Precepts. And it is very obſervable, that tho' that laſt Act narrates that this Act appoints ſuch Saſines to be taken by Sheriffs and their Clerks, yet there is no Mention here of Sheriffs, but only of Sheriff-Clerks; and yet the Lords of Seſſion do now find Saſines null, *ope exceptionis*, except they be given both by Sheriffs as Bailies, and Sheriff-Clerks as Notars.

THE Reaſon why Saſines upon Retours muſt be given by the Sheriffs, is, becauſe he is to anſwer for the retour'd Duty, for which he ordinarily takes Surety when he gives Saſines; and at the Delivery of the Precept, there is a Note made by the Director of the Chancellary in the *Reſponde-Book*, bearing the Sums for which the Sheriff is to take Surety, and he is to be charg'd, and counts therefore yearly in Exchequer by the 99. *Act*, 7. *Parl.* Ja. V. and 64. *Act*, 11. *Parl.* and 124. *Act*, 12. *Parl.* Ja. VI.

LXXIX. THIS Act is in Deſuetude ſince the Regiſters were introduced in *Anno* 1617.

LXXX. FALSIFYING the King's Charter, or the counterfeiting of it, was of old Treaſon; but the falſifying the Charter of a private Perſon was only to be puniſh'd by Mutilation, *R. M, Lib.* 4. *Cap.* 13. and thereafter, by the Loſs of the Right-hand, *Statut.* Alex. *Cap.* 19.

BY this Act, all Falſhood is puniſhable conform to the old Statutes, which are theſe I related; and conform to the Civil and Canon Laws, and that was *deportatio cum publicatione bonorum*, *L.* 1. § *ult. ff. ad L.* Cornel. *de falſis*. But becauſe this Act relates only to falſe Inſtruments, therefore by the 22. *Act*, *Parl.* 5. *Q.* M. it is extended to all Evidents. But becauſe both theſe Acts ſtruck only againſt falſe Notars, therefore by the 22. *Act*, *Parl.* 23. Ja. VI. all Forgers of any Writs, and all who are in Acceſſion thereto, are to be puniſh'd; and Death is the ordinary Puniſhment with us, tho' ſometimes, if the Matter be ſmall, the Puniſhment is leſſened.

AS to falſe Witneſſes, *vide Tract. Crim. Tit.* Falſhood.

LXXXI. BY this Act, there muſt be ſtill Inſtruments taken in the Hands of the Clerk of Court, if any be taken at all; but if the Party be jealous of the Clerk of Court, he may take another Notar with him, and take alſo Inſtruments in his Hands, after the Form and Manner preſcribed by this Act.

LXXXII. NOTWITHSTANDING that by this Act no Commiſſion can be granted to apprize Lands, or ſerve Brieves to any but to the Sheriff, if heretable; yet it is ordinary now for the Lords to grant Commiſſions to their Macers, in both theſe Caſes, who are thereby made Sheriffs in that part: And this Act of Parliament being objected againſt *Struan*'s Service, 26 *Feb.* 1681. it was found to be in Deſuetude.

LXXXIII. *LEASING-making* betwixt the King and His People is puniſhed by Tinſel, or Loſs of Life and Goods, by the 43 *Act*, 2 *Parl.* Ja. I. And by this Act it is ordained, That ſuch as make Leaſings of His Majeſty, to His Barons and Great Men, ſhall be puniſhed in the ſame way as they who make Leaſings to His Majeſty of His Barons and Lieges: And tho' there ſeem'd a clear Parity of Reaſon for this, before the Act, and that *eadem eſt natura, & idem eſt affectus correlativorum*; yet our Predeceſſors would not extend Crimes by Conſequence: And by the 205 *Act*, 14 *Parl.* Ja. VI. the hearing and not revealing, and apprehending ſuch Leaſing-makers, is puniſhed as Leaſing-making.

XCII. BY this Act, there is an Indemnity granted under the Name of a *General Remiſſion*; but tho' in general Remiſſions and Indemnities there needs no Extract be taken of the general Pardon; yet here every Man is to take an Extract of the Pardon.

*Nota*, THAT tho' ſuch as keep Correſpondence with Rebels after their Guilt, be puniſhable as Traitors; yet here ſuch only as kept Intelligence with the *Douglaſſes*, and with *Kil-*

*ſpindie* their *Eam*, which is an old Word ſignifying *Couſin*, after the Doom of Forfeiture againſt them, are declar'd puniſhable; and this ſeems juſt where the Crimes were not clearly underſtood by the People to be ſuch.

# *PARLIAMENT* VII.

XCIII. By this Act, there ought to be a conſtant Vice-Preſident in the Seſſion, but this is in Deſuetude; for Vice-Preſidents are choſen by the Lords, in Abſence of the Preſident; and thus the Lord *Stairs* was choſen Vice-Preſident in Sir *John Gilmor*'s Abſence, 1663. Likeas tho' by this Act the eldeſt Lord is to be Preſident in Abſence of the Vice-Preſident; yet now, in Abſence of the Preſident, the Vote of the Lords elects him who is to preſide in his Place.

'Tis alſo obſervable, That our Kings have been ſo jealous of ſuffering any Act of the Pope to have Authority, without being ratified by them as Kings, that the Pope's Ratification of the College of Juſtice being thought convenient, becauſe of the Aſſignation of ſome eccleſiaſtic Benefices, for its better Support, the King does in this Act ratify and confirm the Pope's Ratification of the King's firſt Act.

XCVI. Sheriffs, Stewards, *&c.* compear yet yearly in Exchequer, and make their *Æque*; and the Time of their Compearance is in *July*. *Vide ſupra Obſerv.* on *Act* 77. *Parl.* 6. Ja. V.

CIV. Bribing is expreſly diſcharged by the 25 *Cap. Stat. K.* Will. and by the 22 *Cap. Stat.* 1. Rob. I. *They who take Lands to Champart, are to be in the King's Will, and loſe their Imployment for all their Lifetime.* *Champart* is a *French* Word, ſignifying a Part of the Land controverted; ſo that whatſoever takes Part of the Thing controverted *per pactum de quota litis*, falls under that Law. By this Act, whoever takes Rewards or Buds, are puniſhable by Tinſel of Honour, Fame, and Dignity: And by the 93 *Act*, 6 *Parl.* Ja. VI. the taking by their Wives and Servants, which was here omitted, is puniſhable by Infamy, Deprivation, and Confiſcation of all the Defender's Moveables.

By this Act, giving of partial Counſel, that is to ſay, conſulting, is declar'd a Species of Bribing, tho' nothing be taken; at leaſt it is puniſhable as Bribing; ſo that it ſeems a Judge may not conſult, albeit he abſtain from judging in that Cauſe.

These Words, *That he ſhall take no further Rewards nor Buds than is permitted of the Law*, are ſet down, to ſhew that Judges may lawfully take the *Quota* allowed by Law to Judges; which we call *Sentence-money*, and the Civil Law *Sportulæ*.

The taking Bribes was, in the Civil Law, puniſhed *per L. Jul. repetundarum. L.* 1, 3, 6. *d. t.* and the Puniſhment was Death, if Money was taken to pronounce a capital Sentence, or Confiſcation of Goods, and Baniſhment in other Caſes, *L.* 7. § 3. *eod. tit.* But by the Doctors, and in our Law, this Crime is called *Barratrie*.

Such as defame Judges as Bribers, are puniſhed here as Bribers; but beſides the *pœna talionis*, which is inflicted upon all ſuch as murmur againſt Judges, there is likewiſe an arbitrary Puniſhment adjected, and either the King or His Council are Judges competent to the Cognition of this Crime, by this Act.

*Nota*, That if a ſpiritual Man murmur againſt any Judge, he has the Privilege to be called before his own Judge Ordinary, by this Act; but this *revocatio fori* is not now in uſe ſince the Reformation.

CV. Base Infeftments are theſe which are given to be holden of the Diſponer, which are valid Rights in themſelves, tho' they never attain Poſſeſſion; for elſe they could not give good Intereſt to reduce the Rights that may hinder them to attain Poſſeſſion. Theſe baſe Infeftments are introduced with us contrary to the Principles of the Feudal Law, which allows no Feudal Conveyance without the Superior's Conſent, and were introduc'd rather by Accident than upon Deſign. This Act upon which they are founded being introduc'd rather to ſuppreſs ſimulate Infeftments, than to ſtrengthen baſe Infeftments; and the great Privileges ariſing to them now, did inſenſibly grow from the Favour which our Law ſhew'd always to lawful Creditors, even as the Privilege of neceſſitating Superiors to receive Compriſers did.

Base Infeftments, tho' yet wanting Poſſeſſion, are preferable to poſterior Arreſtments, but they are not preferred to poſterior Liferent-Eſcheats, except they attained Poſſeſſion *in curſu rebellionis, February* 21. 1667. *Miln* contra *Clarkſon*; and before this Act of Parlia-

ACT ment 1540. they were ſtill preferr'd to poſterior public Infeftments: But by this Act it is ſtatuted, that public Infeftments clothed with Poſſeſſion for Year and Day, ſhall be preferr'd to baſe Infeftments not clothed with Poſſeſſion, tho' prior, which *præſumptione juris & de jure*, are by this declared to be ſimulate Rights.

But tho' this Act requires that the public poſterior Infeftment be granted for onerous Cauſes, yet a public poſterior Infeftment, tho' gratuitous, will be preferr'd, 3. *March* 1626. *Law* contra *Balgownie*. But this may be doubted becauſe of this Act, and in that Deciſion the public Infeftment was preferr'd, becauſe Inhibition had follow'd thereupon; for any Act that can take off the Preſumption of Simulation, and which will make the Infeftment any Way to be known, doth fortify the Infeftment as well as if Poſſeſſion had follow'd; and ſo an Inhibition following upon the Debt for which the baſe Infeftment was granted, will prefer that Infeftment to a poſterior public Infeftment, without Neceſſity to reduce *ex capite Inhibitionis*, and an Infeftment following upon an Appriſing was without Reduction *ex capite Inhibitionis*, preferr'd to a prior baſe Infeftment, tho' clad with Poſſeſſion, becauſe the Appriſing follow'd upon a Debt whereupon Inhibition was ſerv'd before that baſe Infeftment, the ſaid 3. of *March*. 1626.

And likewiſe, if other Diligence was done, or the Time was ſo ſhort that a Year's Poſſeſſion could not be attained, then a Term's Poſſeſſion was ſuſtain'd; or tho' there follow'd no Poſſeſſion at all, the baſe Infeftment will be preferr'd to a poſterior public Infeftment intervening, before the Poſſeſſion could be acquir'd, 13. *Feb.* 1624. Poſſeſſion likewiſe of a Part of the Land ſuſtains the Infeftment for all, but this ſhould hold only in Lands erected in a Barony, or ſuch wherein one Saſine may ſerve, 5. *February* 1668. *Ker* contra *Ker*.

*HOPE*, in his leſſer Practiques, is of Opinion, That in the Concourſe of Two baſe Infeftments, the Prior will be preferr'd *in petitorio*, tho' no Poſſeſſion follow'd thereupon; which ſeems to be reaſonable, becauſe before this Act of Parliament *jus illud obtinebat*, and by this Act, *nihil quoad hoc eſt innovatum*; yet *de practicâ* a baſe Infeftment is as null till it be clothed with Poſſeſſion, as an Infeftment *a me* is before it be confirmed.

If neither of the two baſe Infeftments be clothed with Poſſeſſion, *prior in tempore eſt prior in jure*.

The Husband's Poſſeſſion was alledged to be the Wife's Poſſeſſion as to her Principal, but not *quoad* her additional Jointure, 7 *Decemb.* 1664. Lady *Craig* contra Lord *Loure*: And in our Law, the Husband's Poſſeſſion is accounted the Wife's Poſſeſſion, whether the Husband poſſeſſed by himſelf, or by Wadſetters, or Compriſers deriving Right from him; tho' it was alledged that this was not the Husband's Poſſeſſion, they having poſſeſs'd *proprio jure*; which Privilege is not only introduc'd *ob favorem dotis*, but becauſe ſhe could not poſſeſs; for which Reaſon likewiſe a baſe Infeftment for Relief is preferr'd to a poſterior public Infeftment upon a Compriſing, albeit the Cautioner was only charged to make Payment, which was found a ſufficient Diſtreſs, 28 *July*, 1625. As alſo, after a ſolemn Diſpute, the Lords did prefer a prior baſe Infeftment for Warrandice, tho' not clothed with natural Poſſeſſion, to a poſterior public Infeftment, 9 *January*, 1666. *Brown* contra *Scot*. But here the Infeftment of Warrandice was given *ſimul & ſemel* with the Infeftment of the principal Lands; ſo that there remains ſtill a Doubt as to Infeftments of Warrandice given *ex intervallo*; but Infeftments for Relief were not found ſufficiently cloth'd with Poſſeſſion, by Payment of the Sums for which they were granted, as Infeftments of Warrandice are by Poſſeſſion of the principal Lands; becauſe it was alledged, that it was more natural that the Poſſeſſion of one Land ſhould clothe the Infeftment of another, than that Poſſeſſion of Annualrents ſhould clothe an Infeftment of Land; and that there might be greater Colluſion in Payment of Sums, than in poſſeſſing of Lands, becauſe Creditors might alter their Sums and take new Aſſignations, or retire old Rights; whereas no Man could quite his principal Lands, 26. *June*, 1677. *Cramond contra* the Tenents of *Eaſtbarns*.

But a Father's Poſſeſſion as Liferenter was not ſufficient to prefer a baſe Infeftment given to the Son to a poſterior public Infeftment granted to a ſecond Wife, or to any Creditor. The like in a baſe Infeftment granted by a Goodſir to his Oye by the Daughter, which was not found ſufficient, being clothed with the foreſaid Civil Poſſeſſion of the Goodſir's Reſervation of Liferent to exclude a poſterior public Infeftment, 17. *July*, 1635. And this Poſſeſſion by the Husband, or Father, or Diſponer, is called *poſſeſſio per conſtitutum*, and is not favourable in a Competition with other Creditors; and therefore a Factory granted by the Father to the Son to uplift the Mails and Duties of Lands diſpon'd, to be holden baſe by the Son of the Father, was not found ſufficient to clothe the Son's Infeftment, tho' there were ſeveral Proceſſes intented upon the Factory, 10. *July*, 1669.

This Act requires natural Poſſeſſion, by labouring the Land; or Civil, by uplifting the Mails and Duties; and before Regiſters were invented, that kind of Poſſeſſion was only able to put their Creditors in *mala fide*; but tho' Civil Poſſeſſion hath been found ſufficient, ſuch as obtaining of Decreets, and Payment of Annualrents, albeit the ſame had no relation to the Infeftment of Annualrent, but was only relative to the Bond whereupon the Infeftment followed; yet the ſetting of a Back-Tack by the Accepter of a Wadſet, hath not been found ſufficient to maintain a baſe Infeſtment, except Payment of the Back-Tack Duty had likewiſe followed; ſo that it appears that *poſſeſſio Naturalis vel Civilis ſufficit, ſed non illa quæ a doctoribus dicitur civiliſſima*, as is a Back-Tack.

By this Act alſo, ſuch as make double Diſpoſitions to defraud their Creditors, ſhall be declared infamous, and ſhall be puniſhed in their Perſons and Goods at the King's Pleaſure. And this Puniſhment is extended againſt ſuch as make double Aſſignations: And the 140 *Act, Parl.* 12. Ja. VI. bears, *That no Duty ſhall be diſponed to two ſundry Perſons, which is* crimen Stellionatus *by the Law:* And tho' this Act does not make double Diſpoſitions to be *crimen Stellionatus*, yet it is ſo in effect; but the Civil Law diſtinguiſheth thus, *L. Quin. duobus, ff. ad L. Corn. de falſo*; *Qui rem unam duobus vendidit, dicens rem eſſe ſuam, tenetur falſi; at ſi non dicat eſſe ſuam, tenetur Stellionatus.*

Tho' by this Act Superiors receiving double Reſignations are guilty and puniſhable as ſaid is, and ſeeing to receive ſuch Reſignations is a great Prejudice, becauſe it puts the Parties to great Expences, and that the Superior is preſum'd to get, and may get Advantage by accepting ſuch double Reſignations, or contributing to the making of ſuch double Rights; therefore they ought likewiſe to be liable in Damage and Intereſt, to the Party injured.

CVI. By this Act it is ſtatuted, That a Charge to enter Heir may be directed againſt the Succeſſors of the Defuncts (they being of perfect Age) to enter to their Lands within Forty Days, Year and Day being firſt paſt, after the Deceaſe of the Predeceſſor, and a Comprizing being led upon their failing to enter, the ſame ſhall be as valid as if they were infeſt.

*Nota*, Tho' this Act bears the being of perfect Age, yet Minors may be validly charged to enter Heir *de practica:* But ſeeing this Act is only made againſt ſuch as may enter, but wilfully lie out; it might have been doubted, whether Minors in Ward-lands may be charg'd to enter Heir; for theſe cannot enter till they be Twenty One Years complete: But by our conſtant Practic they may be charged, ſince this is neceſſary for completing the Creditor's Diligence.

*Nota*, That this Act does not appoint that generally ſuch Execution ſhould paſs againſt the appearand Heir, as if he were entred, but only that his Land may be appriz'd: And therefore *quæritur*, What Execution may be got againſt his moveable Heirſhip? And it may be urged, that the ſame may be affected as the Defunct's other Moveables; for tho' they be Heirſhip *reſpectu Hæredis*, yet they are but Moveables *reſpectu Creditoris*; for they become only Heirſhip after they are drawn: And yet it hath been found, that the moveable Heirſhip may be adjudged; and by that Deciſion it would appear, that they can only be affected by appriſing; but there is a Warrant wanting in this Act for appriſing them. There is an Act of Sederunt, *Anno* 1613. allowing Charges to enter Heir, to be raiſed within the Year and Day; but the Summons thereupon muſt be execute after the Year and Day expire, but not till the Fourty Days expire after the Execution of the Charge: But this *annus deliberandi* being introduc'd in favours of the appearand Heir, he may omit the ſame, and renounce within the Year, if he pleaſeth: Neither can an Adjudication following within the Year be challanged *ex eo capite*, *July* 14. 1631. albeit that the ſaid Act appoints, that a Charge to enter Heir may be rais'd after Year and Day expire, after the Defunct's Death; yet the Year and Day muſt only be computed from the appearand Heir's Birth, if he was poſthume, *Spotſ. Tit.* Heirs; *Livingſton* contra *Houlerton*; *& de jure civili poſthumus non habetur pro nato, cum de incommodo ejus agitur, L. etiam, § Ille, ff. de minor.*

CXI. Tho' the Meaning of this Act ſeems to be, That where Tradeſmen, who are Freemen, either deſert their Work, or delays the ſame, the Owner of the Work may chooſe other Freemen, or complain to the Deacon; yet it was found in *July* 1675. by the Council, in the Caſe of *Borlands* againſt the Maſons of *Edinburgh*, That where a Freeman either deſerted or delayed, the Owner of the Work might employ any, even unfree Men; tho it was alledged it was not juſt to puniſh all the Freemen for the Fault of one; nor was it convenient for the Commonwealth that unfree Men ſhould be admitted, for whoſe Work none can be anſwerable.

This Act is *verbatim* formerly ſet down, *Act* 90. *Parl.* 6. Ja. IV. CXVI.

CXVII. By the Civil Law, Teſtaments and all Writs of Importance were to be ſealed; and with us, the appending of the Seal, without the Subſcription of the Party, was ſufficient, R. M. *Lib.* 3. *Cap.* 8. *Num.* 3. & 4. and Papers were then tried by Compariſon of Seals, as now by Compariſon of Subſcriptions: But by this Act, the Subſcription of the Party and Witneſſes is likewiſe to be added with the Seal; and thereafter, *K. Ja. VI. Parl.* 6. *Act* 80. all Papers of Importance are to be both ſealed and ſubſcribed; but now they need only be ſubſcribed, without being ſealed: And tho' by this Act the Subſcription of the Notar is ſufficient; yet by that Act, Two Notars and Four Witneſſes are requiſite, where the Party cannot write.

ACT BY the 4 *Act, Parl. 9.* Ja. VI. Writs that are to be regiſtrated need not be ſealed; but there is no expreſs Law diſpenſing with Sealing, as to other Papers which need no Regiſtration; ſo that the not ſealing is in theſe warranted only by uncontroverted Cuſtom.

CXVIII. FIRE-riſing, and raviſhing of Women, are to be put under Surety, as Mutilation and Slaughter, by this Act: From which, ſome concluded that Mutilation was puniſhable as theſe Crimes were; but the Act appoints not the Puniſhment to be the ſame, but the Way of finding Caution to be the ſame. And by the old Law, *Stat.* Rob. II. *Cap.* 11. Mutilation is to be proceeded againſt as Murder; but yet *licet redimere vitam*, and it is not declar'd there puniſhable by Death. And in all the Journal-Books, no Man was ever puniſh'd with Death for Mutilation; the Puniſhment being ordinarily Confiſcation of Moveables, and Aſſythment to the Party. Nor ſee I any Warrant for Confiſcation of Moveables, ſince the Crime is not puniſhable by Death, nor any expreſs Statute to warrant Confiſcation. I find that Mutilation is inferr'd upon the cutting of a Thumb or Finger, tho' *digitus* was alledg'd not to be *membrum*, but *pars membri*, *June* 27. 1677. and it was formerly found, *July* 15. 1642. *Chein* contra *Mowat*; but tho' this may infer Mutilation, yet I conceive it would not infer Diſmembration. *Vide Obſerv.* on 28. *Act*, 3. *Parl.* Ja. IV.

CXXII. BY this Act all the Lieges may ſell Fleſhes on *Sunday*, *Monday*, and *Thurſday*; but thereafter all Mercats being diſcharg'd on Holy-days, there is an Act of Town-Council, ordaining theſe Landward Fleſhers to bring in their Fleſhes only on *Tueſday*, *Thurſday*, and *Saturday*, and not to ſell in Pieces, but in Quarters, which is confirm'd by a Decreet of the Seſſion, *July* 7. 1595. and ratify'd in the Parliament 1681.

CXXVII. FROM this Act it is clear, that the Acts of Parliament cannot be reprinted without the King's ſpecial Approbation, even tho' the Lord Regiſter conſent; for elſe why needed the Regiſter get a Warrant by this Act; and the Cuſtom always is, that the Regiſter gets a ſpecial Warrant for that Effect. And the Council the 17. of *November* 1681. found that the King's Printer having reprinted the Acts of Parliament without ſuch a ſpecial Warrant, the Copies were confiſcable and ſhould be burnt. And the Reaſon of this is, becauſe of the great Danger that may ariſe from the wrong printing of Acts of Parliament, the difference of a Word altering the Senſe to a Contrariety; but yet it ſeems the Regiſter ſhould have Liberty to reprint them, ſince he is anſwerable for all the Errors; and therefore we ſee that the Regiſter uſed ſtill to ſubjoin his Subſcription to the Acts he reprints, as is to be ſeen at the End of the 15. *Parl.* Ja. VI. where Sir *John Skene*'s ordinary Subſcription is ſet down at the End of the Acts which he reprinted, and Sir *John Hay*'s at the End of the Firſt Parliament, *Ch.* I.

# Queen MARY.

## *PARLIAMENT* III.

ALL the Acts of this Parliament, except the Firſt, are Temporary, for encouraging of ſuch as were to hazard their Lives in that Army, and are renewed fully by Three equipollent Acts, *viz.* *Acts* 41, 42, 43. *Parl.* 2. Ja. VI.

ACT IV.

BY this Act, Churchmen are to have Right to the Fruits on the Ground the Year they die, and to the Annat thereafter; and from this it is to be obſerv'd, that the Annat was a Caſuality that befel by and attour the Fruits that were on the Ground, which belonged to the Churchmen *jure proprio*; and formerly the Churchmen had Right to all the Fruits of the Year, if he surviv'd the Firſt of *January*, for *in beneficiis annus inceptus habetur pro completo*; but if he ſurvived *Michaelmaſs*, he had Right to that whole Year, *jure proprio*, and the Half of the ſubſequent Year, *jure annatæ*. But now by the 13. *Act*, 3. *Seſſ. Parl.* 2. Ch. II. if the Incumbents ſurvive *Whitſunday*, they have Right to the preceeding Half Year by their own Right, and to the next Half Year by their Ann; but if they ſurvive *Michaelmaſs*, they have Right to the whole Year (*viz.* from *January* to *January*) by their own Right, and to the Half of the other Year as Ann. And tho' it may ſeem incongruous, that a Miniſter living till the laſt Day before *Michaelmaſs*, gets no more than he who lives till the Day after *Whitſunday*, yet this is regulated in this Caſe, as it is in all Liferents; and this is allow'd them for the Support of their poor Families: For that Act declares that the ſame ſhall belong to their Executors, without Neceſſity of a Confirmation. And tho' the Act declares that this Ann is to belong to their Executors, yet in effect that is not well expreſs'd, for it belongs to their neareſt of Kin and Wife, tho' they be not nominated nor confirmed Executors. If there be Bairns, the Ann is equally divided betwixt them and the Wife; but if there be no Bairns, it is divided equally betwixt the Wife and neareſt of Kin, ſhe having Right in that Caſe to an Half, and not to the Whole, becauſe the Ann was of old introduc'd in favours of the neareſt of Kin, as appears by this Act; for Churchmen had no Wives under Popery, when this Ann was introduced, *June* 24. 1663. *Elizabeth Scrimgeor contra* the Executors of her Husband.

THO' this Ann falls to Biſhops and Miniſters who die Incumbents, yet it belongs not to ſuch as renounce voluntarily their Benefices, as was found in Biſhop *Lighton*'s Caſe; and neither Manſe nor Gleib fall under the Ann; for the laſt Incumbent's Executors have no Right to the Gleib, except the ſame was ſown before his Deceaſe, *July* 6. 1665. *Colvil contra* the Lord *Balmerinoch*.

THE Reaſon why *Michaelmaſs*, and not *Martinmaſs*, is made the Term in this Caſe, is, Becauſe Miniſters Stipends are payable out of the Teinds, or by ſomewhat which is come in Place of them; and therefore *Michaelmaſs* ſhould have been the ordinary Term; and generally in Payment of all Stipends the Terms of *Whitſunday*, becauſe the Sowing is then ended, and *Michaelmaſs*, becauſe the Corns are then ſeparated from the Ground, are the legal Terms for Payment of Stipends.

THE foreſaid Act allows an Ann to Biſhops, tho' the Act of the General Aſſembly, and the King's Letter, in *Anno* (by which Anns were firſt eſtabliſh'd as they now are) did not mention them; and under the Biſhops Ann falls only the Quots of ſuch Teſtaments as were actually confirm'd in his Lifetime, or during his Ann, *July* 6. 1676. Captain *Wiſhart contra* the Biſhop of *Edinburgh*. By the Canon Law, the Annat was a *Quota* payable to the Pope and College of Cardinals, by every Intrant, out of his Benefice, *Vide* Tuſh. *Concl.* 329. But a Caſuality like ours is payable in the Proteſtant Churches of *Germany*, *vide* Carpzov. *jus conſiſtoriale Tit. de decimis.* It may be doubted whether that Maxim *annus inceptus habetur pro completo*, does yet hold good in other beneficiary Caſes; for tho' it be alter'd by Act of Parliament, *quoad* Annats, yet where there is no Act of Parliament, why ſhould not the old Rule hold? But I rather think that the Act extends to all beneficed Perſons, albeit the Rubric mentions only Biſhops and Miniſters; and ſo there are Two Errors in the Rubric of the ſaid 13. Act, One, in that it mentions only Biſhops and Miniſters; Another, in that it mentions only their Executors, and not their Relict, or neareſt of Kin. And the Rubric ſhould have born, *Act regulating the Ann of benefic'd Perſons*, which ſhews alſo how weak the Argument is, *a rubro ad nigrum*.

THE ancient Biſhops allow'd ſometimes the uplifting of the firſt Year's Rents of Benefices, for aſſiſting Chriſtian Princes againſt Infidels; but the Popes thereafter reſerv'd them to the Uſe of the *Roman* See, upon Pretext to ſupply the general Neceſſities of the Church. Pope *John* XXII. *extravag. ſuſcepti. de elect.* was in this followed by *Boniface* IX. who ſtated them in an ordinary Revenue, till the Council of *Baſil* oppoſed the ſame; and ſtill many learn'd Doctors of the *Romiſh* Church itſelf condemn'd them as Simoniacal, whereupon the *French* Kings did, by Concordates, force the Pope to paſs from the ſame in *France*. They were call'd Annats, Anns, or Annals, becauſe they were *fructus primi anni*; and it ſeems with us, they were not at the Pope's Diſpoſal abſolutely, elſe this Act of Parliament could not have diſpoſed upon them. But it ſeems our Kings have, in Parliament, aſſum'd to themſelves what others ſettled by Concordates with the Popes, as may appear in all the *Regalia* throughout the whole old Acts of Parliament. The whole Doctrine of Annats is excellently treated by Antonius Maſſa *de materia annatarum*.

BUT I conceive our Ann, which is an Half Year's Stipend, comes from the *Saxon* reform'd Church, wherein *ultra Salarium quoad defunctus Eccleſiæ miniſter promeruit ex ſingulari beneficio* *neſcio viduæ ac liberis dimidius gratiæ annus aſſignetur*, Carpzov. *Juriſp. conſiſtor. L.* 1. *Tit.* 12. It was introduc'd there in *Anno* 1580. a little before King *James* introduc'd it here by the Letter to the General-Aſſembly in *Montroſe*.

V. BY this Act, ſuch as die in that Army were to have their Ward, Non-entreſs, Relief and Marriage, freely from the Queen.

It is obſervable, that tho' uſually ſuch Acts are made when our Armies are *in procinctu* going to Battle; and tho' the King, nor His Exchequer, ſeek no Advantage by Caſualities in ſuch Caſes, yet regularly it is no Defence in Law againſt a Ward or Marriage, that he by whoſe Death they were ſought, were killed in the King's Service.

VI. THO' where there is a Governor, the Stile of Acts of Parliament made by him, is, *The Governor, with the Advice of the Three Eſtates*; yet this Act ſays, *By the Conſent of the Governor, and the Conſent of the Noblemen, both Spiritual and Temporal.* By which Words alſo it is clear, that the Lords of the Clergy are to be accounted as Noblemen, and ſo are to find Caution under the ſame Pains as Noblemen, and to pay public Burdens as Noblemen, &c.

# PARLIAMENT IV.

VII. BY this Act, theſe who are excommunicated, and continues ſo for a Year, for any Cauſe, loſe their Moveables, Creditors being firſt paid; and by the 3. *Act*, 20. *Parl.* Ja. VI. they are to loſe their Liferent-Eſcheats, if they be excommunicated for Religion. *Vide ſupra*, *Obſerv.* on 9. *Act*, 4. *Parl.* Ja. V.

VIII. *VIDE* my Criminal *Tract. Tit.* Treaſon.

IX. THIS Act, inflicting the Pain of Death and Confiſcation of Moveables, upon ſuch as ſhoot at Deer, Wild-fowl, or Wild-beaſts, is deſervedly in Deſuetude. *Vide infra Obſerv.* on *Act* 51. *Parl.* 6. *Q.* Mary.

X. THIS Act, and the Inſtructions ſubſequent to it, were but temporary Remedies for repairing Lands burnt at that Time by the *Engliſh* Invaſion; but tho' only Parliaments can regularly invert Property, yet the Privy-Council do force Heretors to ſell burnt Tenements, if they will not repair them themſelves, to the end other Heretors, and the public Advantage of the Burgh may not be prejudged; and this the Council did in *Anno* 1675. when all the Houſes near the Parliament-Cloſe were burnt. And this is conform to a Power granted by the 6. *Act*, 3. *Seſſ. Parl.* 1. Ch. II. by which it is appointed, that the Provoſt and Bailies may charge all Perſons who have the Property of ſuch ruinous Lands, to repair them within Year and Day, and if they refuſe, the Magiſtrates may value and ſell. *Vide* Obſervations on the 226. *Act*, *Parl.* 14. Ja. VI.

# PARLIAMENT V.

XI. THIS Act, as to the Prices of Wine, is in Deſuetude, but not in ſo far as concerns the mixing of Wines, which, by the Opinion of the Civilians, is a Species of Falſhood, and is puniſhable as ſuch, Carpzov. *de falſo*.

XVI. THIS Act againſt abominable Oaths is enlarg'd, *Act* 103. *Parl.* 7. Ja. VI. *Vide* my *Crim. Obſerv. Tit.* Blaſphemy, § 6.

ACT XVII. THIS Act againſt Perturbers of the Kirk is enlarged, *Act* 27. *Parl.* 11. Ja. VI. for that Act reaches all Tumults in Kirk-yards; and the Puniſhment in that Act extends to Confiſcation of all the Offender's Moveables. It is obſervable from this Act, that Children are only to be ſcourged for ſuch Crimes, Minority leſſening the Puniſhment, and all within 14 Years are accounted Children.

XIX. *VIDE Crim. Obſerv. Tit.* Bigamie.

XX. *VIDE Crim. Obſerv. Tit.* Adultery.

XXI. *VIDE Crim. Tit.* Falſhood.

XXII. NOTARS are ſtill according to this Act examined and admitted by the Lords, but are not preſented by the Sheriffs; for now they are preſented by the Clerk to the Notars, who gives in a Bill for them to the Lords.

XXIV. BY this Act the Inſtruments of ſuch as exerce the Office of Notar, not being lawfully admitted, are null, but yet if the pretended Notar was habite and repute a Notar, his Inſtruments will be ſuſtain'd.

SUCH as uſurp the Office of Notars are puniſhable by this Act as Falſaries or Forgers, yet I never obſerv'd that for this Crime Death was inflicted upon them.

*Nota*, IT is obſervable from this and many other Acts, that the Acts are called, *The King's Laws*, and not Laws made by the Parliament, and the Act related to, made by King *James* V. but not condeſcended upon here, is the 81. *Act*, *Parl.* 6. Ja. V.

XXV. IT is obſervable from this Act, that the Secret Council uſed, by their own Authority, to make Sumptuary Laws, both as to Meat and Clothing; and by the Act of Council here related to, the Contemners of the ſaid Act of Council are to be puniſhed in their Perſons and Goods at the Lord Governor's Will; and yet one of the Accuſations againſt the Earl of *Middleton* was, That the Lord *Lorn* being found guilty of Treaſon, the Time of the Execution was referr'd to him, as being then the King's Commiſſioner, which it became no Subject to accept.

XXVII. PRINTING is *inter Regalia*, and ſo the King may diſcharge any Man to print without his Licence. *Vide* Fritch. *de Typographiæ abuſu*, where he makes the regulation of the Preſs to depend upon every Magiſtrate by the Law of Nations; and Printing may do as much Miſchief to the Government as Arms, and ſo the Magiſtrate ſhould have the Command of the One as well as of the Other; tho' I know it is moſt unjuſtly pretended by ſome Republicans, that Printing being a Trade, no Man can be debarr'd from the free Uſe of it, except by Parliament, in which their own Conſent is imply'd. We ſee alſo that the King allows his own Printer only to print Bibles, and other School Books, &c. *Vide Act* 25. *Parl.* 11. Ja. VI. againſt the Sellers of erroneous Books.

# PARLIAMENT VI.

XXVIII. IT is obſervable, that this Revocation of Q. *Mary* was under the Privy-Seal; whereas other Revocations are only under the King's Hand. It differs in nothing elſe from the other Revocations.

XXIX. IN the firſt Part of this Act, Reverſions, which were formerly, as all other Writs, ſufficient, if ſealed by the Granter's Seal, are declared null, if they be not ſealed and ſubſcribed; and tho' it is here declared, that if the Party cannot ſubſcribe, a Notar may ſubſcribe for him; yet by the 80. *Act*, *Parl.* 6. Ja. VI. it is requiſite that there be Two Notars and Four Witneſſes in Matters of Importance, or Heretage, where the Party cannot write.

BY the Second Part it is declared, That all Reverſions are null if they be not regiſtrated; except Reverſions of Land within Burgh, which need no Regiſtration; and this is again enacted, *Act* 16. *Parl.* 22. Ja. VI. By this Act Reverſions taken by way of Inſtrument in the

ACT Hands of the Notar that gave the Saſine, are as valid as Reverſions ſubſcribed by the Party himſelf, and regiſtrate; for according to the Law then ſtanding, Reverſions were ſufficient if ſubſcribed by one Notar, tho' the Party did not ſubſcribe; and Inſtruments taken in the Hand of the Notar that gave the Saſine, were as ſufficient as a Reverſion under a Notar's Hand: But ſince that Act, all Reverſions both without and within Burgh ſhould be ſigned by the Party himſelf, or by Two Notars; and no Reverſion within Burgh needs to be regiſtrated, 11. *February* 1681. *Irvine* contra *Corſan*, which being found inconvenient, was thereafter firſt corrected by an Act of *Sederunt*, *February* 22. 1681. and now by the 11. *Act*, 3. *Parl.* Ch. II. by which they are ordain'd to be regiſtrated in the Town-Clerk's Books within 60 Days after the Date thereof, except they be incorporated in the Body of Rights.

XXXI. THO' this Act runs only againſt Committers of Slaughter, yet it holds in all criminal Cauſes.

XXXII. IF any Man be out of the Country, he muſt be cited upon 60 Days; but if he was in the Country the time of the firſt Citation, it is ſufficient, by this Act, that he be cited upon 15 Days: And tho' this Act ſays, That, *If he was Eight Days cited before his Departure*, he may be cited upon 15 Days to the Second Diet; yet it holds if he was in the Country at the Firſt Citation, tho' he went immediately out of the ſame.

XXXIII. *Vide Crim. Obſ. Tit.* 21. of Libels, *Part* 2.

XXXIV. *Vide* Notes upon *Act* 77. *Parl.* 6. Ja. V.

XXXV. THE Form of citing the neareſt of Kin is now introduc'd in the chooſing of Tutors dative by the Exchequer; and is eſtabliſhed moſt juſtly by the 2 *Act*, *Seſſ.* 3. *Parl.* 2. Ch. II. tho' formerly the King might have granted Tutories dative, without any Citation of the neareſt Kinſmen.

*Nota*, By this Act it is clear, that a Curator cannot by a private Renunciation of his Office, free himſelf, but he can only be freed by the Judge; for tho' by the Civil Law Tutors and Curators were forced to accept, yet by our Law they are not; but if they once accept, or adminiſtrate, tho' without a formal Acceptance, they are ſtill liable from the Date of their Adminiſtration, and not from the Date of their Nomination; and that which was at firſt voluntary, becomes neceſſary.

XXXVI. THO' this Statute anent Lentron be renewed, *Act* 221. *Parl.* 14. Ja. VI. and that the Council uſed lately to grant Diſpenſations; yet theſe penal Statutes concerning Lentron are now in Deſuetude.

XXXVII. *Vide Obſ.* on *Act* 36. *Parl.* 8. Ja. II. and on *Acts* 68. and 69. *Parl.* 8. Ja. III.

XXXVIII. THESE Inſtruments of Reſignations are not only to be ſealed, by this Act, but to be regiſtrated, by the 3 *Act*, *Seſſ.* 1. *Parl.* 2. Ch. II.

XXXIX. ALL Warnings are, by this Act, to be made only upon Forty Days, which holds, tho' the Party be out of the Country; becauſe the Act is general, tho' in other Caſes, a Party out of the Country muſt be cited on Sixty Days, 20 *Feb.* 1666. *Mc Brair* contra *Crighton*: And yet tho' this Act be general, there needs no formal Warning, conform to this Act, from a Tower or Fortalice, (*turris pinnata*) even tho' the Poſſeſſor had a Tack: nor in Lands liferented; for in theſe the Heretor will get upon a Bill, Letters from the Lords, charging the preſent Poſſeſſor to remove upon 6 Days, becauſe Towers and ſuch Houſes belong not to Labouring, nor are uſeful for it: And this Act was made in favours of Labourers; and it were unreaſonable that the Heretor, after a Liferentrix is dead, ſhould be put to all theſe Delays, for removing thoſe who poſſeſs by a Right that is *ipſo jure* expired.

THESE Words of this Act appointing Warnings to be made, either *perſonally, or at their Dwelling-houſes, and at the Ground of the Lands*, are ſo to be interpreted, as that there muſt be ſtill a Copy left upon the Ground of the Land, or at his Dwelling-houſe, and upon the Ground of the Land; which Citation upon the Ground of the Land was, as it ſeems, made neceſſary, becauſe in all real Executions *quæ prædia tangunt*, Copies muſt ſtill be left upon the Ground; and to the end that all who pretend to have real Rights, and even Sub-tenents, may be thereby certiorated, 25 *Feb.* 1680. *Craw* contra *Craw*.

BECAUSE this Act ordains all Warnings to be made Forty Days before *Whitſunday*, and ſpeaks not of another Term, therefore the Warning muſt be made before *Whitſunday*, tho' the Perſon warned be not obliged to remove by his Tack, till the *Martinmaſs*; but Execution muſt be ſuperſeded till then. *Vide* 8 *July*, 1626. and 16 *December*, 1628. *Foulis* contra Tenents, and *Inglis* contra Tenents, 15 *June*, 1631. *Ramſay* contra *Weir*.

ACT

Tho' this Act appoints theſe Warnings to be made at the Kirk-doors of the Paroch within which the Land lies, yet the Lords have ſuſtain'd Warnings to be made at that Kirk which was reputed the Paroch, and where Warnings were uſed to be made, tho' it was not truly the Paroch-kirk, 24 *January*, 1667. Earl of *Argyle* contra *Campbel:* And tho' by this Act, ſuch Warnings ſhould be read in Time of Divine Service, (that is to ſay, immediately after Sermon) yet they ſuſtain'd the Warning, the Execution bearing that it was lawfully uſ'd, and the Uſer mending his Execution at the Bar, 25 *January*, *inter eoſdem.*

Tho' the Reaſons of Advocation here expreſs'd, ſeem to hold only in Actions of Removing, becauſe they are annexed to this Act, yet they hold generally in all Advocations. *Vide* my *Crim. Obſerv. Tit.* Advocations: And tho' the Privilege granted to Advocates here, of being only purſuable before the Lords, may only ſeem competent in Removings; yet it is extended to all Caſes; and now they may advocate any Action intented againſt them before inferior Courts.

I find that the Advocates of *Utrecht* have the ſame Privilege, Rub. *de Advocatis*, *Art.* 13. *Vide* Voet. *de Statutis*, *Sect.* 7. *Cap.* 3. *Num.* 16. Where likewiſe he determines, That this Privilege of Exemption extends not to criminal Caſes; but that in theſe they may be purſu'd before inferior Judges; for theſe are not properly comprehended under the Word *Actions*; nor are Statutes to be extended *de caſu in caſum.*

This Act is explain'd in the Obſervations upon the 32 *Act*, *Parl.* 2. Ja. I. *ſupra.* and 11 *Act*, *Parl.* 1. *Seſſ.* 3. Ch. II. XL.

*Vide Crim. Obſerv. Tit.* Purſuers. XLI.

Of old, when any Right was quarrelled as null, the Nullity was ſuſtain'd by way of Exception or Reply, and a Day was allow'd to the Defender to call his Warrant; that is to ſay, the Perſon who was his Author, and who was bound in Warrandice: But now few Nullities are *regulariter* receiv'd by Exception, but by way of Reduction, to the end the Authors may be called, who may defend him; and ordinarily the Defender intimates at the Bar. the Purſuit to his Author's Advocates, to the end they may defend him, and if they do not, they are liable in an Action of Eviction for Damage and Intereſt; but the old Form of calling Warrants is in Deſuetude. XLII.

Tho' Bonds of Man-rent are hereby diſcharged, yet former heretable Bonds are excepted. XLIII.

*Vide Crim. Obſerv. Tit.* Falſhood, *Num.* 8. XLVII.

It is obſervable, that there needed a particular Act of Parliament for cutting down the Wood of *Falkland*; becauſe, as I think, the Queen was then a Minor; and it was to be cut down by the Regent, and the Regent being but a Tutor, it has been thought he needed a Decreet, or Act of Parliament for his Warrant, even as the Tutor of a private Party cannot alienate his Pupil's Lands without a Decreet of the Lords of Seſſion: And it may be argued from this Act, That tho' a Wood be old, yet it cannot be cut down by a Tutor, without the Warrant of a Judge; for this Act bears, *That this Wood was old, and ready to periſh.* It may be likewiſe doubted, Whether, ſince the King's Parks are a Part of the annex'd Property, the King, or any having Right from Him, may cut down the Wood, without an expreſs Act of Diſſolution, or other Warrant from the Parliament, ſince the King is only but a Liferenter of the annex'd Property; and a Liferenter can only cut down what is neceſſary for his own Uſe. But ſince Woods would periſh if they were not cut, I think there needs no previous Diſſolution. XLVIII.

Tho' by this Act Deacons are diſcharg'd, as tending to Sedition, and Viſitors appointed to be choſen in their Place; yet the very next Year, the ſame Queen *Mary* allows Deacons to be choſen, by a ſpecial Grant to the Craftſmen of *Edinburgh*; becauſe, as that Grant bears expreſly, the Act was never in Obſervance; and ſince the making of it, it was found by Experience, that Deacons were neceſſary in Towns. From which it may be argued, That when a Law is found abſolutely inconvenient, the King may diſpenſe with it till the next Parliament, eſpecially where the Law had never been obſerved: But I think the Speciality of that Grant lies in this, That this being an Act of Parliament relating to Government, and made for the Security of the Crown, the Monarch may uſe it, or diſpenſe with it, as he pleaſes, as every Perſon may diſpenſe with what is introduc'd in his own Favours: Tho' to this it may be anſwered, That what is introduc'd for the Good of the Commonweal, as the Act bears this was, cannot be diſpenſed with, without the Conſent of the Three Eſtates. To which it may be replied, That Matters of Government do not concern them directly, but by Conſequence, Government being the Intereſt of the King, as Property is of the Subject. LII.

ACT LIII. THIS Act is enlarged by the *Act* 156. *Parl.* 12. Ja. VI. by which the Lords of Seſſion are ordain'd to grant Letters ſummarly on Six Days, againſt ſuch as ſtop High-ways.

LVI. THIS Act is explain'd in the *Act* 13. *Parl.* 2. Ja. IV.

LVII. THO' by the 5 *Act*, 2 *Parl. Seſſ.* 3. Ch. II. the Burghs of Regality or Barony are allowed to bring home Timber, Iron, *&c.* as the Return of the native Commodities of the Kingdom; yet it was controverted if they might bring home Salt; and it was found that they could not bring home Wine, nor Salt, nor Brandy, even as the Return of their native Commodities; ſo that none can trade in theſe, ſave the Burghs-royal.

LVIII. THE Acts here related to, are the 60 *Act*, 7 *Parl.* Ja. III. and 13. and 14 *Acts*, *Parl.* 4. Ja. V. which declares the breaking of Dovecotes, Parks, and Ponds, to be Theft; and upon the 25 *July*, 1623. *Raith* and *Dean* are ordain'd to be hang'd for breaking of Yards, ſtealing of Bees-ſkeps and Sybows: And it was Theft by the Civil Law, *Lege Pompon.* 8. *par. Pomponius* 1. *ff. Fam. eriſc. Vide Crim. Obſerv. Tit.* Theft, *Num.* 15.

LX. THIS Act againſt the ſpeaking Evil of the Queen's Grace, or *Frenchmen*, was made when the *Frenchmen* came over to aſſiſt the Queen againſt the *Engliſh*; and tho' it be temporary *quoad* the *French*, yet it is ſtill a ſtanding Statute *quoad* our Monarchs: And it is obſervable by it, that the Hearers of falſe Reports againſt the Queen, and not reporting the ſame, are puniſhable as the principal Speakers: But it may be doubted, if Hearers are oblig'd to dilate, when they cannot prove.

LXI. THO' this Caſe, in ſo far as concerns theſe temporary Pleas, have now no Force; yet that Part of the Act appointing Women and others, who make Perturbation in the Paſſage to Towns, is ſtill in Obſervance, and the Puniſhment is, by our Practice, arbitrary.

# PARLIAMENT VII.

LXII. BY this Act, the Judge is allowed to exact Caution from ſuch as propone Improbation; and this Act was found to extend as well to Exceptions of Improbation, as to Actions of Improbation; and tho' it appoints Caution only to be found, yet the Lords ordain oft-times the Money to be conſigned, and Forty Pound is the ordinary Sum; and ſometimes they ſuſtain *cautio juratoria*, where the Party cannot find Caution; but this *cautio juratoria* is never allow'd, except where there are previous and ſtrong Preſumptions of Falſhood, or elſe the Lieges might be extremely vex'd: Ordinarily the ſame Day is appointed by the Judge, for the Proponer of the Falſhood to conſign, and for the Producer of the Writ to bide by the ſame: Like to theſe Conſignations were the Sponſions mentioned in the Civil Law, whereby Litigators *ſponſionem faciebant certæ pecuniæ, quæ ejus lucro cederet qui judicio viciſſet, L. pœn. ff. de aleatoribus, L.* 17. § *ult. ff. de præſcript. verb.*

*Nota*, BY this Act, where Improbation is propon'd at the King's Inſtance, the Informer is to find Caution; but if the King's Advocate inſiſt *ad vindictam publicam*, I conceive he is oblig'd to find no Caution, becauſe he is never preſum'd to purſue calumniouſly.

LXIII. WHEN any Thing is to be proven by Writ, if the Writ be not produc'd, this Act appoints that Proteſtation ſhall be given againſt the Probation of that Part of the Exception; but now the Form is to call upon the Act, and crave Circumduction of of the Term, which Circumduction is here call'd Proteſtation; but if the Writ be produc'd, this Act appoints that the other Party ſhall be heard againſt the ſame after Renunciation of Probation. And the Form is, That when any Writ is produc'd *in modum probationis*, the other Party proteſts to be heard againſt the ſame, at the adviſing of the Cauſe, and the Producer puts up an Act renouncing further Probation.

LXIV. THIS Act appoints the Expences of Plea to be tax'd, and inſert in Decreets, which is conform to the *Ch.* 68 and 69. *Quon. Attach.* and tho' by the Civil Law Expences of Plea ought not to exceed the principal Sum purſu'd for, Bart. *in L.* 8. *Cod. de Indiction.* yet I have ſeen more Expences allow'd than the Sum purſu'd for extended to. And it were very unjuſt, that if a Perſon of Quality were purſu'd unjuſtly, by a mean Rogue, for a ſmall Matter, that his Expences ſhould not be determined according to what he was really forc'd to expend; for the Neceſſity of Expending is the only juſt Rule in ſuch Caſes.

# *PARLIAMENT* VIII.

LXV. THIS Act of Parliament doth enable *Frenchmen* to bruik Lands and Eſtate in *Scotland*, and naturalizes them ſo, as that they may enjoy all the Privileges here as any *Scotſman* may do; but tho', *quoad* the Point of Succeſſion, Strangers have by many Nations been debarr'd, and that by the *Roman* Law, *cum peregrinis Teſtamenti factio non erat, L.* 1. *C. de hæred. inſtituend. L.* 1. § 2. *ff. de Legatis* 3. yet *Craig. Pag.* 96. obſerves, that Strangers were not debarr'd from Succeſſion in *Scotland*; and I find it ſo decided, 13. *January* 1575. in the Caſe of one *Richardſon*. Theſe Privileges granted by this Act are likewiſe confirmed to the *Frenches* by an Act of *Sederunt*, the 11. of *June* 1595. From theſe firſt Words in this Act, appointing Letters of Naturality (or Naturalization) to be given to ſuch of the *French* Subjects as ſhall happen to be in the Kingdom of *Scotland*, it may be doubted that *Frenchmen* cannot pretend to this Right except they live here; but this is expreſly contrary to the *French* Privileges there granted to us. It may be alſo urg'd, that *Dutchmen* or others cannot pretend to it, tho' they be naturalized in *France*; for, to naturalize them, becauſe they are naturalized in *France*, were to allow the *French* King to naturalize any he pleas'd in *Scotland*, tho' Enemies to us. 2. Only *Frenchmen* are naturaliz'd, which is to be interpreted only of ſuch as are properly ſo. 3. This were *fictio fictionis*, which is reprobated by Law. It ſeems alſo juſt that except this Privilege be continued to us in *France*, *Frenchmen* ought not to have it in *Scotland*. *Quær.* If Merchants, tho' not naturaliz'd, will not have Right to heretable Rights granted for Security of their Money; for without this there could be no Commerce.

LXVI. THIS Act contains the *French* Privileges to us communicated by the *French*, whereby the *Scots* may ſucceed in *France* in the ſame Way that the *Frenchmen* themſelves did; and they are by this Act naturalized to that and all other Effects, and which was very neceſſary for us; ſince by the Law of *France* the Fiſk excludes the true Heirs of Strangers, except as to Goods brought in by them: Which Privilege is call'd by the *French*, *Droict d' aubeine*. Beſide this Right of Succeſſion, the *Scots* likewiſe are free to be preferr'd to all Eccleſiaſtical Dignities. The Gentlemen are free from Taxes, and the *Scotiſh* Ships free from Impoſts, albeit of late the *French* exact from us 50 *Sols per* Tun, as from other Strangers. As to which I drew this Memorial, as Aſſeſſor to the Royal-Burrows.

## *A MEMORIAL concerning the Privileges due to the* Scots *in* France.

THE *French* Nation finding themſelves oblig'd to have foreign Recruits for maintaining their Wars, pitch'd upon *Scotland*, as a Nation very fit to furniſh them Levies; and ſo old was their Alliance, that a League Offenſive and Defenſive was enter'd into betwixt *Charles* the Great, King of *France*, and *Achaius* King of *Scotland*, in *Anno* 787. At which Time, *Charles* the Great beſtow'd upon the King of *Scotland* the *Double Treſſure*, garniſh'd with *Flower-de-luces*, or as the *French* call it, *Fleurie & contre fleury*, born by them at this Day, as all the *French* Hiſtorians and Heraulds do acknowledge.

AFTER this, the *French* being engaged in conſtant Wars with the *Engliſh*, they employ'd the *Scots* on all Occaſions, in which their great Succours and Services are ſet down by *Favin* a learned *French* Author, in his *Theatre of Honour*. And to engage that Nation the more, as well as to reward their Services, the guarding of the King's Perſon was beſtowed upon them by *Charles* V. and they were holden as naturaliz'd *Frenchmen*, and were exempted from Payment of all Cuſtoms. And tho' many of theſe Contracts and Leagues be loſt, yet theſe following Papers are ſtill extant.

A Treaty containing theſe Privileges betwixt *Alexander* II. and *Lewis* of *France*, call'd St. *Lewis*.

ANOTHER betwixt King *Robert* le *Bruce* and King *John*.

AN Act of Parliament 1558, relative to the like Act in *France*, wherein Queen *Mary*, who was then married to *Francis* Dauphin of *France*, doth, with the Conſent of Parliament, naturalize all the *French* in *Scotland*, and enable them to ſucceed to Eſtates moveable and immoveable here, and free them from all Taxes payable by Strangers. In which Act of Parliament, the Copy of the Privileges granted by the *French* to the *Scots*, is *verbatim* ingroſſed.

*Item*, A Patent by *Francis* King of *France*, dated *May* 1510. exeeming the *Scots* Nation from paying Cuſtom in *Normandy*.

*Item*, AN Act of Exchequer approving thereof, dated the ſaid Year.

*Item*, AN Act of the Treaſurers in *France*, conſenting to the ſame.

*Item*, LETTERS patent from the ſaid King to his Great Council, for expeding the former Patent, dated the ſaid Year.

*Item*, ACT of the Great Council, conſenting thereto.

*Item*, AN Act of the *Cour des Aides* at *Paris*, approving the ſaid Patent.

*Item*, CHARTER by King *Henry* II. of *France*, exeeming the *Scots* Nation from Cuſtoms in *Normandy*, and containing on the Back thereof the Conſent of the *Cour du Parlement* at *Rouen*; as alſo, an Approbation of the *Cour des Aides*, dated 1554.

*Item*, CHARTER by the ſaid King, exeeming the *Scots* Nation from paying any Cuſtom through the whole Towns in *France* and *Normandy*, containing an Approbation of the *Cour du Parlement* at *Rouen*; as alſo Approbation of the *Chambre des Comptes* of *Rouen*; alſo Approbation of the *Cour des Aides* in *Rouen*. All in *Anno* 1554.

*Item*, EXTRACT forth of the Regiſter of *Cour des Aides*, for the *Scots* Merchants tranſporting Wares from *Normandy*, to find Caution that the ſaids Goods ſhall be ſold in *Scotland*, dated the ſaid Year.

*Item*, CHARTER by the ſaid King *Henry*, diſcharging the Act foreſaid of finding Caution, but to give their Oath if they be required, dated 1554.

*Item*, COPY of a Confirmation by King *Henry* IV. of the *Scots* Privileges granted by his Predeceſſors, dated 1594.

*Item*, SUPPLICATION *James Colvil* to the Burrows of *Scotland*, craving Recompence for obtaining the ſaid Charter.

*Item*, COPY of a Warrant by King *Henry* IV. to his *Cours des Parlements*, and other Judges, for reſtoring to *Scots* Merchants whatever has been taken from them, and granting them free Trade through his whole Kingdom, dated 1594.

*Item*, CONFIRMATION by the ſaid King *Henry* IV. exeeming the *Scots* Nation from paying Cuſtoms in *Normandy*, containing Approbation of the *Cour du Parlement* of *Rouen*, and regiſtrated in the *Chambre des Comptes*, with Conſent of the King's Advocate; and alſo regiſtrated in the *Cour des Aides*, with Conſent of the King's Advocate there; as alſo regiſtrated in *Rouen*, in *Anno* 1599.

*Item*, CHARTER by the ſaid King, directed to the *Cour des Aides* in *Normandy*, diſcharging the ſamen Act of finding Caution, That the Goods tranſported from *Normandy* ſhall be ſold in *Scotland*.

*Item*, EXTRACT forth of the *Cours des Aides* of *Rouen*, for Regiſtration of the former Letters.

*Item*, EXTRACT of the Regiſter of the *Cour de Chambre des Comptes* of *Rouen*, for Regiſtration of the ſaids Letters.

*Item*, EXTRACT of the Regiſter of the *Chambre des Comptes* of *Normandy*, for Regiſtration of the former Letters.

*Item*, EXTRACT forth of the *Domain* Books in *Rouen*, conſenting to the Regiſtration of the ſaids Letters in their Books; as alſo, Extract of the Books of *Diep*, conſenting to the Regiſtration thereof in their Books.

*Item*, TWO Warrants of the Treaſurers of the Finances in *Normandy* for the regiſtrating of the foreſaids Letters. All the ſaids Writs are dated in *Anno* 1599.

*Item*, EXTRACT of the *Domain* in *Rouen* for Cuſtoming the *Scotſmen*'s Goods there, in reſpect the *Scots* Privileges were not confirmed by King *Lewis* XIII. dated 1611.

*Item*, CHARTER by *Lewis* XIII. confirming the *Scots* Privileges, and Exemption of Cuſtoms in *Normandy*, and regiſtrated in Four ſeveral Courts in *France*, dated in *July* 1613.

*Item*, EXTRACT of the Approbation of the ſaid Charter at *Rouen* the ſame Year.

*Item*, EXTRACT of the ſaid *Chambre des Comptes* the ſame Year.

*Item*, CHARTER by the ſaid King of the ſaids Privileges direct to the *Chambre des Comptes* in *Rouen*, dated in *Auguſt* 1613.

ACT

*Item*, Extract of the *Cour des Aides* of *Rouen* of the former Letters.

*Item*, Extract of the *Domain* of *Rouen*, approving the ſaids Letters.

*Item*, Warrant of the Treaſurer of Finances, approving the Regiſtration of the ſaids Letters.

*Item*, Warrant of the Burrow of *Newhaven*, conſenting to the Regiſtration of the foreſaids Letters, in *Anno* 1613.

*Item*, Extract in Form of Arreſt of the great Council of *France*, declaring that the *Scots* Merchants ſhall pay but for every 100 Weight of Wool 25 *Sols* of Cuſtom, and for every Piece of *Scots* Hides 2 *Sols* 6 *Deniers*, and that notwithſtanding of the new Tax'd of Cuſtoms raiſed in the Dutchy of *Normandy* upon ſuch Merchandice, and this to evite all Proceſs that might fall thereupon. Dated 1635.

*Item*, Warrant by the ſaid King *Lewis* to the *Chambre des Aides*, and Mr *Deſportes* in *Normandy*, to proceed to the Approbation of the ſaid Arreſt of the great Council, which is regiſtrated in the Books *Des Aides* of *Normandy* in the foreſaid Year.

*Item*, Extract of the *Cour des Aides*, approving the Regiſtration of the ſaids Letters.

*Item*, Extract of *Domain* of *Rouen*, approving the ſaids Letters.

*Item*, Extract of the Intimation made to the Cuſtomers of *Newhaven* of the foreſaids Letters, and Approbation thereof in the *Cour des Aides*.

*Item*, Extract of the Burrow of *Diep*, conſenting to the Regiſtration of the ſaids Letters in the great Council, all dated in *Anno* 1635.

Conform to theſe Privileges, the Parliament of *Paris* did, in *Anno* 1586, decern the *Scotiſh* Nation to have Right to all the Privileges, and to be capable of Employments, and free from all Cuſtoms; whereupon the learned Mr. *Servin*, that famous Advocate, has written a learned Book, maintaining the ſaids Privileges, to which he has annexed the ſaid Decree and Sentence. Likeas, the ſaids Privileges are acknowledged by *le Bret*, in his Book concerning the Prerogatives of the Kings of *France*, *Cap. Naturalization*, and many other *French* Lawyers, and by *Favin* in his above-cited *Theatre*.

By virtue of which Rights and Privileges, the *Scots* have been always eſteem'd as naturalized in *France*, and have enjoy'd all the Privileges due to the Natives, until of late, that there being 50 *Sols per Tun* impoſed upon foreign Bottoms, ſome of the *Scots* in *Rouen* were charg'd for Payment thereof; whereupon *Mackmath*, *Blackburn* and *Pringle*, having been purſu'd in the *Cours des Aides*, they were not only in *July* 1649. abſolv'd from paying any Part of the ſaid Taxation, but the Collectors were ordain'd to reſtore unto them what they had exacted upon that Head. As alſo, there being a *Scots* Veſſel conſign'd to Mr. *Pringle* in *Anno* 1663. and he being charg'd for the ſaid 50 *Sols per* Tun, he was freed from the ſaid Taxation by the Parliament of *Rouen* after full Debate, upon 16. *June*, 1663.

On our Part likewiſe the *French* enjoy all the Privileges of Natives, and poſſeſs Lands and Heretages, and are as capable of Succeſſion as the Natives are; nor pay they any Taxes, being declared free conform to the ſaid Treaties by ſeveral Acts of Exchequer in *Scotland*, tho' the *Engliſh* have impos'd a *Crown per* Tun to compenſe that 50 *Sols*.

From all which it appears moſt juſt and reaſonable, that the *Scots* ſhould have all the Privileges of the Natives of *France*; Becauſe,

I. The ſame have been granted to them by ſolemn Charters and Conceſſions, which tho' it had been free to the *French* King to have at firſt granted, yet being granted, he was not thereafter, by the Principles of Juſtice, free to have recalled the ſame.

II. Tho' mere gratuitous Privileges might be recalled, as they cannot, yet renumeratory Privileges granted for Services done, as theſe Charters, can never be recalled without an open Violation of Juſtice. And it is undeniable, that *Scotland* has ſpent more Blood and Money in the *French* Service than all thoſe Privileges were ever worth; and it is known, that the laſt Conceſſions were granted to the *Scots*, for giving Queen *Mary* in Marriage to the *Dauphin* of *France*, whereby if he had had Children, *Scotland* itſelf had been annexed to *France*; and becauſe the *Scots* did refuſe Her to King *Edward* VI. of *England*, they were thereupon invaded by the *Engliſh*, and their Nation was almoſt ruined.

III. Tho' renumeratory Conceſſions might be quarrel'd, as they cannot, yet mutual Treaties and Contracts can never be abrogated nor taken away, without the Conſent of both the Parties Contracters.

IV. The *Scots* being ſecured by Deciſions of the Supreme Courts of *France*, as ſaid is, they have thereby the greateſt Security that the Law of any Nation can give.

As theſe Reaſons may convince any Man that it were againſt the Juſtice of *France* to take away the Privileges of the *Scotiſh* Nation, ſo the Principles of Prudence and Policy ſeem very much to oppoſe the taking them away. For,

I. What can any other Strangers expect from Conceſſions, Treaties, or Contracts, when ſo old and well deſerved Privileges are queſtioned, it being very well known to all Nations that *Scotland* has deſerv'd extraordinarily of *France*, and this Alliance has been famous beyond all the other Alliances now known in the World.

ACT II. THE *Scots* and *Scotiſh* Nation have, upon this Account, refuſed all other Alliances, to their great Loſs and Prejudice, in ſo much that they have oft-times ſuffered their Kingdom to be invaded, haraſs'd, and ruin'd by the *Engliſh*, becauſe we preferr'd the *French* Alliance to their's. And as our Countrymen have always been ready to ſpend their Lives for the *French*; ſo within theſe 50 Years we have loſt 100000 Men in their Service, who did not amongſt them all bring home 20000 Livres to this Kingdom; and 'tis very well known how ready we are to own the *French* Intereſt, in all Courts and Countries where we live abroad.

THE Kingdoms of *Scotland* and *England* may come to divide by the Faillure of the *Scotiſh* Line in *England*; and ſo it ſtill ſeems prudent for the *French* King not to extinguiſh his Intereſt in *Scotland*.

AND whereas it may be pretended, that we have forfeited our Privileges by declaring War againſt the *French*. To this 'tis anſwered, That 1. The denuncing of War by us, was only the Effect of a neceſſary Obligation upon us, as being a Part of Great-*Britain*, and not a War entred into by *Scotland* upon any national Account. 2. By Treaties following upon the War, all Things are reſtor'd to the former Condition they were in, except in ſo far as former Treaties were innovated by expreſs Conditions; but ſo it is, there is nothing inſerted in any of thoſe Treaties, to the Prejudice of our former Leagues and Privileges; and therefore they muſt revive and return to the ſame Force and Vigour they were in before the War.

I find this Act regiſtrated and recorded in the Books of Sederunt; and generally it is obſervable, that moſt of the public Papers, whereupon any legal Debates or Securities might depend, were inſerted in the Books of Sederunt; which was ſomewhat like the *French* Cuſtom of verifying in the Parliament of *Paris* (that is the ſame with our Seſſion) the King's Edicts; and thus the Pacification betwixt the Regent and the *Hamiltons*, *Anno* 1572. and many ſuch Papers are inſerted there: And of old, even public Accidents were likewiſe inſert, ſuch as Eclipſes, &c.

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# PARLIAMENT IX.

LXVII. ORDINARILY, in Acts of Indemnity which follow Civil War, as this is, the King or State, does only diſcharge all Action that may be competent for all manner of Omiſſions, or Commiſſions, by Virtue of any Power or Warrant of thoſe in Power for the time; as is to be ſeen in the 10 *Act*, 2 *Seſſ.* 1 *Parl.* Ch. II. But here in this Act, all Actions that may be competent for any Cauſe or Occaſion during the Time, for which the Troubles laſted, are once diſcharged, except there be a Warrant given by the Perſons nam'd in the Act, for intenting Actions during that Time; but thereafter, by the *Act* 44. 11 *Parl.* Ja. VI. the Lords of Seſſion are made Judges to the Interpretation of that Act of Oblivion; and all Decreets recovered during theſe Times, are declar'd irreducible, if they be not purſued within Year and Day; and this ſhort Preſcription is declar'd to run againſt Minors, which is likewiſe conform to the ſaid 10 Act; in which late Acts, the Nature of Amneſties and Oblivion ſhall be more fully declared.

LXVIII. *Vide Obſ. ad Act* 11. *Parl.* 1. Ja. I.

LXIX. *Vide Obſ. ad Act* 49. *Parl.* 13. Ja. I.

LXX. UPON this Act, the Forgers, or Bringers home of falſe Money, uſe to be forfeited, as was found in the Caſe of *John Drummond*, *November* 27. 1621. and many other Caſes: And tho' it was alleged in Defence of *Hamilton* and *Burn*, *October*, 1677. That only Officers of the Mint-houſe us'd to be forfeited, becauſe of their exuberant Truſt, and that it was eaſy for them to commit ſuch Crimes; yet *Drummond* was no Officer, but a Sadler in *Perth*. The Words of this Act that are ordinarily founded upon, are, *That the Revealers of Forgers, or Home-bringers of falſe Coyn, ſhall have the one Half of the Eſcheat of all their Lands and Goods, moveable and immoveable*; and this Puniſhment is peculiar to Treaſon; and it ſeems that Forging or Coining is an Incroachment upon the King's Prerogatives; One of which is the coining of Money: But I ſee not why bringing home of falſe Coin could, upon this Account, be declar'd Treaſon. 'Tis alſo obſervable from the former Caſe, 1677. that the Meanneſs of the Quantity or Value coined, excuſes not from the Puniſhment of this Act. *Vide Crim. Obſerv. Tit.* Falſhood.

BY

ACT LXXII. BY this Act it is appointed, That no Parſon, Vicar, or other Kirkman's Manſe or Gleib, can be ſet in Feu, or long Tack; and therefore an Heretor, to whom the Vicar's Gleib was feued, tho' a Year before this Act, was refus'd Relief, when that Land was deſign'd to the Miniſter, becauſe the Feu ſet to him was contrary to this Act; and tho' the Feu was ſet prior to this Act, yet it was null, becauſe it was not confirmed before this Act, *February* 12. 1635. *Vide Obſ.* on 48 *Act*, *Parl.* 3. Ja. VI.

LXXIII. ALL ſuch as practiſe Witchcraft, or conſult with them, are by this Act puniſhable by Death; as are alſo all ſuch as pretend to have any ſuch Craft or Knowledge, therethrough abuſing the People: From which 'tis obſervable, that ſuch as pretend to foretell Things to come, or to tell where Things are loſt, may by this Act, be puniſhed with Death, tho' really they have no ſuch Skill.

By this Act alſo, all Sheriffs, Lords of Regalities, and other Judges having Power to execute the ſame, are ordain'd to put the ſame in Execution; but it does not therefore follow, that Stewarts, and Bailliffs, and Sheriffs, are competent thereto; and *de facto*, the Juſtices only, or ſuch as have Commiſſions from the Council, uſe to judge this Crime. *Vide Crim. Obſ. Tit.* Witchcraft.

LXXIV. NOTOUR Adultery is by this Act declar'd puniſhable by Death; and by the 105 *Act*, 7 *Parl.* Ja. VI. that is only declar'd to be notour Adultery, where 1. there are Bairns, one or more, procreated betwixt the Adulterers. 2. When they keep Company, or bed together notoriouſly known. 3. When they are ſuſpected of Adultery, and thereby give Slander to the Kirk, whereupon, being admoniſhed to ſatisfy the Kirk, they contemptuouſly refuſe, and for their Refuſal they are excommunicate: If either of which Three Degrees be proved before the Juſtices, the Committers are puniſhable by Death. From which Act it is to be obſerved, 1. That by the Firſt Act, Premonition to abſtain was ſtill to be made in all Caſes; yet in neither of the two firſt Caſes here related, it is declar'd neceſſary: But ſince it is not lawful to kill him who was premoniſhed, and thereafter converſed, except they converſed in ſuſpect Places, Gibrald. *de homicid. Num.* 11. it ſeems, that in neither of theſe Statutes, Converſation ſhould be criminal, even after Prohibition, except it be in ſuſpect Places. 2. The Juſtices are only declar'd to be Judges to the Notoriety of Adultery; and therefore it may be controverted, if Lords of Regality be Judges competent to the Cognition of it; and this ſeems to be reſtricted to the Juſtices, becauſe it is an arbitrary Inquiry in a capital Caſe. 3. This Act does not exclude capital Puniſhments in other Caſes of Adultery, but only ordains that theſe Three Degrees ſhall be puniſhed by Death; and ſince there are other Caſes more grievous to the Party injured, and more ſcandalous to the Commonwealth, it may be argued, that the Puniſhment of Death ſhould likewiſe be extended to them; as for Inſtance, to commit frequent Adulteries.

LXXV. THIS Act, declaring that the raiſing of Bands of Men of War, and the riſing in that Manner is puniſhable by Death, is formerly explain'd, *Act* 2. *Parl.* 1. Ja. I. *Vide Crim. Obſ. Pag.* 44. & 45. and this Act is ratified by the 12 *Act*, 10 *Parl.* Ja. VI.

LXXVI. BY this Act, the building of Kirk-yard-Dikes is referr'd to the Lords of Secret Council, who are to take ſuch Courſe therein as they ſhall think fit: But by the 232 *Act*, 15 *Parl.* Ja. VI. the Parochioners are ordain'd to build them to the Height of Two Ells; and the Lords of Seſſion are ordain'd to grant Letters of Horning for that Effect, which they uſe now to do.

LXXVII. THIS is fully explain'd at the 7 *Act*, 9 *Parl.* Ja. VI. and the firſt Part of it was enacted formerly by Act of Secret Council, *December* 21. 1561. and that begins, *It is ſtatute and ordain'd by the Queen:* Which ſeems ſtrange, ſeeing to *ſtatute* is only proper to Parliaments; but Acts of Council do oft-times bear *Statute and ordain. Vide* Coſtal. *de Imperator. Quæſt.* 73. *Num.* 25. This Act mentions Three Kinds of Biſhops, the Biſhop Elect, the Biſhop Poſtulate, and the Biſhop Conſecrate; a Biſhop Elect, is he who is elected by the Chapter upon a *Congé d'eſlire* from the King, but is not yet conſecrate; a Biſhop Poſtulate, is he who was only called, but not elected, and cannot be elected, as a Minor, a Baſtard, *&c. Vide Cap. innotuit,* § *Habile de elect.* And it is obſervable from this Act, that both theſe uſed to diſpone Kirk-lands, or ſet the ſame in Tacks, elſe they needed not have been diſcharg'd by this Act: But tho' we have now Biſhops elect, yet we have no Biſhops poſtulate; and theſe Elects *exercent ſolum ea quæ ſunt juriſdictionis, ſed non ea quæ ſunt ordinis.*

ACT LXXVIII. BY this Act, Notars are to be admitted only by the Lords of Council, that is to ſay, the Lords of Seſſion, as *de facto* they now are: And by the Act of Sederunt, 1595. the Lords ordain'd, that yearly in *November*, One of their Number ſhould be nam'd by them, to receive Notars; who ſhall only receive ſuch as are paſt Twenty Five, can write an Evident in *Latin* or *Engliſh*, and be Prentice Five Years to a Notar; tho' now they are admitted before Twenty Five, and without having been Prentice at all.

By this Act, ſuch as exerce the Office, without being admitted by the Lords, or after they are diſcharg'd by them, may be puniſh'd arbitrarily, and even to Death: But it has been found, That Evidents ſubſcribed by Notars once admitted, tho' thereafter diſcharg'd, are valid, they having ſtill been habite and repute to be Notars.

LXXIX. THO' this Act appoints that all Notars ſhall be admitted by the King, yet now they need no Letters from the King, but do depend upon the Clerk of Regiſter, and his Depute, the Clerk to the Notars. The Clerks of Seſſion are by their Admiſſion as ſuch, Notars, tho' they be not admitted in manner mentioned in this Act, and Inſtruments under their Hands in judicial Acts, make as much Faith as the Inſtrument of any Notar.

LXXX. THE Act here related to, is the 34 *Act*, *Parl.* 6. *Q.* Mary: and the Acts diſpenſed with both in this and the ſaid 34 *Act*, is the 77 *Act*, *Parl.* 6. Ja. V. And it is obſervable by this Act, that when former Laws have not been univerſally obſerved, no Advantage is taken upon them: And this is one of theſe Caſes, *in quibus communis error facit jus.*

LXXXI. THE Obſervation in the former Act holds alſo in this; and the Act here diſpenſed with, is the 38 *Act*, *Parl.* 6. *Q.* Mary.

LXXXII. BY this Act it is declared, That Five or Six of the principal Burrows ſhall be called to the concluding Peace and War, and to the laying on Taxations. It may be doubted, whether by the Council, to which they are to be called, be meant here the Parliament, or Privy Council; and tho' ordinarily the Parliament be called the King's Council, and that it may ſeem they only ſhould impoſe Taxations; yet it may be urged, that by Council is here meant the Privy Council, becauſe all the Burrows muſt be cited to Parliaments, and the King and His Council uſed before to lay on ſuch general Taxations; and *de facto* His Majeſty did in ſo many Caſes, without either Parliament, or General Convention of Eſtates, as in laying on the Taxation for defraying the Expence of the Baptiſm of King *James* VI. *December* 6. 1562. Which Taxation was laid on by Eight Earls, Five Biſhops, and Four Burrows, not mentioning Barons, becauſe it ſeems the Earls were acccounted Barons; the Taxation was 12000 Pounds, whereof 6000 Pounds by the Spiritual Eſtate, Four Thouſand Pounds by the Barons and Freeholders, and 2000 Pounds by the Burrows: And another Taxation, for defraying King *James* VI's Expence in his Journey to *Denmark*, and many other ſuch Taxations; and this was then neceſſary, becauſe Taxations behov'd to be impoſ'd, His Majeſty's Revenue being then very mean; and to have called a Parliament or Convention, would have put the People to more Expence than theſe neceſſary Taxations were worth: But now by the 5 *Act*, 1 *Parl.* Ch. II. all Sums to be raiſed for Maintenance of Forts or Armies, muſt be firſt concluded in Parliament, or Convention of Eſtates.

And now the King has a conſiderable Revenue by the Exciſe, for defraying thoſe ſmall Neceſſities, for which the Council then impoſed; and it is certain in the general, that all Countries ſhould ſupply the Monarch with Means to defray the Expence of the Government. *Vide* Arniſ. *de jur. Majeſtatis in bona privatorum.* *Vide Act* 85. *Parl.* 6. Ja. IV.

LXXXIII. BY this Act, the making privy Conventions or Aſſemblies within Burghs, to put on Armour, or diſplay Banners, *&c.* without Licence from the Sovereign, are puniſhable by Death.

*Obſerv.* I It ſeems, that mere Convocations or Aſſemblies are not *per ſe* puniſhable by Death, without putting on Armour, or diſplaying Banners.

*Obſerv.* II. That naked Aſſiſtance at ſuch Tumults with a Batton, was not found by the Juſtices to infer Death, *Anno* 1665. And I conceive, that tho' a previous Deſign were prov'd, yet the Aſſiſtance with a Batton would not be ſufficient, ſince the Act requires putting on Armour, or clothing themſelves with Weapons; which imports hoſtile Weapons, for neither of theſe can be verified in a Batton, and penal Statutes are not to be extended; but yet the appearing with a Batton is ſufficient to puniſh arbitrarily ſuch as aſſiſt at Tumults.

LXXXIV. THIS Act confiſcating Ship and Coals wherein Coals are tranſported, is in Deſuetude, but is not expreſly abrogated by any Law; and tho' at firſt, Licences for tranſporting Coals were neceſſary; yet now even theſe Licences are in Deſuetude, we having now diſcovered more Coals than ſerves our Nation.

ACT LXXXV. THIS Act, confiſcating Beeff and Mutton that comes to Mercat without Skin and Birn, is ſtill in Obſervance, and was made for diſcovery of Theft; for the Skin being upon the Beaſt that is kill'd, does bear all Marks whereby it may be known. And for the ſame Reaſon in the Southern Shires, the meaner Sort who kill any Beaſts, are obliged to keep their Ears, and if the Fleſh be found where the Ears cannot be produc'd, it is commonly look'd upon in theſe Countries as a Point of Dittay. Not only muſt the Beaſts be brought to the Mercat with their Skins, according to this Act, but by Acts of Burrows, the Skins that are brought to the Mercat, muſt not be ſcor'd nor hol'd, which Fleſhers did before negligently. Nor muſt the Haſlock be pull'd, that being the beſt Part of the Wool. And by the Acts of the Convention of Burrows, made at the Deſire of the Conſervator, the Skins of Beaſts within this Kingdom, did riſe in Value a Third more than when they were carried beyond Sea.

# *PARLIAMENT* X.

LXXXVII BY the 2. *Act*, 1. *Parl.* Ja. II. which is the Act here related to, the King's lawful Age was declared to be 21 Years; but it ſeems, that becauſe it was left dubious by that Act, whether the Year 21. was to be *inceptus* or *completus* when begun or ended; therefore by this Act it is declared to be 21 Years complete, and the Word Complete is twice repeted. And it ſeems, that before this Act even the Year itſelf was debateable; for in the 93. *Act*, 7. *Parl.* Ja. V. it is ſaid, that the King, after his perfect Age of 25 Years, ratifies, &c. By an Edict of *Charles* V. of *France*, *Anno* 1375. their Kings are declared Majors. & *hors de tutelle*, at their Age of Fourteen.

LXXXVIII IN this Act, all Infeſtments of Kirk-lands, not confirmed by King or Pope, before the Year 1558. (at which Time the Reformation begun) were declar'd null; and by this Act, Confirmations from *Rome* after that Year are diſcharg'd, and the Queen's Confirmations are declar'd equivalent to the Pope's. And I find, that by Act of Secret Council, *September* 10. 1561. the ſending to *Rome* for ſuch Confirmations is, by Proclamation, diſcharg'd, under the Pain of Barratry.

ACT.

# King JAMES VI.

## PARLIAMENT I.

I. QUEEN *Mary* being Queen during Her Life, appoints the Earl of *Murray* to be Regent, and his Election is confirmed by this Act; and it is declared to laſt till the King's Age of Seventeen, at which Time it is declar'd, that He ſhall enter to the Exerciſe of the Government. I find amongſt the unprinted Acts ſubjoin'd to this Parliament, a Reſignation of the Crown made by Her, which it ſeems was neceſſary, She being Sovereign during Her Life, as the King is during His Life.

*Obſerv.* SHE calls the Earl of *Murray* Brother, tho' he was Her natural Brother, which was conceal'd *ob honorem*, but ineptly. And tho' the Earl of *Murray* is here call'd the King's deareſt Couſin, yet he ſhould have been call'd His Uncle: Nor are Uncles properly Couſins. But I think this was, becauſe all Earls who are Counſellors are call'd Couſins and Counſellors; but yet if he had been to have been call'd a Counſellor, for this Cauſe he ſhould have been call'd Couſin and Counſellor. I have alſo ſeen a Commiſſion to one of the King's natural Sons in *England*, wherein he was call'd *our Couſin*.

IT is obſervable, that ſometimes the Acts of this Parliament bear, to be *by our Sovereign Lord, my Lord Regent and the Three Eſtates*, as the 8, 12, 20, 21 and 29. which is not well expreſs'd; for the Eſtates and Regent had no Power to make Acts, and therefore the reſt bear better, *Our Sovereign Lord, with the Advice and Conſent of His deareſt Regent and Three Eſtates*.

*Nota*, THE Parliament's ſaying, *my Lord Regent*, ſeems very ill Grammar; for it ſhould have been, *the Lord Regent*.

III, IV, V, VI. THOSE Acts confirm, and relate to former Acts paſt in the Parliament holden by Queen *Mary*, *Auguſt* 24. 1560. and yet we find no ſuch Parliament; but the true Anſwer to this is, as appears by *Spotſwood*'s Hiſtory, That the Lords of the Congregation having met in *Anno* 1560. and having paſt thoſe Acts aboliſhing the Popiſh Religion, many of the Members of that pretended Parliament proteſted, That this Meeting was no Parliament, becauſe there was none there to repreſent the Queen, nor the King of *France* Her Husband; whereupon Sir *James Sandilands* was ſent over to procure a Ratification of theſe Acts: Which being deny'd, the ſame Acts are here ratify'd by the Earl of *Murray* when he came to be Regent, as if they had been paſt in a lawful Parliament.

VII. FOR underſtanding of this Act, and the Nature of Patronages, it is fit to know, that the Right of Patronage is a Power of Nomination granted to him who either was Maſter of the Ground whereupon a Kirk was built, or who doted any Thing to the Maintenance of it, or who did build a Church to preſent one to ſerve the Cure thereat; in all which Caſes he is accounted Patron, and may preſent a Perſon to be Miniſter, or to any other Benefice, and that only if he reſerve ſuch a Power to himſelf in his Mortification; for *Hope* in his leſſer Practics, is of Opinion, that Reſervation is neceſſary; and the Reaſon is, becauſe *jus patronatus eſt ſervitus libertati Eccleſiæ impoſita*; and therefore is not to be allow'd, except the ſame was adjected at firſt to the Mortification, Molin. *ad Reg. de infirm.* The firſt Mention of Patronages is by St. *Paulin,* about the Year 431. and *Juſtinian* I find mentions the *Nov.* 67.

PATRONAGES in *Scotland* are either Laic or Eccleſiaſtic; all Patronages are accounted Eccleſiaſtic, which either belong to Eccleſiaſtic Perſons, or which have flow'd from the King (tho' by Infeſtment) ſince the Reformation, in ſo far as concerns theſe Benefices; wherein the King ſucceeds in place of the Pope, who, before the Reformation, was accounted univerſal Patron. Laic Patronages are ſuch as have been diſponed before the Reformation by His Majeſty, and theſe paſs by Infeſtment, or have been founded by Laic Perſons ſince; and theſe muſt be now obtained by a Signature from His Majeſty, even by ſuch as either contribute *dotem, fundum, edificationem.* The Words of the Conceſſion are, His Majeſty grants *advocationem, donationem, & jus patronatus Eccleſiæ de,* &c.

IT is expedient to know the Differences betwixt the old Laic Patronages, and theſe which are diſpon'd by the King ſince the Reformation, becauſe by the Act of Annexation, *July* 1587. all Kirk-lands are annexed to the Crown, and an Exception is always made of Lands which pertain to the Benefices of Laic Patronages; which Exception is only extended to laic Patronages which were lawfully eſtabliſhed before the Reformation: Which is alſo conform to the Canon Law, by which the Pope may prejudge an Eccleſiaſtic Patronage, but cannot a Laic. Bevg. *de union. beneff.* § 3. *Num.* 9.

AFTER one is preferr'd by the Patron, he hath only *jus ad rem,* but his Collation and Inſtitution which is given him by the Churchman, to whom the Preſentation is directed, gives him *jus in re;* but if the Benefice to which the Patron preſents, be a Benefice without Cure, that is to ſay, having no Care of Souls, as Provoſtries, Prebendries, *&c. eo caſu* there needs no Collation or Inſtitution, *December* 11. 1632. L. *Lugtoun* contra *Edmiſton.*

THE Patron muſt preſent One within Six Months after he comes to know the Vacancy, elſe the Preſentation, *pro ea vice,* belongs to the Church *jure devoluto;* in which we agrree with the Cuſtoms of *Normandy,* as in many other Things: But *Molineus* does more rationally conclude, *ad Reg. de infir. reſig. Num.* 63. That the Biſhop does confer *jure proprio,* after elapſing of theſe Six Months, becauſe all Churches of his Dioceſs *ſunt in illius ordinatione;* ſo that *ſubſtracto per lapſum hunc jure patronatus, quod huic juri derogabat, redit ad ſuam naturam: Quod probatur ex C.* 22. *& C.* 2. *Extr. de ſupplend. negl. Prelat.* And yet when the Arch-Biſhop preſents upon the Biſhop's Failure, he does it only *jure devoluto, nam inter utrumq; eſt gradus juriſdictionis, quæ ab inferiori, putà Epiſcopo, poſt elapſum tempus legitimum devolvitur ad ſuperiorem, putà Archi-Epiſcopum; ſed Patronus nullum facit juriſdictionis gradum:* But if the Prebsytery refuſe to admit a qualified Miniſter preſented by the Patron, then the Patron may retain the whole Fruits of the Benefice in his own Hands, *Act* 115. *Parl.* 12. Ja. VI. This Retention is likewiſe allowed by the 1 *Act, Parl.* 21. Ja. VI. But whereas by the former Act, the Preſentation *jure devoluto* fell to the Preſbytries, by the laſt Act it falls to the Biſhop: But tho' by theſe Acts it be lawful to the Patron to retain the vacant Stipends, or Fruits of the Benefice in his own Hand; yet it may be doubted, if he may apply them to his own Uſe; for theſe are not only different Effects, but it ſeems, that this being contrary to the Nature of Things ſacred, and to the Principles of the Canon Law, he cannot; for tho' by *Cap. In quibuſdam,* 12. *de pœn. Cap.* 13. *de elect.* Patrons had the Cuſtody of their own Churches when they vaked; yet the Fruits of all vacant Churches were to be reſerved for the future *Intranti, futuro Clerico, Cap.* 2. *Extr. ne ſede vacant.* And tho' at firſt Kings, and then all Patrons pretended to the intrometting with the Fruits of their Churches, eſpecially in *Britain,* as *Malch. Weſtmonſt.* obſerves in the Year 1240. yet *Alexander* I. by the *Cap.* 14. *Extr. de off. jud. ord.* appointed, That even Procurators ſhould be appointed for intrometting with theſe Fruits during the Vacancy; *quòd Patroni laici curam tantummodo & defenſionem ſuarum eccleſiarum haberent, non etiam poteſtatem ullam in rebus quas iis donarunt. Vide Can. Noverunt* 10. *Quæſt.* 2. Notwithſtanding of which Canons, *Hoſtienſis* and others except ſuch Caſes, wherein by the Foundation, or by a ſingular Privilege, or by Preſcription, the Contrary is introduc'd: And *Molineus* aſſerts, That all laic Patrons may appoint Adminiſtrators, and gather up the Rents, tho' they cannot *fructus Eccleſiarum vacantium in uſus ſuos convertere, ſed futuro Clerico reſervare, vel utiliter in Eccleſias impendere:* And therefore it ſeems, that the Parliament having only allowed laic Patrons to retain theſe Stipends during the Vacancy, they can only apply them to a pious Uſe, but can in no Caſe appropriate them to themſelves; for as ſuch an Appropriation would be ſacrilegious, ſo it would be ſufficient for preſerving the Patron's Right, that he might beſtow them upon ſuch pious Uſes as he pleaſed; but ſince the *Act* 52. *Parl.* 1. Ch. II. and the 23 *Act* of the Third Seſſion of that Parliament, appoint all vacant Stipends to be employed for Univerſities, and other pious Uſes, and that there are ſeveral Exceptions there made, and yet none in favours of laic Patrons; I ſee not why the Rents of laic Patronages fall not likewiſe under the Collection of vacant Stipends, the laic Patrons having been repreſented in that Parliament, and ſo conſenting to this Act; eſpecially ſeeing the ſaid *Act* 52. declares, that the Benefices of vacant Kirks ſhould, during the Vacancy, be employ'd upon pious Uſes, and the Collectors of vacant Stipends have alwiſe been in uſe to collect theſe.

ACT

*SELDEN*, in his Treatiſe of Tithes, aſſerts, that the Right of Inveſtiture was at firſt reſerv'd by lay Patrons in the Foundations, and that the Gleib and Tithes were at every Vacation conferr'd by the Patrons to the new Incumbents, by ſome Symbole or Ceremony not differing from our Saſines; and it is probable that for ſome Ages after *Charles Martel*'s Reign it was ſo, becauſe Tithes were then tranſmitted by laical Infeudations. And I have ſeen ſeveral Rights of this Nature in the Chartularies of our Abbacies. And tho' afterwards this was condemn'd by many Councils, yet Kings reſerv'd to themſelves the vacant Fruits of Biſhoprics, as being Founders and Patrons of theſe Benefices. And with us this Clauſe, reſerving to the Patrons Power to retain theſe Stipends during the Vacancy, ſeems a Veſtige of their old Pretenſion; but I ſhall examine all this very fully in my Treatiſe of Tithes.

IF the Biſhop refuſe to admit one preſented by the Patron, then Recourſe muſt be to the Arch-biſhop; and if he likewiſe give not Redreſs, then the Council will give Letters of Horning to charge the Ordinary to receive the Perſon preſented; and by that Act the Biſhop may refuſe to admit a Perſon, who hath not reſerv'd to himſelf a ſufficient Maintenance in ſetting Back-tacks of his Parſonage to the Patron; which Paction is accounted Simoniacal, and the Lords of Seſſion declar'd only Judges competent thereto, tho' by the *Ch.* 2. *Lib.* 1. *R. M.* Patronages are declar'd to belong to the Eccleſiaſtic Juriſdiction, and the ſaid Paction is probable by the Party's Oath, albeit *regulariter nemo tenetur jurare in ſuam turpitudinem*, by the 1. *Act*, *Parl.* 21. Ja. VI. it is appointed that the Biſhop ſhall not refuſe to admit any qualified Miniſter who hath been once admitted and receiv'd a Miniſter; by which it is clear that the Biſhop is not oblig'd to receive an Expectant who is not an actual Miniſter; and the Reaſon is, becauſe *non conſtat* if he be yet qualified, and the Biſhop cannot be obliged to enter him, and conſequently is not obliged to accept his Preſentation.

BY the Canon Law Four Months were allow'd only to a laic Patron, and Six to an Eccleſiaſtic; this was our Law before this Act, as is clear by the 2. *Cap. R. Maj. Lib.* 1. and there was good Reaſon it ſhould have been ſo; for the Conſtitution concerning it, *C.* 2. *Ext. de ſuplend. negl. præl.* is written *Epiſcopo St.* Andreæ *in* Scotiâ; and this is cited as our Law, by *Le Roy de jure patron. C.* 28. and in caſe of the Patron's Negligence, a Gradation was allow'd from Inferiors to Superiors, till it ended in the Pope.

BY that Law likewiſe, a laic Patron might vary in his Preſentation, but an Eccleſiaſtic Perſon could not; and if an Eccleſiaſtic Patron preſented a Perſon that was unworthy, he loſt the Right of his Preſentation *pro ea vice*; but a Laic Patron did not. And by our Law, if the Patron preſent one that is unfit, he may preſent another, and a Third, providing all his Preſentations end within Six Months; for the preſenting one within Six Months interrupts not ſo, as that he may thereafter preſent another within other Six Months, as ſome think, except his not admitting be occaſioned by the Biſhop, who cannot ſeek a *jus devolutum* by his own Fault. By the 7. *Act*, *Parl.* 1. Ja. VI. the Gradations then allow'd were from the Ordinary to the Superintendant and Provincial-Aſſembly, and from them to the General-Aſſembly. Where there are more Patrons, they have Right to preſent *per vices*, and he who hath been in Poſſeſſion of preſenting *trina vice*, that is to ſay, the Three laſt Times ſucceſſively, without Interruption, hath the only Right of Preſentation *in poſſeſſorio*, in a Competition with the other Patrons *pro ea vice*, without Prejudice to the reſt to declare their Right for the future, as accords; and by ſome it is alledged, that Preſentations *trina vice ex deceſſu incumbentis*, excludes all other Rights *etiam in petitorio*; but this is not our Law.

DOCTOR *Forbes*, in his Treaty of Simony, exclaims extremely againſt this Act of Parliament, for allowing the Incumbent to ſet Tacks, reſerving to himſelf a ſufficient Maintenance; and he urges violently, that this Act allows rather Simony than accuſes it.

VIII.

IT may be argued, that this Act debars not ſuch of the Royal Line as have Right to ſucceed to the Crown; for this relates only to a Coronation, and the Coronation itſelf is not neceſſary, *Coronatio enim magis eſt ad oſtentationem quam ad neceſſitatem, nec ideo Rex eſt quia coronatur, ſed coronatur quia Rex eſt*, Oldrad. *Conſil.* 90. *Num.* 7. Balbus. *Lib. de Coronat. Pag.* 40. Nor do we read that any Kings were Crowned, except *Joaſh*, in Scripture, and *Clovis* King of *France* was the Firſt that was crowned: Nor are any Kings of *Spain* crowned to this Day. Neither is a Coronation Oath requiſite; *Siſenandus* being the Firſt who in the Fourth *Tolletan* Council gave ſuch an Oath amongſt the Chriſtians, as *Trajan* was the Firſt among the Heathen Emperors. *Gregory* was the Firſt of our Kings, who *Anno* 879. gave the firſt Coronation Oath, having embraced the Chriſtian Faith, in which He was very zealous, ſwore to preſerve it; but this Oath was not made to the People, for they were not preſent, but to God: Nor could He, as *Blackwood* obſerves, *Apol. pro Regib. C.* 26. bind His Succeſſors, *quia par in parem non habet Imperium*; nor could He bind Himſelf for them to the People, *quia Cliens jurat Domino non Dominus Clienti, Tit. de forma fidelitatis, Lib.* 2. *Feud.* Likeas it may be ſaid, that this Act being made in the King's Minority, and being prejudicial to the Right of Blood in His Succeſſors, it falls under His Revocation, made *Parl.* 11. *Cap.* 31. whereby He expreſly revokes every Thing which might hurt the Privilege of the Crown, which this Act 8. would do, if Kings were thereby debarr'd from Succeſſion for differing in Religion from their Subjects. This is contrary to the Confeſſion of Faith, which ties us to Obedience to our King, tho' He be an Heretic. And ſince private Subjects are not debarr'd upon this Account from their Property, the King ought not to be debarr'd from the Exerciſe of His Government, which is His Property. And that Kings cannot be debarr'd by a Statute, is clear by all the Doctors, *In Can. qui jura diſtinct.* 8 *Æcurs. in L. Princeps ff. de Legibus, L.* 4. *de natal. reſtit. L. Jura ſanguinis, ff. de Reg. Jur.* § *ſed naturalia inſtit. de Jure Naturali forma juramenti quod præſtant Reges in Coronatione per Gloſſ.* 1. *in Cap. fin. de Eccleſ. ædif. eſt quod jurat. ſe Regni ſui jura illibata conſervaturum. Vide* Ant. Corſet. *de poteſt. Reg. Pars* 3. *Num.* 62. Some are alſo of Opinion, but unjuſtly, that Coronation is to a King the ſame Thing that Inveſtiture is to a Subject, and therefore as Heirs may continue the Poſſeſſion of their Predeceſſors before the Infeſtment, but cannot ſell, excamb, or do any other Deeds of Property till he be infeſt; ſo, tho' a King before He be crowned may do theſe Things that are neceſſary for preſent Adminiſtration, yet He cannot hold Parliaments, diſpone upon annexed Property, and do any other Deeds which require the Exerciſe of the Royal Power, till He be actually crowned. And whereas this Act ordains, that all future Kings ſhall take this Oath at their Coronation and the Receipt of their Princely Power, which implies that they ſhould take this Oath before they can adminiſtrate; it ſeems that this implies a Contradiction, for they muſt adminiſtrate in appointing the Coronation, and ordering all Things thereto relating; and our King did govern long ere He was crowned. But theſe Words are exegetic only of the Coronation, and by them is meant the Receipt of His Authority in the Coronation. This Act is ratified by the 99. *Act*, 7. *Parl.* Ja. VI. *Vide Act* 2. *Parl.* 3. Ch. II.

X. IT is fit to know, that whatſoever of the Thirds was not aſſign'd to Miniſters did appertain to the King; and it was called *Superplus*, whereof there was yearly a Book made, which altered, and was more or leſs, according to the Aſſignation to the Miniſters, and according to the *Superplus*-Books. The King's Collector did charge for the *Superplus* for the King's Uſe, and with it alſo the omitted Benefices, which the Prelates and beneficed Perſons omitted in the up-giving of their Rentals; and alſo for common Kirk and Friers Lands, which alſo with the Thirds, were appointed for the Uſes aforeſaid.

THE Rent of the Thirds for the King's Uſe is altogether extinguiſhed, partly by Reſtitution of Biſhops, who have Right to their own Thirds, and partly by Erection of Abbacies and Priories, in which the Thirds are diſcharg'd in favours of the Lords of Erection, they planting the Kirks. Likewiſe in Parliament 1617. and 1621. and in our late Parliaments, there was Commiſſion granted by the Parliament for planting of Kirks, which has made the old Book of the Aſſignations of Miniſters Stipends, and yearly Plat thereof, to be out of uſe. Many of theſe Books of Aſſumption are ſtill preſerv'd, and they are very uſeful for clearing what the old Rentals of Benefices were; ſo that it may be known whether Benefices be ſet with Dimunition of the Rental.

XII. FOR the better underſtanding this Act, it is fit to know, that a Provoſt with us is that which *præpoſitus* is in the Canon Law, *præpoſitura eſt dignitas, quando eſt Collegiata alias non Fed. de ſen. Conſil.* 80. *alia ergo eſt Jur. Can. præpoſitura Collegiata, alia non Collegiata.* But with us, where there was a College-Kirk, it was govern'd by a Provoſt and Prebends; and generally it was inſtitute for Divine Service. But there are Colleges inſtitute for inſtructing of Youth, as the old College of St. *Andrew*'s, which is governed by a Provoſt.

A Provoſt is in our Law no Prelate, and therefore Tacks ſet by him are null, without Conſent of the Patron, 12. *July* 1616. *Hope* Tit. *Kirk*; but *è contra*, the Patron may gift Prebendaries without Conſent of the Provoſt or Prebends, except it be otherwiſe provided by the Foundation.

THE Collegiate Kirks, Provoſtries, Prebendaries, having been founded by Noblemen for their own Eaſe and Advantage, they retain ſtill a greater Power over them than over any other Benefices; and therefore by this Act the Patrons of theſe may provide them to Burſers or others, notwithſtanding of the Foundation, which is ratified by the 158. *Act*, *Parl.* 12. Ja. VI. and by the 54. *Act*, *Seſſ.* 1. *Parl.* 1. Ch. II. *vide Obſerv.* on that Act.

XIII. FORNICATION is now puniſh'd only by the Kirk-Seſſion; and this Act is not exactly obſerved, for the Offenders now only pay an arbitrary Fine, and ſtand upon the Stool of Repentance.

XIV. THIS Act and the next are explained in my Criminal Treatiſe, *Tit. Inceſt.*

XVII. THE melting down of any Money already coined within the Kingdom under the Pains here expreſs'd, is puniſh'd with us, becauſe our Coin, being as fine as our Plate, it would be thus melted down, and ſo the Stock of the Money would be impoveriſhed; and, as the 66. *Act*, *Parl.* 8. Ja. III. obſerves, it would waſte and miniſh by Tranſlation in the Fire. But the Queſtion being agitated, Whether foreign Coin may be melted for Bullion? It was urg'd, That by this Act no Gold nor Money already coin'd within this Realm was to be melted: For by the ſaid 66. Act, no Gold nor Money that bears Form, and is printed, ſhould be melted. But to reconcile theſe, the Anſwer is, That if Money be once allow'd to be current here by direct Allowance, as by Proclamation, it is not thereafter to be melted down; and ſo it was decided in the Lord *Hatton*'s Caſe, *February* 1683.

XVIII. THO' the Lords of Seſſion are not Judges competent to reduce Sentences paſt in Parliament, as the more Sovereign Judicature; yet they are Judges competent to reduce Rights confirmed in Parliaments, whereby the Confirmation falls in Conſequence, *quia confirmatio nihil novi juris tribuit. Vide* 25. *March* 1631. Biſhop of *Dunkel* contra the Lord *Balmerinoch.*

THIS Act againſt forbidden Weapons, is explained by me in my Criminal Treatiſe, *Tit.* 3.

XIX. *VIDE* the Criminal Treatiſe, *Tit. Falſhood.*

XX. THIS Act was to ſupply the Nullities which could have been objected againſt ſuch Rights by the Court of *Rome*, who pretended to the only Right of beſtowing Church-Benefices; ſo that our Separation from the Church of *Rome*, was firſt authorized by the Parliament in the Year 1560.

XXI. V*IDE Crim.* Tit. *Theft.* But it is now fit to obſerve, that when any Man cries for Help againſt Thieves, all who are deſired are obliged to concur with the Owners of the Goods, under the Pain to be holden Partakers of the Theft; which Huy and Cry with us was called *Quiritatio* by the *Romans*, by the *Greeks* οχετλιάζειν. *Vide L.* & 2. *Cod. de his qui lat.* & *L.* 1. *ff. de ſerv. fugitiv.*

XXIII. ALTHO' by our Law Pactions for Gifts, or Rights to accreſce to private Men, tho' not actually as yet fallen to them, are valid; and thus it has been found, that a Man may renounce or ſell *hæreditatem futuram*; yet by this Act, a Gift of Eſcheat, when a Party ſhall be denounced, is declared not to be valid, becauſe this may occaſion the Perſon whoſe Eſcheat is ſo gifted, to be denounced *viis* & *modis*; and this proceeds upon the ſame Reaſon that the Civil Law diſcharges ſuch Deeds, *quæ præbent votum captandæ mortis alienæ*, and by the Canon Law a Benefice cannot be promiſed or beſtow'd when the ſame ſhall happen to vaik, *nec confirmatur ſequenti vacatione collatio, C. propoſuit, de con. preb. Ca.* 2. *de preb. in* 6. & *argumento hujus legis.* It ſeems that the Survivances of Offices ſhould be null by the ſame Parity of Reaſon; for theſe preclude the King from His free Gift, and are the Occaſion of Snares. Likeas, ſuch Gifts, by our Law and Stile, ſhould expreſs *modum vacandi*, which cannot be done where there is no Vacation; and tho' we have no expreſs Statute, yet by our Practice, which obſerves Stiles as Statutes, if a Gift expreſs not *modum vacandi*, it will be null; ſo a Gift of Eſcheat not mentioning the Horning whereupon it proceeded, was not ſuſtained, tho' a Horning Year and Day before the Date of the Gift was libell'd on in the Declarator, and tho' the Gift was paſt the King's own Hand at Court, where Hornings could not be got, 20. *November* 1628. *Welſton* contra *Stewart.* For if this had been ſuſtain'd no Horning had ever been expreſs'd thereafter, but the Donator had ſtill choos'd out one of the meaneſt Debts, ſince he is bound to pay the Debt in the Horning by his Gift.

XXVII. THO' this Act requires that Saſines within Burgh ſhould be ſubſcribed by the Clerk, and given by the Bailie of the Burgh, yet the Lords ſuſtain'd a Saſine of Lands within Burgh given by the Sheriff and Sheriff-Clerk, where there were no Magiſtrates or Town-Clerk in Office at the Time that the Saſine was given, 21. *July*, 1666. *Thomſon* contra *Mackitrick.* This is one of the Inſtances that *neceſſitas non habet legem. Vide* 11. *Act*, 3. *Parl.* Ch. II.

XXVIII. THIS Act was but temporary, and ſo is uſeleſs now.

XXIX. THIS Act is ratified by the 15. *Act*, 2. *Parl.* Ch. II. and the Reaſon why Maltmen are diſcharg'd to have a Deacon, is, becauſe at their Meetings they might eaſily conſpire to ſet a Price upon the Victual, and upon the Ale and Beer at their Pleaſure, and force the Gentlemen to ſell at any Rates.

ACT XXXI. IT may ſeem ſtrange that this Act made by Queen *Mary* ſhould be inſert here, but that Parliament holden upon the 19. Day of *April* 1567. is not at all printed, and therefore it has been thought fit to inſert this Act in favours of the reform'd Religion amongſt Her Son's Acts, and to let it continue in Her Name, becauſe it might clear that Her Majeſty had conſented thereto in Her own Reign.

THIS Act bears an Acknowledgment of the Queen's deriving Her Authority-Royal from God, which has been inſert by our Reformers, to ſhow their Abhorrency of their Opinion, who think that our Monarchs derive their Power from the People.

XXXIII. THERE is no ſuch Parliament as that here mentioned, to be held upon the 29. of *December* 1567. and therefore the 33. Act is here renew'd; but it was needleſs to have made a ſpecial Act for allowing this to be printed; for both theſe Acts 32. and 33. might and ſhould have been one. *Vide Obſerv.* on this Act in my *Crim. Tit. Treaſon.*

# PARLIAMENT II.

XXXIV. BY this Act, it is clear that Commiſſions for Regents of the Kingdom were then ſubſcribed, whereas they are now ſuperſcribed; and were then paſt under the Privy-Seal, (as all Factories, Aſſignations, or other private Rights granted by the King are as yet) but now all ſuch public Truſts are paſt under the Great-Seal.

*Nota*, WHAT was then a Regent is now a Commiſſioner; which Word is but late, and the Regent was then called Protector. The firſt Commiſſioner mention'd in our Laws is the Earl of *Montroſe*, for the Parliament 1604; but that Inſcription ſpeaks nothing of a Commiſſion under the Great-Seal, as all ſubſequent Inſcriptions do from the Year 1607. and downwards.

MANY Acts in this and the enſuing Parliament bear, *With Advice of the Regent, Three Eſtates, and hail Body of the Parliament*; which Words, *the hail Parliament*, ſeems ſuperfluous, for the King and the Three Eſtates are the hail Parliament. But this was probably inſerted either to ſhow the Unanimity of the Parliament, or to include the Officers of State, becauſe they are not comprehended under any of the Three Eſtates. And this may be adduc'd to redargue their Opinion, who think that the Officers of State did not ſit in Parliament till the Parliament 1633. Nor do they yet ſit as ſuch in the Parliament of *England*, for I find them marked in the *Sederunts* very anciently, but differently; for tho' now they are called, and are alſo marked down in the *Sederunts* after the *Lord Barons*, and are therefore called *Lords*, yet ſometimes the *Sederunt* adds, after the Burghs, *Together with the Officers of State*; and the *Sederunt* of the *Parl.* 15. bear, *That the King's Majeſty, and Officers of State, declare the Parliament to run, and ordain the Articles to meet.*

XXXVI. IT is fit to know, that all Alienations and Diſpoſitions made by Perſons who were thereafter forfeited for Crimes of Treaſon, are null, if they be made *poſt commiſſum crimen*, tho' they be made before Sentence or Declarator. And that tho' it may be pretended that in ſome latent Crimes of Treaſon, ſuch as where Treaſon is inferr'd for concealing and not revealing Treaſon, the Subjects could not know the Committer's Guilt, and ſo might bargain with them, or take Rights from them; but yet ſuch heretable Rights are declar'd null, becauſe the King having feued out his Lands, he is not obliged to acknowledge any ſingular Succeſſors, except their Rights were confirmed, & *ſibi imputent* who did not confirm. This Act is ratified by the 65. *Act*, 5. *Parl.* Ja. VI. and all former Practics contrary thereto are reſcinded. Which Clauſe in that Ratification was neceſſary, becauſe, as *Sinclair* obſerves in his old Practics, there had been ſeveral Deciſions paſt in favours of the Earl of *Mortoun*'s Creditors, ſuſtaining Rights made by the Earl of *Mortoun*, who was after 20 Years latent Guilt convict for concealing the Deſign of murdering the Earl of *Lennox* Queen *Mary*'s Husband. As theſe Acts ſtrike againſt heretable Rights made by forfeited Perſons, ſo by the 202. *Act*, 14. *Parl.* Ja. VI. all Bonds, Obligations, Factories, Penſions, and Aſſignations granted by forfeited Perſons, are declared null, except theſe Rights be confirmed by the King, or authorized by a Decreet of the Judge before the citing of the Perſons forfeited. From which Act it may be inferr'd, *Arg. legis*, that ſuch Rights granted *poſt commiſſum crimen*, but before Citation, are valid, tho' not confirmed by a Decreet, if they were granted for true Debts prior to the committing of the Crime, ſince this Act runs only againſt fraudulent Diſpoſitions.

ACT As alſo, for the ſame Reaſon it may be urg'd, That where ſuch perſonal Rights are granted merely to defraud the Fiſk, they would be null, tho' confirmed as ſaid is; for elſe a Man being to commit the Crime of Treaſon, might purpoſely diſpone his Moveables to prejudge the Fiſk.

*Nota*, That ſuch moveable Rights confirmed as ſaid is, will only be a Ground for Diligence againſt the forfeited Perſon's Moveables, even as if the ſaids Moveables had fallen to the King by ſingle Eſcheat; but they will not be a Ground of Diligence againſt a forfeited Perſon's real Eſtate.

*Nota*, That as Gifts of forfeited Lands can only be paſt under the Great-Seal, ſo the forfeited Perſon's Moveables ſhould be regularly gifted under the Privy-Seal, being as to the King, the ſame Way of Tranſmiſſion that an Aſſignation is to a private Party; but in the Earl of *Argyle*'s Caſe, it was found that the Moveables of the forfeited Perſon might be likewiſe tranſmitted under the Great-Seals.

XXXVII. THO' by this Act the Superior's Forfeiture does not prejudge the Vaſſals who are innocent, yet this Act is expreſly abrogated by the 201. *Act*, 14. *Parl.* Ja. VI. and by our Law the Vaſſals Rights are null, except they be confirmed, or unleſs he has originally conſented to them, or unleſs the Feus be ſet in the Terms of the *Act* 71. *Parl.* 14. Ja. II.

From this Act it may be urged, That ſince by a ſpecial Law, Vaſſals of Perſons forfeited in this Parliament are ſecured, notwithſtanding of the forfeiting of their Superiors; yet therefore *regulariter* the Sub-vaſſal's Right falls to the King by the forfeiture of his Superior, or his own Forfeiture; and that not as caduciary, for then it would only fall to Him with the Burden of all Rights granted by the Vaſſal; but it falls to the King *qua ſuperior*, ſo that He is not obliged to acknowledge any Rights except they be confirmed by Himſelf. This was debated in the Caſe of General *Dalzel* contra Lady *Caldwal*.

*Nota*, The ſaid 201. *Act*, 14. *Parl.* Ja. VI. appoints this Act to be delete out of the Records of Parliament, and this has been deſign'd oft-times to prevent our taking abrogated Acts for Acts in Force, but yet they are ſtill printed. And ſome think this neceſſary, becauſe Men argue oft from abrogated Acts, as from this Act in the ſaid Caſe of the Lady *Caldwal*.

XXXVIII. ALL Monks, with us, were called Friers, from the *French* Word *Frere*, which ſignifies a Brother. The Religious Women were called Nuns, from the *Latin* Word *Nonna*, which ſignifies a ſacred Virgin.

The Lands holding of Friers or Nuns, are by this Act declar'd to hold of the King, and all the Lands of Monks and Nuns are by the 29. *Act*, *Parl.* 11. Ja. VI. annexed to the Crown, *quoad* their Temporality; and tho' thereafter many of theſe Benefices were erected in favours of laic Perſons, yet by the 14. *Act*, *Parl.* 1. Ch. I. the Superiority of all Lands belonging to Abbacies, Priories and other Benefices, belong to the King.

XXXIX. THIS Act is explained in the *Act* 36. and is drawn back to all Rights made even prior to this Act, by the 65. *Act*, 5. *Parl.* Ja. VI. which is a ſingular Inſtance of drawing back Acts prior to the Dates.

XLI, XLII, XLIII. THESE Acts are explain'd in the Obſervations upon the Third Parliament of Queen *Mary*.

# PARLIAMENT III.

XLIV, XLV, XLVI. THESE Acts of this Parliament are explain'd in my Criminal Treatiſe, *Tit. Hereſy*.

*Nota*, That by the *Act* 45. Archbiſhops, &c. were to be puniſhed, being found negligent by the General-Aſſembly of the Kirk, the Biſhops before the Year 1606. being but Titular Biſhops, and ſubject to the General-Aſſembly, and were to be deprived by them, as is clear alſo by the 46. Act of this Parliament.

By the 46. *Act* it is alſo obſervable, that all the Churchmen were then only to give their Oath, for acknowledging and recognoſcing His Majeſty and His Authority; the Oath of Supremacy having come in only by the 1. *Act, Parl.* 18. Ja. VI. By this Act alſo, Nonreſidence is declared unlawful, and is yet a Cauſe of Deprivation, except it be diſpenſed with, the *habilis modus* whereof is by a Letter from the King.

XLVIII. By the 72 *Act, Parl.* 9. *Queen* Mary, the Miniſter was to have the Parſon or Vicar's Manſe, or ſo much thereof as ſhould be ſufficient for him; and no Kirkman's Manſe or Gleib could be feued; yet an Heretor, to whom a Vicar's Gleib was feu'd a Year before that Act, was allow'd Repetition, *Feb.* 12. 1635.

*Nota*, This Deciſion is otherwiſe related by Miſtake in the *Obſerv.* on the ſaid Act.

The Manſe comes from the *Latin* Word *Manere*. *Vide* Selden'*s Hiſtory of Tithes, Pag.* 52. By it we underſtand the Miniſter's Dwelling-houſe; and if the Parſon or Vicar had a Dwelling-houſe or Manſe, it belong'd to the Miniſter, but if there was none of theſe, no other Houſe could be deſign'd, tho' it ſtood within the Precincts of an Abbacy, *Feb.* 11. 1631. Miniſter of *Innerkeithing* contra *John Keir*. If there be no ſuch Parſon or Vicar's Manſe, the Heretors muſt build one, by the 31 *Act* of *Parl.* 1644. but thereafter, by the 21 *Act*, 3 *Seſſ. Parl.* 1. Ch. II. the Value is declar'd to be from 500 Merks, to 1000 Pounds; ſo that the Miniſter may build a Manſe to himſelf, and he or his Executors will get Repetition of what he beſtows in building, not exceeding 1000 Pounds; but if the Miniſter build only to the Value of 500 Merks, he will not have Action againſt the Parochioners for more, tho' not exceeding 1000 Pounds, upon Pretence that he might have built to that Value, *January* 8. 1670. *Charters contra* the Parochioners of *Curry:* Where it was alſo found, That the Reparation or Building of the Manſe, affects not ſingular Succeſſors, and is not *debitum fundi:* As likewiſe, the Miniſter of *Frazersburgh contra* Parochioners.

By that Act likewiſe it was found, That ſince Manſes are ordain'd to be built by the Heretors, that therefore Liferenters are not liable: Which Deciſion may be very dangerous to Miniſters, ſince it may oft-times diſappoint, or at leaſt for many Years ſuſpend their Relief; as for Inſtance, If a Father ſhould denude himſelf of his Eſtate in favours of his Son an Infant, reſerving only his own Liferent; and it may be doubted, whether ſuch Liferenters *per reſervationem*, may not be lookt upon as Heretors in this, as they are in ſome other Caſes: And yet tho' Liferenters were not bound to build Manſes, yet they were found liable to repair them, theſe being but *minores impenſæ*, which required to be preſently done; but neither Heretors nor Liferenters will be obliged to pay what is to be beſtowed upon Building or Repairing, nor to ſtent themſelves for that Effect, if they have Materials of their own. It has been alſo found, That Manſes are to be built and repaired where they were burnt, or waſted *caſu fortuito*.

A Gleib is that Portion of Land that is to belong to the Miniſter, *Gleba terræ*, or a little Piece Land; and is, by this Act, to comprehend Four Acres of arable Land, or Sixteen Soums Graſs, where there is no arable Land, *Act* 7. *Parl.* 18. Ja. VI. Theſe Four Acres are to be deſign'd out of Lands formerly belonging to the Parſon or Vicar; and if there be none ſuch, they are to be deſign'd out of Abbot's, Prioreſs's, Biſhop, Frier's, or any other Kirk-land lying within the Bounds of the Paroch, *Act* 161. *Parl.* 13. Ja. VI. Which Order is exactly to be obſerved in the Way ſet down by this Act; as *Dury* obſerves, *July* 13. 1636. *Halyburton* contra *Paterſon*; yet I find, that Biſhops Lands were deſign'd before Abbots Lands, becauſe that Biſhops have greater Intereſt in the Cure: And albeit it may ſeem, that the deſigning the moſt eweſt, or neareſt Lands to the Manſe for a Gleib, be in favours of the Miniſter, and for his Eaſe; yet the Lords found a Deſignation null at the Inſtance of the Heretor, whoſe Lands were deſigned, becauſe there were other Lands nearer to the Manſe; for elſe any Heretor's Lands within the Paroch might be deſigned for a Manſe, out of Prejudice.

By the 116 *Act*, 12 *Parl.* Ja. VI. it is ordained, That Miniſters who are provided to Churches where there was no Parſon or Vicar formerly, ſuch as Cathedral Kirks, or Abbacies, ſhall have a ſufficient Manſe within the Precinct of the Cathedral or Abbey, except the Heretors of the Precinct provide them to as good a Manſe, and as commodious.

These Deſignations are to be expede, according to this Act, by the Archbiſhop, Biſhop, Superintendant, or Commiſſioner; who ſhall give their Teſtimonial, how he and Two of the Parochioners have deſign'd ſuch Four Acres, preſently poſſeſs'd by ſuch a Man: Upon which Deſignation, with a Supplication from the Miniſter, the Lords of Seſſion are ordain'd to grant Letters of Horning upon Ten Days; which is renewed by the 21 *Act*, 3 *Seſſ.* 1 *Parl.* Ch. II. By which it is alſo appointed, That ſuch Deſignations of Manſes ſhall be by ſuch Miniſters as the Biſhop ſhall appoint, and Two or Three of the diſcreeteſt Heretors.

ACT XLIX. BY this Act beneficed Perſons, being Year and Day at the Horn, loſe their Benefices, which fall under their Liferent-eſcheat: But it may be doubted, whether theſe Benefices ſhould fall to the Patrons of the Benefices, as other Lands fall to Superiors, to compenſe their Want of a Vaſſal; eſpecially ſeeing where Kirks vaik thro' the Ordinary's not accepting of a Preſentation, the vacant Stipends are declar'd to remain with the Patron; or whether theſe Benefices ought to belong to Univerſities, and ſuch as have Right to vacant Stipends? Or whether they ought to belong to His Majeſty, and to be tranſmiſſible immediately by Gifts in Exchequer, as other Liferenters are? And this laſt is moſt conform to our Law.

LI. THO' it appears by this and other Acts, and by our Progreſſes of Writs, that the Pope uſed to confirm Rights made of Church-lands; yet that was never neceſſary by any poſitive Law, with us; and Feus even of Kirk-lands, prior to the Reformation, were, and are valid, without any ſuch Confirmation: But becauſe about the Time of the Reformation, which was the 8 of *March*, 1558. beneficed Perſons did dilapidate their Benefices: therefore by the 7 *Act*, *Parl*. 9. 1584. it was declared, That all Feus not confirmed by the King or Pope before that Time, were null.

LII. AT this Time there were Two oppoſite Parliaments ſitting, One for the King, at *Striviling*, or *Stirling*, by the Earl of *Lennox*, as Regent; and Another for the Queen, at *Edinburgh*; and therefore this Act ratifies all that was done by the Parliament for the King; and annuls all that was done by the Other. *Vide* Melvil's *Memoirs*, *Pag*. 113. *Vide Obſerv*. 100 *Act*, 7 *Parl*. Ja. VI.

LIII. BY this Act excommunicate Perſons ſhould be denounc'd Rebels at the Inſtance of the King's Advocate, or Procurators for the Kirk; but now the King's Advocate is Procurator for the Kirk. After this Denunciation their Liferent-Eſcheat falls to the King, and all ſimulate Gifts of them are null, *Act* 197. *Parl*. 14. Ja. VI. and the excommunicate Perſons and their Tenents are liable for the Rents *in ſolidum*, but the Payment of the one frees the other. Nor will the Defence of *fructus percepti & conſumpti*, for the maintaining of their Lives, defend the excommunicate Perſon as to Bygones; the Reaſon whereof is, not becauſe if this could defend *quoad* Bygones it ſhould defend *quoad* the future, and ſo the Act of Parliament would be evacuate, as is alledged in *Dury*, *June* 26. 1629. but the true Reaſon is, becauſe the excommunicate Perſon cannot be *bona fide poſſeſſor*, ſince he is ſo frequently cited.

LIV. BY this Act, the Archbiſhop or Biſhop may appoint Perſons for taxing the Parochioners for repairing of Churches, if the Parochioners elected to Tax refuſe; upon which Act the Lords are ordained to grant Letters of Horning, which is extended to the repairing of Kirk-yard-dikes, by the 232. *Act*, 15. *Parl*. Ja. VI. But it may ſeem reaſonable that the Patron ſhould repair the Church, ſince the Care of the Edifice belongs to him, & *ejus eſt incommodum cujus eſt commodum*, yet our Law burdens not the Patron, but the Parochioners, becauſe they get the Advantage in it of the Word and Sacraments; for which Reaſon alſo the Canon Law burdened them in the laſt Place, if there were not a Fund for that Effect; or if *fructus reſidui ex beneficio*, were not ſufficient, *Vide* Paul. *de citad. de jur. patr. art*. 5. but for this Reaſon, all who are Parochioners ſhould be liable to repair, and yet the Heretors are only liable. And it will ſeem that theſe Heretors ſhould be firſt liable who have bought in their own Teinds, ſince they have moſt Advantage by the Benefice, the Rents of which Benefice were by the Canon Law burdened with theſe Reparations.

BY this Act alſo, if any intromet with the Stones or Timber of a demoliſh'd Church, the Biſhop's Decreet is equivalent to a Decreet of the Lords of Seſſion; but this is in Deſuetude.

BY this Act alſo, the Parſons of the Paroch ſhould furniſh Bread and Wine to the Communion, how oft the ſame ſhall be adminiſtrated; and it ſeems that by the Word *Parſon*, ſhould be meant either *Rector Eccleſiæ*, for he is called the Parſon, or all the Perſons who are Parochioners; and which ſeems reaſonable, becauſe they partake of the Sacraments; and yet Heretors are only liable. 2. It is clear from theſe Words, *That what is due for Communion Elements ſhould only be due when the Communion is given*; but yet Heretors are liable yearly, tho' the Communion be not given, but it ſhould be then given to the Poor in that Caſe, and not to the Miniſter.

# PARLIAMENT IV.

FROM the Narrative of this Act, it is obſervable that the Reformation from Popery was firſt authorized in Parliament in *Auguſt* 1560. which Obſervation may conduce to clear many Things, both in relation to Dates and others which depend upon the Reformation. LV.

By the Canon Law there could be no Divorce upon Separation, becauſe Marriage is a Sacrament, and ſo could not be diſſolved but by Death; but all Proteſtants allow a Divorce in caſe of wilful Diverſion; and therefore by this Act, if Perſons abſent themſelves, and will not cohabit for Four Years, they may be cited to adhere, and if Divorce follow, the Wife loſes her Tocher, & *donationes propter nuptias*; and if the Huſband be the Perſon who diverts, the Wife will, by the ſame Parity of Reaſon, get her Conjunct-fee, and every Thing elſe to which ſhe could have had Right if her Husband had died, 21. *March* 1637. Lady *Manderſton* contra *Renton*; and by our Law, the Party injured has Liberty to marry after ſuch Divorces. The Canon Law requires Ten Years Diverſion, tho' this Act requires only Four Years, *C.* 8. *extrav. qui filii. Vide Ritors, de differ. Jur. Civ.* & *Canon. L.* 2. *C.* 14. but even in that Caſe they grant no Divorcement, but only *ſeparationem quoad thorum* & *menſam.* As to the Four Years preſcribed by this Act, it may be doubted whether they ſhould run from the Date of the Citation only, or from the Time of the Withdrawing or Deſertion. And it would appear, that ſince the Act of Parliament ſays, *That if they remain in their malicious Obſtinacy for the Space of Four Years*, therefore the Four Years ſhould run only from the Date of the Refuſal, either by Citation, or at leaſt by being required; and yet the Commiſſars ordinarily make them run from the Date of the Withdrawing and Deſertion ſimply, tho' neither cited nor required. And tho' it would ſeem by this Act that Four Years ſhould intervene before the Decreet of Adherence, yet the Commiſſars will grant a Decreet of Adherence upon a Year's Deſertion, or leſs, if it can be proven to be malicious, or deſign'd; for they think it is enough that Four Years run before the Decreet of Divorce.

Since the Act of Parliament requires malicious Deſertion to precede the Divorce, it may be doubted whether Citations at the Pier and Shore of *Leith*, to thoſe that are out of the Country, or at the Dwelling-houſe to theſe that are within the Country, be ſufficient, ſince they may be ſo cited without being malicious Deſerters: And it were hard, that a Man being taken with Pyrates or Robbers, or neceſſarily abſent without knowing of any ſuch Citation, ſhould for Four Years Abſence loſe his Wife. And tho' in the *Romiſh* Church, where there is no Diſſolution of the Marriage, this might be ſufficient, ſince upon his Return he might recover his own Wife, yet it is moſt dangerous with us; and tho' theſe Citations be ſufficient in other Caſes, yet there is no Parity of Reaſon for their being ſufficient here, where Malice is required, and where the Loſs is irreparable. It may be alſo doubted, if a Wife remaining in her Husband's Houſe, but refuſing him all Acceſs to her, may be ſaid to have diverted; and I conceive ſhe may; for all the Reaſons in the one Caſe conclude againſt the other.

The Form of Proceſs here ſet down, ſeems to be borrowed from the *Saxon* Law, related by *Snedvin. ad Tit. Inſtit. de nupt. Par.* 4. *de divert.* & *Harprech. ad Part.* 11. *de Nupt. Num.* 131. & *ſeq.* And leſt this Proceſs may proceed from Colluſion, by the Husband's being deſirous to divert upon Deſign to obtain a Divorce; therefore, by our Law, the Purſuer is obliged to ſwear that there is no ſuch Colluſion.

In place of Letters in the Four Forms mentioned in this Act, Letters of Horning are now ſummarly granted on all Commiſſars Decreets, *Act* 7. *Parl.* 21. Ja. VI. as alſo on the Decreets of Sheriffs, Stewards and Bailies, &c. *Act* 177. 13. *Parl.* and *Act* 10. *Parl.* 18. Ja. VI. for of old Horning being under the Seſſion's Signet, was only granted on Decreets of the Lords.

THIS Act is in Deſuetude, for Salt may now be lawfully tranſported; but then we had not enough to ſerve the Country. LVI.

BY this Act, every Cooper is to put his own Mark upon his own Barrel; but by the 141. *Act*, 8. *Parl.* Ja. VI. there are Staples appointed for Salmon, where a Gadge and Mark is to be kept. LVII.

ACT LVIII. THIS Act relates to the Time wherein *Grange* kept the Caſtle of *Edinburgh* for the Queen.

# PARLIAMENT V.

LXII. BY this Act Miniſters Gleibs are not to pay Teind, which is extended by the 162. *Act, Parl.* 13. Ja. VI. ſo far, that Miniſters Gleibs are thereby to be free from all Impoſitions whatſoever; and it was found the 9. of *June* 1676. *Burnet* contra *Gib*, that not only Gleibs of Kirks eſtabliſh'd by Law were to be free, but even Gleibs of Chapels, where there was Divine Service ordinarily. And this Privilege of being free from Teinds, was to be extended not only to Miniſters Gleibs, whilſt they were poſſeſs'd by the Miniſters themſelves; but that even the Gleibs of Vicars were to be free from Teinds, when come in the Hands of Laics, except it could be alledged, that within theſe 40 Years bypaſt theſe Laics had paid Teinds for theſe Gleibs, albeit this Act of Parliament be only conceived perſonally in favours of Miniſters, but not really in favours of Parſons or Vicars Manſes, 16. *July* 1678, Earl of *Queensberry* contra *Douglas*. This Act is conform to the reform'd Churches abroad. *Vide* Carpz. *jus conſiſt.*

LXIII. BY this Act, the Lords are ordain'd to direct Letters of Horning at the Chancellor's and Biſhop's Inſtances, for charging the Havers of Writs belonging to Hoſpitals ſummarly to produce them; and the Clerk of the Bills having refuſed to paſs a Bill upon this Act, as being in Deſuetude, and as having been at firſt but temporary, becauſe it ordains a Report to be made betwixt and *Paſch* next; yet the Lords ordain'd ſuch Letters to be granted, and found the Act neither Temporary nor in Deſuetude, *January* 1667. Hoſpital of *Northberwick*.

LXIV. *VIDE Obſerv.* on the 111. *Act*, 14. *Parl.* Ja. III. and on the 119. *Act*, *Parl.* 7. Ja. VI.

LXV. THIS Act is explain'd in the 36, and 39. *Acts*, 2. *Parl.* Ja. VI.

LXVI. THO' by this Act it is declared only, that in the Competition betwixt ſuch as have obtained Confirmations from the King, the laſt Right firſt confirmed ſhall be preferr'd; yet this holds alſo in Rights holden of other Superiors; becauſe if the Right be given to be holden of the Superior, & *a me*, it is no complete Right till it be confirmed, and the firſt complete Right is to be preferr'd.

*Nota*, FROM this Act, That the Lords of Exchequer ought not to refuſe to grant Confirmations, & *de praxi*, if they refuſe, the King's Vaſſals proteſt that their Refuſal ſhall not prejudge their Rights. But I find, that where many Creditors were confirmed in one Day, the Lords preferr'd them according to their Diligence, and their having taken Saſine, and not according to the Date of preſenting the Signatures, ſince neither were negligent, nor had uſed Precipitation; for they ſhunn'd to determine, that the Exchequer had not preferr'd or brought in all juſtly; for that were to make the Two Courts interfere, 6. *December* 1678. *Miln* contra *Paſoulis*. But in the Competition betwixt Two Confirmations, the Lords found, that the Firſt who had paſt the Seals was to be preferr'd; and that the Preference of the Confirmation was to be judged by the paſſing the Seals, and not by the Date of the Signature, ſince it is not the Signature, but the Charter that prefers, becauſe a Charter firſt paſt the Seals, tho' upon a poſterior Signature, will be preferr'd as the more complete Diligence, the Seal being in place of the King's Subſcription: And conſequently the Date of the Charter is not ſtill to be looked to, ſince the Charter bears ſtill the Date of the Signature. And the Date of the paſſing of the Seals is proven in our Law by an Atteſtation under the Hand of the Keeper of the Seal; for tho' that Atteſtation may ſeem to be the Teſtimony of only one Witneſs, yet it is *actus officii*, and the Minute-Book is a ſufficient Check upon his Atteſtation, 26. *February* 1680. *Clackmannan* contra Earl *Wigton*.

IT is alſo obſervable from this Act, that albeit the Keepers of the Seals are diſcharged to paſs double Confirmations of Rights of the ſame Lands, yet *de praxi* the Exchequer and Seals paſs very frequently ſuch double Rights *periculo petentis*; and tho' where the Obtainer of the firſt Right cannot inſtantly exclude the Second, as by clearing that the Granter was denuded, and ſo the ſecond Right was null. There may be ſome Pretext for granting ſuch double Rights, *periculo petentis*, the Exchequer not being Judges competent to the Competition of double Rights, yet where the firſt can clearly and inſtantly exclude the Second, there is no Reaſon for paſſing the Second; for by paſſing ſuch double Rights, the Firſt is put to the Neceſſity of a Reduction, ſince no Right once paſt under the Great-Seal can be annulled by way of Exception, but only by way of Reduction. And ſince the ſecond Right, tho' null, may be the Foundation of a Preſcription, and will eſtabliſh a full Right in the Obtainer, if he continue 40 Years in Poſſeſſion.

LXVII. THIS Act, prohibiting Fleſh to be tranſported in Ships, except in ſo far as is neceſſary for Victualing the Ships, is now in Deſuetude.

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# PARLIAMENT VI.

LXIX. IT is obſervable, that in this Act it is ſaid, That *Our Sovereign Lord has declared and granted Juriſdiction to the Kirk, which conſiſts in the Preaching of the Word, the Correction of Manners, and the Adminiſtration of Sacraments*; which inferrs that Eccleſiaſtics have no temporal Juriſdiction ſave from the King, which the Canons have alſo acknowledged, as ſhall be clear'd in the Act concerning the Supremacy: But they are acknowleg'd to have had an Eccleſiaſtic Juriſdiction, for the Act bears, *Has declared*; and this Eccleſiaſtic Juriſdiction is declared to conſiſt in Preaching, Correction of Manners, and Adminiſtration of Sacraments.

LXX. THIS Act diſcharges Gaming and Drinking in Ale-houſes on the Sabbath, and is conſidered in the *Act* 83. *Parl.* 6. Ja. IV.

LXXI. THO' ſuch young Noblemen or Gentlemen as go abroad, need not now Licences from the Council, nor to make Application to the Biſhop or Superintendant within 40 Days after their Return, yet if the Council ſuſpect that they are like to change their Religion, they uſe to cite the Parents, and to force them to bring home their Children, or elſe to impriſon or fine them as they ſee Cauſe. This Act was renewed by a Proclamation of Council, *January* 1679.

LXXII. BY this Act, the Labourer is to require him who has Right to the Teinds, to come and teind within Eight Days after the Shearing, by making Premonition on Three Sabbath Days after the Shearing; which is by the 48 *Act*, *Parl.* 11. Ja. VI. reſtricted to Two Sabbaths; and thereafter by the 5 *Act*, *Parl.* 21. Ja. VI. it is appointed, that the Teinding be at Three ſeveral Times, *viz.* the In-field at one Time, the Bear at another Time, and the out-field Corn at a third Time, and that Eight Days intervene after each complete Shearing: But all this is innovated by the Form ſet down very fully, 9 *Act*, *Parl.* 22. Ja. VI. Which laſt Act is now in Obſervance, and being fully conſidered, needs no further Explication.

LXXIV. *VIDE Crim. Pract. Tit.* Idle Beggars, and *Obſerv.* on the 16 *Act*, 3 *Seſſ.* 1 *Parl.* Ch. II. where this Act is ratified and enlarged. In this Act excellent Overtures are ſet down for Puniſhment of Vagabonds, and theſe who flee from their Maſte'r Service; who by this Act are appointed to be burnt in the Ear, and ſcourged for the firſt Fault, and to ſuffer Death for the Second; ſo far can the repeting of a Crime heighten it's Puniſhment, even in mean Crimes. Analogical to this Act is the *Tit. ff. de Fugitivis.* where likewiſe many excellent Overtures are propos'd

LXXV. ALBEIT by this Act, all the Hornings are to be regiſtrated in the Sheriff-books of the Shire where the Rebel lives; yet by the 265 *Act*, 15 *Parl.* Ja. VI. incaſe the Sheriff refuſe to regiſtrate the ſame, it is ſufficient that they be regiſtrated in the general Regiſter; but if the Horning be for a criminal Cauſe, it muſt be regiſtrated in the Books of Adjournal, *Act* 140. *Parl.* 8. Ja. VI.

*Obſer.* II. THAT Horning againſt Witneſſes need not be regiſtrated at all, nor can Witneſſes Eſcheats fall upon ſuch Denunciations; becauſe it were hard to put the Purſuer to ſo much Expences, or to make an Eſcheat fall for a negligent Contumacy.

ACT. *Obſer.* III. THAT Denunciations at the Mercat-croſs of the Shire where the Rebel dwells, ſhould only debar Rebels *ab agendo*, and not Denunciations at the Mercat-croſs of *Edinburgh*; as was found *January* 24. 1674. *Blair* contra *Blair:* And even theſe Defenders who are denounced at the head Burgh of the Shire, cannot be debarr'd from proponing that which requires their perſonal Preſence; nor are their Creditors or Aſſignies debarr'd from purſuing.

*Obſer.* IV. THO' by this Act the Treaſurer has Power to intromet with the Rebel's Goods, and may raiſe Letters for that Effect, which were called *Letters of Intromiſſion*; yet now Eſcheats muſt be gifted, and the Donatar muſt raiſe Summons of general Declarator thereupon, wherein it muſt be tried, if the Rebel was lawfully denounc'd; and after general Declarator, he muſt have a Decreet of ſpecial Declarator; which is, in effect, only a Decreet for Payment, tho' it be abuſively called a ſpecial Declarator; and the former Letters of Intromiſſion are juſtly found not to be legal now.

THE affixing a Roll of the Rebels Names here mentioned, is in Deſuetude, except as to Fanatics, and theſe who pay not the King's public Dues.

SOME Doubts concerning this Act are explain'd in the *Act* 142. *Parl.* 8. Ja. VI.

LXXVI. THIS Act is explain'd, *Crim. Pract. Tit.* Libels.

LXXVII. BY this Act, the Pains of breaking Lawburrows is to be divided equally betwixt the King and the Party injur'd; and the Reaſon of this is, becauſe the King is injur'd by the breaking of the Lawburrows, the Charge of Lawburrows being in His Majeſty's Name; and tho' ordinarily the Party charged finds Caution of Lawburrows; yet, if after the Charge any Prejudice be done, the Party charged is liable, becauſe the Charge is contemned, *July* 8. 1628. *Semple* contra *Cuningham*.

THE civil Action whereby this Breach of Lawburrows is purſued, is called, *An Action of Contravention*; and muſt, becauſe of this Act of Parliament, be rais'd at the King's Advocate's Inſtance, as well as at the Inſtance of the Party injur'd; and the Purſuer's Title is the Charge, if no Caution be found; or the Extract of the Bond of Cautionry, if Caution be found. The ordinary Deeds whereby Contravention is inferred are, beating or ſtriking the Party to whom the Lawburrows is found, or his Servants, except the Servants or Tenents were beat upon a ſpecial Account, nowiſe relating to the Maſter; which Speciality muſt be proven, or elſe 'tis preſum'd to have been on the Maſter's Account: And for the ſame Reaſon it is, that tho' the Stile of Letters of Lawburrows bear, *That the Complainer, his Men, Tenents and Servants*, &c. *ſhall be ſkaithleſs in their Perſons, Lands, Heretages, Goods and Gear*; yet the taking of Two Horſes from the Purſuer's Tenents, was not ſuſtain'd to be a Contravention, becauſe that was not done on the Maſter's Account, nor was the Tenent himſelf Purſuer, *January* 28. 1632. *Grant* contra *Grant*. Nor was, for the ſame Cauſe, the breaking up the Tenent's Houſe, and taking ſome Goods out of his Cheſt, found a Contravention, *February* 9. 1633. *Lindſay* contra *Denniſton*. But ſince it was not a Contravention, becauſe the Maſter was not concerned in the Injury, as theſe Deciſions bear, I ſee not how the Tenent's Concourſe could have altered the Caſe, *quoad* the Contravention, tho' in both Caſes the Tenent may purſue Damage and Intereſt.

ALL Lawyers are clear, that there muſt be clear Grounds of Injury alledged; and therefore, feeding Beſtial upon controverted Lands, is not ſufficient, *December* 20. 1592. But in mutual Contraventions upon that Head, the Lords allowed both Parties to turn their Libel in a Moleſtation, and granted Commiſſion to examine Witneſſes *hinc inde*, *January* 24. 1663. *Rouchlay* contra *Wood*. Nor would the Lords find, that paſturing upon waſte High-land Ground, ſhould infer Contravention, except it had been done by the Maſter's Command, or frequent herding to his Knowledge, *July* 8. 1664. Earl of *Airly*, contra *M$^c$intoſh:* But yet if Deeds of Violence be done, even upon debateable Lands, that will infer Contravention; ſuch as the houghing of Oxen.

THIS *animus injuriandi* is ſo neceſſary, that Deeds done by drunken Men, are, by many Lawyers, thought not to infer a Contravention, *Chriſtin. Tit.* 4. *Art.* 8. And the adulterating the Purſuer's Wife, will not infer a Contravention, becauſe this is not done *animo injuriandi*, but *animo libidinoſo*, Chriſtin. *Art.* 7. He likewiſe thinks, that threatning real Injuries is ſufficient; and *Threatning* is a great Breach of the Peace, eſpecially when it is by a Man who uſes *minas proſequi*; but verbal Injuries, *per ſe*, are not thought ſufficient, by Lawyers; nor have we any Deciſion ſuſtaining a Contravention on that Head.

SINCE by this Act the King and the Party have different Intereſts, therefore Impriſonment, or paying of a Fine to the King by prior Sentence, will not exclude a Purſuit of Contravention at the Party's Inſtance, *March* 20. 1623. *Futhie* contra *Carmichael*, and *Jan. Penult.* 1622. *Johnſton contra* Laird of *Weſtniſbit*. And certainly that Deciſion related by *Hope*, *Tit.* Contravention, *Forreſt* contra *Turnbul*; where it was found, that the King's Advocate could not inſiſt alone in a Contravention, if the Party injur'd diſcharg'd the Deed, tho' after the intenting of the Cauſe, is an illegal Deciſion; for ſeeing the King is injur'd *crimine fractæ pacis*, and that by this Act, the King has Right to the Half of the Penalty, and had formerly

Right to all, by the 5 *Act*, *Parl.* 1. Ja. III. the Party cannot diſcharge the King's Part. Contravention is a penal Action, even at the private Party's Inſtance; and therefore *titulus coloratus* will defend againſt it; and thus a Contravention being libelled, as inferr'd from the caſting of a Ditch, whereby the Purſuer's Land was overflow'd; the Lords found, That a Conſent from the Purſuer's Father, tho' he was but Liferenter, did defend againſt that Action, *January ult.* 1633. L. *Weymiſs* contra L. *Gairntilly*, without Prejudice to purſue an Action of Damage and Intereſt; to which the Lords turned this Libel, without Neceſſity of a new Proceſs: And this Action is likewiſe elided for the ſame Reaſon, by ſubſequent Diſſimulation; and therefore a Purſuit of Contravention, founded upon cutting of Trees in the Purſuer's Wood, was elided by the ſame Purſuer's granting Licence thereafter to the ſame Defenders, to cut in the ſame Wood; which poſterior Licence, the Lords found, did infer a preſumptive Remiſſion, *January* 11. 1633. *Denniſton* contra *Lindſay*. Nor is this Contravention inferred by Injuries, done upon Provocation or Self-defence; but tho' Provocation ſeems to be good againſt the Provoker, yet it ſeems not to be good againſt the King: And it may be doubted, whether the Penalties of the Acts of Parliament may be ſought, by and attour the Damage and Intereſt, or if the Damage is to be a Part of the Penalty.

LXXIX. *HOPE* obſerves from the Narrative of this Act, That as only landed Men can be Judges in Perambulations, ſo landed Men ought only to be received Witneſſes in heretable Debates: But this Obſervation holds not in our Practic; which allows any *habile* Witneſſes in Perambulations, and all other heretable Debates.

LXXX. BY this Act, all heretable Obligations, or Writs of Importance, are to be ſubſcribed, and ſealed before Two famous Witneſſes, if the Parties can write, or by Two famous Notars, before Four famous Witneſſes, if they cannot write.

*Obſer.* I. That Sealing is not neceſſary, but Subſcription is ſufficient in Parties, and is not neceſſary in Witneſſes, by this Act, tho' it be requiſite by the 5 *Act*, 3 *Parl.* Ch. II. even in Witneſſes alſo: And tho' the ſealing be only remitted in Papers to be regiſtrated, by the 4 *Act*, 9 *Parl.* Ja. VI. yet it is not neceſſary in any Writ, by our preſent Cuſtom.

*Obſerv.* II. THAT in our Practice, all Writs exceeding an Hundred Pounds, are interpreted to be Writs of Importance, and ſo to need Witneſſes, *January ult.* 1623. But if any Sum be to be annually paid, that Writ whereby it is to be paid, requires Witneſſes, tho' never ſo ſmall, becauſe yearly Preſtations may ariſe to a conſiderable Sum, *July* 4. 1632. And tho' Sums above One Hundred Pounds require Writ; yet Intromiſſion with Victual, or any Thing elſe, is probable by Witneſſes, as all other Things conſiſting *in facto* are: As alſo, Intromiſſion with uncoined Money, or Silver in Maſs, is probable by Witneſſes, tho' exceeding One Hundred Pounds: But Promiſes, & *nuda emiſſio verborum*, tho' for leſs Sums than One Hundred Pounds, are only probable by Writ, becauſe By-ſtanders may miſtake the Poſition and force of Words, *January* 19. 1672. *Douchar* con. *Brown*.

*Obſerv.* III. THIS Act is only to be extended to ſuch Things as require Writ, *ex ſua natura*; and to which Writ uſes to be adhibit; for Merchant-bargains made in Mercats, do not require Writ, and ſo are probable by Witneſſes; for Men uſe not, nor cannot adhibit Writ in ſuch Caſes; nor are Witneſſes requiſit in Diſcharges granted to Tenents by the Maſters, becauſe of their Ruſticity, and the ſmalneſs of the Sums: Nor are Witneſſes requiſit in Contracts of Marriage, upon which Marriage has followed, *nam notorietas facti habetur pro teſtibus*, *July* 1. 1662. *Breidie* contra *Breidie*. But it may be doubted whether this holds in Strangers, ſuch as are third Parties; and I think they are not oblig'd to pay the Tocher, tho' it certainly holds in the Man and Wife themſelves who contract; and tho' it hold not in third Parties, who are meer Strangers; yet it ſhould hold in the Father, when he obligeth himſelf to pay the Tocher; where there is a tripartite Contract ſubſcrib'd by many Parties, they are in place of Witneſſes to one another, all Parties having ſubſcrib'd, *July* 19. 1676. *Forret* contra *Veitch*. And a Writ having the Subſtantials filled up with the Granter's own Hand, is equivalent to it's being ſubſcrib'd by Witneſſes, *January* 23. 1675, *Vans* contra *Malloch*.

*Obſerv.* IV. THO' the Sum exceed an Hundred Pounds; yet if the Purſuer reſtrict his Purſuit to an Hundred Pounds, it is probable by Witneſſes, *July* 7. 1629. *Wallace* con. *Muir*.

WHERE the Parties cannot Write, two Notars and Four Witneſſes are required by this Act; But yet a Merchants Mark is ſuſtained, if it can be prov'd, that he uſ'd to ſubſcribe ſo, *February* 1. 1669. *Brown* contra *Johnſton*. But this is only ſuſtain'd amongſt Merchants, and to facilitat Commerce: But it ſeems that in Law, no ſuch Mark ſhould be ſuſtain'd, except where the Writ has Witneſſes alſo. Subſcription alſo by the Initial Letters of the Subſcriber's Name, is ſuſtain'd, if the Subſcribers be prov'd to have ſtill ſubſcribed ſo, theſe Inſtrumentary Witneſſes are preſum'd to have been choſen by Conſent, and therefore Sons, Servants, &c. may be Witneſſes; and it may be doubted if Women may be Witneſſes in Writs; but it is ſtill fit to chooſe diſintereſted Witneſſes, for if the Granter's own Relations be Witneſſes, and one of two of them deny his Subſcription, the Writ will be reduc'd as Null, tho' not improven as falſe, as was found in *Nimmo's* Caſe.

ACT These Witneſſes are by this Act to be deſign'd by their ſpecial Dwelling, or ſome evident Token, by which they may be known. As to which,

*Obſer.* I. That tho' Deſignation by the Dwelling-place, be declar'd ſufficient by this Act, yet if that Deſignation be too general, as that the Witneſs is In-dweller in *Edinburgh*, and that there be many of that Name there: or the Perſon cannot be known by that Deſignation. The Lords will ordain them to be more particularly condeſcended on, even by an Aſſigney, who may pretend that he is not oblig'd to know who the Witneſſes were, but that it was ſufficient for him to ſee that the Bond had Witneſſes, but yet that the Witneſs was Servitor to the Earl of *Southesk*, tho' the Earl had more Servants of that Name, *February 7. 1672.*

*Obſer.* II. That tho' the Act ſay, that the Writ ſhall be Null, if the Witneſſes be not deſign'd in the Writ; yet the Lords will allow the Purſuer to deſign the Witneſſes if they be inſert, tho' the Witneſſes ſo deſigned be dead, and many Years have intervened ſince the Writing of the Paper, but in that Caſe they will ordain the Deſignation to be aſtructed *per comparationem literarum*, and an Oath in Supplement, 15 *July* 1664. *Colvil contra* the Executors of the Lord *Colvil*; but if the Writ mention no Witneſſes, the Lords will not allow the Purſuer to condeſcend who were Witneſſes, and to deſign theſe Witneſſes, 24 *Jan* 1668. Magiſtrates of *contra* the Earl of *Finlator*. All which holds only in Caſes ariſing from Writs prior to the *Act* 5. *Par.* 3. Ch. II. By which Act Witneſſes muſt be ſubſcribing and deſign'd, elſe the Writ is Null.

I find this whole Act was *verbatim* made in *France* at *Moulins*, *Anno* 1556. and has been brought in here very ſhortly after, *viz.* 1579. There is a learned Commentary Writ upon it by *Boſellus Borderius*, which may be very uſeful in our Practice. I find alſo that by the Edicts in *Flanders*, nothing can be proven by Witneſſes above Three Hundred Pounds, *vid. Stockman. Deciſ.* 120.

LXXXI. BY this Act, Spuilzies, Ejections, and others of that Nature preſcrive in Three Years.

*Obſer.* I. That tho' the Action of Spuilzie and Ejection preſcrive *quoad* the Specialities indulged by the Law to theſe Actions, which are, that violent Profits will be granted, and that if the Purſuer prove that the Spuilzie or Ejection were committed, he may tax his own Damages *per juramentum in litem*, yet if the Purſuer reſtrict his Action to wrongous Intromiſſion, or Re-poſſeſſion, he may purſue for the ſame at any Time within Fourty Years, 16 *March*, 1627. *Inglis contra Kirkwood.*

*Obſerv.* II. That from theſe Words in the Act, *and others of the like Nature*, the Lords have found that an Action of Intruſion preſcrives within Three Years, 2. *February* 1610. As alſo, that an Action for demoliſhing of a Mill, or an Action intented for the Damage and Intereſt ſuſtained in ryving out a common Moor; and generally all ſuch Actions as ariſe from Violence, and inferr upon that Account extraordinary Damages, do preſcrive within Three Years, *quoad* the Extraordineſs of the Damage.

*Obſerv.* III. That nothing but a formal Purſuit of Spuillie interrupts this Preſcription, and therefore an Action of Oppreſſion and Depredation intented before the Juſtices, was not found ſufficient to interrupt this Preſcription, tho' that was a more exuberant Concluſion, and ſo included Spuillie as a leſſer, and the Juſtices are Judges ordinary alſo; and by this Act it is enough to purſue before the Judge ordinary, 8. *February* 1676. Maſter of *Rae* contra *Dumbeath*.

LXXXII. ACTIONS of Removing preſcrive ſo (if not purſued within Three Years) that there muſt be a new Warning before any Removing can be intented; and the Lords have found that theſe Three Years are to be computed from the Time to which the Warning is made, but not from the Date of the Warning.

LXXXIII. BY this Act all Actions for Houſe-mails, Men's ordinary Servants Fees, Merchant Accompts, and other like Debts, preſcrive in Three Years.

*Obſerv.* I. That theſe Actions are not abſolutely extinguiſhed by the Preſcription, but after Three Years they become probable only by Writ, or Oath of the Defender; whereas if they had been purſued within Three Years, the Debt was probable by Witneſſes. And this Act is founded, as I think, upon the Preſumption that Men would not ſuffer ſuch Debts to ly over for longer than Three Years, without taking an Obligation for them in Writ, and the Preſumption lies for their being yearly paid; and that which was *præſumptio hominis*, is after the Current of Three Years made here *præſumptio juris & de jure, & lex ſtatuit ſuper præſumpto.*

*Obſerv.* II. These Words, *Or other the like Debts*, that are not founded upon written Obligations are dangerous, as all ſuch general Clauſes are, which make the People unſecure, and the Judges arbitrary. And tho' one would think that Mails and Duties of Lands ought to preſcrive as ſoon as any of theſe, ſince it is not preſumable that theſe would be ſuffer'd to be unpaid, yet it was found they did not preſcrive in Three Years, 20. *January* 1627. *Roſs* contra *Fleming*.

ACT

By this Act Houſe-mails, *&c.* preſcrive, if they be not purſu'd within Three Years, and therefore the Libel for ſuch Debts is not relevant, except it be expreſly libell'd that ſuch Duties were owing, and are yet reſting unpaid, and conſequently the Tenent may depone that he poſſeſs'd but that he paid, which Quality is receivable; and yet if the Tenent depone ſimply that he poſſeſs'd and forgot to adject the Quality, the Lords would not ſuſtain it to be adjected *ex intervallo*, at the adviſing of the Cauſe; or in a Suſpenſion or Reduction, unleſs the Tenent could prove that the Maſter would not ſuffer the Quality to be received, or would offer to prove Payment by the Maſter's Oath.

*Obſerv.* III. It may be doubted whether this Act, ordaining Merchant Accompts to preſcrive in Three Years, doth reach to Accompts owing to Strangers, for they ſeem not oblig'd to know our Law, and this would ruin all Commerce, *& locus contractus ſemper attendendus.* But it was found, that this Act does extend to all Merchant Goods, as well when ſold in Groſs as by Retail.

It may be doubted whether theſe Two laſt Acts run againſt Minors, ſince it is provided expreſly that Preſcriptions againſt Spuillies and Ejections ſhall not run againſt them; which ſhows, that if this had been deſign'd in the other Preſcriptions, the ſame Clauſe had been renew'd ſince it was under Conſideration, and ſo ſeems not to have been forgot only; and there ſeems to be ſome Reaſon for this, ſince Minors are prejudg'd by Spuillies and Ejections, and ſo Preſcriptions in theſe ſhould not run againſt them; but in Removings the Hazard is only that a new Warning muſt be uſed, and in *other the like Debts*: The only Loſs is, that the Debt cannot be prov'd by Witneſſes after Three Years; and ſo ſince theſe Preſcriptions did little Hurt to Minors, it was not neceſſary to ſtop their Courſe. It is alſo obſervable, that tho' all theſe Preſcriptions run in Three Years, yet if Actions be once intented they ſtop the Preſcriptions, and thereafter Spuillies, Removings, or Aliments, *&c.* do not preſcrive in leſs Time than Fourty Years, as all other Debts do; and till then violent Profits are due; or the like Debts may be prov'd, as if the Action had been purſu'd within Three Years, 26. *January* 1622. *Herring* contra *Ramſay*. As alſo by our late Deciſions, if the Purſuer has continued to employ a Merchant, the Currency of that Compt and Truſt will preclude the Preſcription, ſo that many former Years preceding the Three laſt may be craved, tho' this Act ordains all Merchant Accompts to preſcrive within that Time; but if a Bond be taken for theſe poſterior Years, it is thought that cannot be called a current Accompt; and it may be debated whether in Law One or Two Articles will make a current Accompt; and if it do, there may be many Ways taken to elude this Act. *Vide* 16. *December* 1675. *Somervel* contra the Executors of *Muirhead*. This Currency extends to Brewers Accompts of Furniſhing, 13. *November* 1677. *Wilſon* contra *Ferguſon*, (*vide* Sand. *Lib.* 5. *Deciſ. Tit.* 6.) tho' it was alledged, That albeit it ſhould hold in Merchant Accompts where there are Diſcharges taken, and where a Compt Book adminiculates the Receipt, yet it ought not to be conſidered in furniſhing of Ale where neither of theſe are obſerv'd; and yet this Currency was not reſpected in Servants Fees for theſe ſame Reaſons, becauſe a Servant's Fee is alter'd at the Maſter's Diſcretion, 12. *February* 1680. *Roſs* contra Mr. *Salton*.

*VIDE Crim. Obſerv. Tit.* Foreſtallers, and *Tit.* 32. LXXXVII. LXXXVIII.

LXXXIX. It may be doubted whether this Act, that gives Power to the Sheriffs and other Judges to throw down Cruives and Yairs, ought to be extended to Dikes built over Waters, or a Part of the Water, for making a Dam to a Mill.

II. Whether Sheriffs, or Lords of Regality, *&c.* may execute this Commiſſion for their own Advantage, and where they themſelves are the Parties grieved, ſince that were *ſibi jus dicere*, and they would probably be partial, whereas they may get others to execute the ſame.

THIS Act, diſcharging Exportation of Coals, is now in Deſuetude. XC.

XCI. THIS Act, fining ſuch as propone unjuſt Exceptions, or loſe the Plea within Burgh, for the Uſe of the Poor, is conform to that Title in the Civil Law, *Inſtit. de pœnis temere litigantium*; for there can be nothing ſo abſurd and unjuſt, as that Men ſhould not at leaſt have their true Expences upon Oath; whereas we uſe to modify little or nothing, even where there is not the leaſt Colour for a Purſuit or Defence, and this I think a great Iniquity in all Judges who are guilty of it. *Vide inſtit. de pœn. temere litigantium.*

XCII. BY this Act, the Lords of Seſſion are ordained to diſtribute Juſtice without Reſpect to any private Writing impetrate from His Majeſty, and by this His Majeſty is freed from Importunity, and His People from Injuſtice. This was formerly ſtatuted by King *David* II. *Cap.* 18. *& Cap.* 41. and by the 2. *Cap. Statut.* 1. Rob. I. Judges are ordain'd to judge *ſecundum leges antiquas*; and in the Civil Law, *per L.* 1. *&* 6. *C. ſi contr. jus vel util. publ. & per novel.* 82. *Cap.* 13. and in the Canon Law, *Cap.* 5. *de Reſcript.* This ſame Law is

ACT is alſo in *France*, and is learnedly treated by *Rebuff. ad conſtitut. Reg. tit. de reſcript.* And *Plutarch* commends *Antiochus* for having made a Law in theſe ſame Terms. But tho' the former Statute of King *David* warrants the Judge not to reſpect that Command, but to indorſe and ſend back the Warrant, and not execute the unjuſt Command, which is by the 41. *Cap.* of the ſame Statutes extended ſo, that they are not oblig'd to delay Juſtice upon any ſuch private Warrant; yet I find by § 10. *Cap.* 20. of theſe ſame Statutes, that the King may diſcharge or prohibite a Judge to proceed in the Caſe of Perambulation, for certain Cauſes. For reconciling which Statutes it muſt be anſwered, That the King cannot either *ſimpliciter* diſcharge a Perambulation, nor any other Proceſs, but that He may diſcharge it for weighty Cauſes relating to the Public, to which all private Intereſts muſt cede, even as He may remit Crimes for ſuch Cauſes, tho' theſe be of greater Conſequence; or rather that the King may diſcharge Perambulations, becauſe the public Peace is oft-times concerned in theſe, ſince there uſed to be ordinarily great Convocations at ſuch Perambulations; and therefore the Juſtice-General was of old only Judge-competent to Perambulations. Upon *March* 4. 1553. the Queen Regent appears in the Seſſion, and declares that the Lords ſhould proceed to do Juſtice, notwithſtanding of any Letter or Order from Her, which is marked in the Books of *Sederunt*.

*Obſerv.* II. That before this Act the Council us'd frequently to diſcharge the Lords of Seſſion to proceed in judging private Cauſes, whereof many Examples are to be ſeen in *Hope*'s larger Practics, and an Inſtance of it is to be found in the 94. Act of this Parliament; but that Cuſtom is here diſcharg'd, and as yet the Council uſes frequently to diſcharge the Juſtices to proceed. And notwithſtanding of this Act, I find in the Regiſters of Council 1581. King *James* revokes in Two ſeveral Caſes, Gifts granted by Himſelf, and diſcharges the Lords of Seſſion to ſuſtain Action upon them.

*Obſerv.* III. That the Lords are alſo allow'd to proceed not only to decide, but alſo to cauſe execute their Sentences, notwithſtanding of ſuch private Writings, Charge or Command; ſo that the Privy-Council cannot ſuſpend the Lords Sentences, neither by an Act of Council, nor yet by Letters under the Signet; but yet the Privy-Council, by virtue of their late Commiſſions, are allowed, and do uſually grant Protections, whereby the Executions of the Lords Sentences are oft-times ſtopt.

XCIII. IN ſo far as this Act diſcharges the Lords of Seſſion to take Buds or Bribes, I have explain'd the ſame, *Crim. pract. Pag.* 248.

*Obſerv.* I. That the Lords are allow'd to reject any Perſon whom the King preſents to them to be a Lord, if he be not qualify'd and of good Fame; and therefore the Lords uſed when the King preſented any Perſon to be a Lord (which was by a Letter direct to the Seſſion, wherein the King did nominate him a Lord) to name ſome of their Number to examine him. But now the Form of Trial is more ſevere, and is ſet down in his Letter direct by His Majeſty, in *Anno* 1674. whereby they are immediately after Pleading to reſume the Debate, and to give their Opinion firſt in a Cauſe debated *in præſentia*, and to ſit with the Ordinary in the Outter-houſe, and to report ſome Cauſes there debated, and to give their own Opinion, with the Reaſons thereof.

*Obſerv.* II. That by the firſt Inſtitution of the Seſſion, the Preſident was ſtill an Eccleſiaſtic Perſon, and of the Dignity of a Prelate, as this Act ſays; and yet I ſee no ſuch Article in the firſt Inſtitution; but however that is here diſpenſed with for the future: For by the 96. *Act*, 5. *Parl.* Ja. V. it is only ſaid, that the Seſſion ſhall conſiſt of Fourteen Perſons, the one Half Spiritual, and the other Temporal, with a Preſident.

XCIV. BY this Act the Tenor of Letters of Horning, and of the Executions thereof, cannot be proven by Witneſſes; the Reaſon whereof I conceive to be not only becauſe upon ſuch Letters Men's Eſcheat and Liferent may fall, and that were of too great Importance to be proven by Witneſſes, ſince our Law does not allow any Debt above 100 Pounds to be proven by Witneſſes. But becauſe Witneſſes can neither know nor remember the exact Tenor of all the Formalities of Executions and Stampings thereof; and ſo ſtrict are the Lords in the Obſervation of this Act, that after the Horning and Executions were regiſtrate, they would not allow the Meſſenger to add the Words, *Three Oyeſſes*, in his Executions, tho' he offered to prove that there were truly Three Oyeſſes, and was content to bide by the Execution ſo amended; and that the Executions did bear the Words, *Thee Oyeſſes*, which wanted but the Letter *r*, to make the *Oyeſſes, Three Oyeſſes. Vide July* 28. 1671. Sir *John Keith contra* Sir *George Johnſton*; and *July* 11. 1676. *Stevenſon* contra *Innes*.

It may be doubted whether the Tenor of ſuch Letters may be proven, if there be any other Adminicles in Writ, ſince even Papers of the greateſt Importance may be thus proven by Witneſſes; and there is no Paper whereof the Tenor may not be proven, nor is the proving of a Tenor here diſcharged; and if the Letters of Horning and Executions be regiſtrate, the Regiſtration takes both off the Suſpicion of Falſhood, and makes the Witneſſes who are to depone know what Solemnities were uſed; but yet it will never appear by the

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regiſtrate Extract whether the Executions were ſtamped, and yet this Point being *facti*, may likewiſe ſeem to be probable by Witneſſes who ſaw the ſame ſtamped. In the Caſe betwixt *Boid* and *Malloch*, *December* 19. 1677. the Lords inclined to think, that even Executions of Hornings being once perfected by Writ, and thereafter loſt, might have their Tenor proven, tho' by this Act it would not be originally proven that Letters of Horning were execute; but they were all clear that this Act was *ſtricti juris*, and did not extend to Executions of Compriſings, and therefore they found that the Tenor of ſuch Executions might be proven.

*Nota*, THAT a regiſtrate Extract will not ſtop a Certification when a Horning and its Executions are call'd for, but the Principal muſt be produc'd. Tho' this hold againſt the Uſer of the Horning, yet the King's Donator is not oblig'd to produce the principal Horning; for elſe by Colluſion betwixt the Debitor and the Creditor, the King's Donator might be eaſily prejudged.

THE Parliament having ordain'd that the Witneſſes to be uſed for proving the Tenor of the Executions, ſhould be led in the Lords own Preſence; It may be urg'd *argumento hujus legis*, that Witneſſes for proving of all Tenors ſhould be led *in præſentia*, and which is very reaſonable, becauſe proving of Tenors is *nobilis officii*, & *altiſſimæ in daginis*.

IT is likewiſe obſervable in this Caſe, that tho' the Parliament made an Act for regulating that Point for the future; yet they left the Deciſion of the Caſe depending to the Common Law.

XCV. IT is fit to know that there being a Staple appointed, where all Staple Goods to be brought from *Scotland*, are declared free of all Cuſtom laid upon imported Goods, which was a very great Favour. It was therefore very juſt that no Merchant ſhould have Liberty to enjoy the Privileges of the ſaid Staple, except he would give his Oath of Obedience to the King, and pay his Entry in that Incorporation. This and the ſubſequent Act are ſtill in Obſervance, and the Conſervator uſes to raiſe general Letters againſt ſuch as break the ſame, by Warrant from the Council, who are the ordinary Judges in theſe Caſes, except where Matter of private Right falls in.

# *PARLIAMENT* VII.

C. BY the old Canons, all Ordinations were null wherein the Perſons ordain'd was not entitled to a certain Church, *Can-ſanctorum diſtinct*. 70. and thence it was that all *Miniſteria vaga*, wherein a Man was ordain'd a Miniſter, without reſpect to any particular Church or Charge, were diſcharg'd by our Church, tho' in the *Lateran* Council thereafter the Ordination was allow'd, but the Biſhop who ordain'd was oblig'd to Aliment the Church-man ordain'd, without a ſuitable Living.

BY this Act Paroches are to be deſign'd and circumſcrib'd, and every Paroch to have its own Stipend and Paſtor; but this *Quota* was not determin'd, till the Commiſſion of Surrender of Teinds in *Anno* 1627. determin'd that the loweſt Proportion of a Miniſter's Stipend ſhould be 8 Chalders of Victual, or 800 Merks; which Act is thereafter ratify'd by the 8. *Act* of the *Parl.* 1633.

IT is alſo provided by this Act, that all Kirks annex'd to Biſhoprics be provided to Miniſters, and when the Title of any Prelacy is conferr'd on any, that the ſaid Stipend be reſerv'd; the Reaſon whereof was, that the Pope uſe to unite Paroches and Benefices to Biſhoprics, upon Pretext of the Meanneſs of Biſhoprics; and therefore in the Beginning of the Reformation, when Titular Biſhops were made, it was thought juſt that theſe Paroches ſhould be again provided with ſpecial Miniſters.

WE call him a Tutelar who has the Title of a Benefice, & *qui eſt in Titulo*; and thus the Seculars, who had Right to the Teinds due formerly to the Church, are call'd the Titulars of the Teinds; and by the old Canons it is clear, that *quædam beneficia a Titulo pendent, quædam a reditu*: And theſe Tithes are in the Eccleſiaſtic Hiſtory ſaid to have had their Origine, either *ab intitulatione in codicem & matriculam cujuſlibet Eccleſiæ, unde intitulari dicebantur in Canon. Sanctorum, diſtinct*. 70. or from the old Cuſtom of fixing upon the Altars or Churches the Titles of theſe who were preſented to it. Some alſo think that moſt Offices in the Church had their Denominations from the Offices in the State and Army, there being an Analogy *inter militiam armatam & cæleſtem*; and that there were Titulars allow'd in the one

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as in the other, *vide Bengæum de titulis Beneficiorum, Cap.* 1. It is clear by the ſaid *Canon. Sanctorum, diſtinct.* 70. that *ſingula Beneficia certo loco & Miniſterio circumſcripta erant*, as in this Act of Parliament.

CI. BY this Act it is not lawful for any who are provided to Benefices under Prelacies, to dilapidate their Benefices; that is to ſay, to ſet them with Diminution of the Rental which they paid at their Entry; and if the Miniſter contravene, he is to be depriv'd, and the Right to be null. But by the 11. *Act, Parl.* 10. Ja. VI. all Rights made by Prelates, with Diminution of the Rental, are null, and the Converſion of Victual payable to them into Money, below the Worth, is by that Act declar'd a Diminution. They are alſo thereby ordained to find Caution not to dilapidate the Benefices. Likeas by the *Act* 3. *Parl.* 18. Ja. VI. the diſmembring any Part of the Benefice is declar'd a *Species* of Diminution, and ſo null. It has been juſtly doubted, whether a Biſhop obtaining Certification in an Improbation, whereby the Land returned to the Biſhopric, might thereafter diſpone theſe Lands by a new Right: And it has been decided that this was no Dilapidation, if given for the ſame Rental or Feu-Duty they paid before the Act *1606*; for ſuch Certifications being frequent, and the Deſign of theſe Certifications being only to force the Feuers to produce, it were hard to extend them, eſpecially ſince the Deſign of theſe Acts is only to hinder the beneficed Perſons to diminiſh the Rental and Value of them the Time of their Entry, 27. *January 1676*, Biſhop of *Caithneſs contra* his Vaſſals. It ſeems that there is *eadem ratio* for ſuſtaining Rights by the Succeſſor of that benefic'd Perſon, who obtain'd the Certification, tho' it may be alledged againſt him, that he is oblig'd to leave the Benefice in as good a Condition as he found it. It may be alledg'd, that the ſame Reaſon ſhould ſuſtain Rights made by benefic'd Perſons, who have obtain'd Reduction, *ob non ſolutum Canonem*.

THESE Acts are ſo comprehenſive, that the *Act* 5th, *Parl.* 22. Ja. VI. ſeems unneceſſary.

CXII. BY this Act, if any Man was robbed by any of a Clan, he may kill or arreſt any of that Clan, if it be found by a legal Trial, that the Clan'd Man who did the Injury, was harbour'd among the Clan after the Injury was committed. But tho' this ſeems as juſt as Letters of Repriſal are, yet it is now in *Deſuetude* juſtly; for *crimina ſuos tenent authores*.

CXIII, and CXIV. THESE Two ſumptuary Laws are in *Deſuetude*: But in the Act 113. a Caſe is obſervable, wherein even the King's Licence for tranſporting Wooll is not to be reſpected, but is to be eſteem'd ſurreptitious.

CXV. THIS Act ſeems ſtrangely inſert here, ſince Popery was aboliſh'd long before this Act.

CXVII. *VIDE Obſerv.* on *Act* 77. *Parl.* 6. Ja. VI.

CXVIII. BY this Act all Actions of Deforcement, and breaking of Arreſtment, are ordain'd to be ſummarly diſcuſs'd by the Lords without Delay; and therefore they might have been excepted from the Order of the Roll ſet down in the late Act of Regulations; but yet they are not, for they muſt abide the Order of the Roll, as other Actions, and all the Privilege that they have *quoad* this, is, that they come in upon Six Days Warning, and need not be continued; that is to ſay, they have but one Diet.

IT is fit to know that theſe Actions may be purſued civilly or criminally, and the Puniſhment is Confiſcation of Moveables, and an arbitrary Puniſhment of their Perſon.

*Obſerv.* I. That the Creditors injur'd by the breaking of the Arreſtment, are to be preferred to the Fiſk; the Reaſons whereof was, That it ſeem'd unjuſt that a Creditor doing Diligence for his own Debt, ſhould be diſappointed by his own Diligence, as he would certainly be, if, when he had purſued, and prevail'd in his Action for breaking of Arreſtment, that the Parties Eſcheat falling by this Diligence, the King ſhould be preferr'd to the Uſer of the Diligence; and we ſee likewiſe in all ſuch Caſes, the Party offended is ſtill preferr'd to the Fiſk: And thus where Parties are at the Horn for a civil Debt, the Donatar of the Eſcheat is ſtill liable for the Debt; and in Theft, by Act of Parliament, the Party injur'd is preferr'd to the Fiſk. But it ſeems ſtrange, why by this Act the Gift of Eſcheat is declar'd null, if it be not expreſly burdened with the Creditor's Debt. It might ſeem more convenient, that the Gift ſhould rather have been burdened with it, as in other Caſes.

*Obſerv.* II. THO' by this Act it be declar'd, that the Debt ſhall be paid out of the Offender's Moveables, yet that does not hinder the Party offended to do Diligence againſt the Offender's real Eſtate, for what Sums the Lords ſhall modifie.

*Obſerv.* III. THAT Arreſtments may be made, not only in the Hands of thoſe who owe any Thing to the Debitor, but Arreſtments may be even made in the Debitor's own Hands; which, tho' it may ſeem ſtrange, yet it is done to the Effect, that if the Debitor ſhall be found to have alienated any of his Moveables ſo arreſted, after the Arreſtment is laid on, he may be purſued for breaking of Arreſtment, and puniſhed conform to this Act.

These Arreſtments are uſed in the ſame Senſe, and are execute in the ſame Way that we uſe them; and all this Subject is very well treated by *Chriſtin. Tit.* 3. *ad leges Mechlin. Argent. Tit. des Arreſt.* 8.

CXIX.

By the Civil Law, Prodigals (under which Name were comprehended all ſuch as manag'd not well their Affairs) got Curators only by a Judge; but with us they are interdicted, (and their Interdicters are their Curators) and that either judicially, or by Conſent: But tho' it may ſeem that if a Man interdict himſelf, he cannot reduce that Interdiction, becauſe he has conſented; nor yet ſhould Obligations granted by him be ſuſtained, tho' he be thereafter found by the Lords to have been provident, ſince the Publication did put all *in malâ fide* to contract with him, yet Papers granted by him will be ſuſtain'd on that Head, and even the Interdiction itſelf will be reduc'd, as contrary to natural Liberty, the Granter being *Mentis compos, & rei ſuæ ſatis providus*; and there having no Precognition preceded, *December* 4, 1623, *Gerhan* contra *Hay*, *February* 12. 1633. *Forbes* contra *Forbes*, which leaves the People in great Uncertainty: And it ſeems much better that voluntar Interdictions were abſolutely taken away, tho' I believe voluntar Interdictions have been introduc'd amongſt us for Preſervation of ancient Families (for they extend not to ſecure Moveables, or againſt perſonal Execution) and it was found that many weak Perſons would conſent to a voluntar Reſtraint, who would not compear judicially to be reſtrained: And the Letters of Publication paſſing upon a Bill by Deliverance of the Lords of Seſſion, ſeems to be a Kind of interpoſing of the Authority of a Judge, and ſo to make the voluntar Interdiction a judicial Interdiction; but the Narrative of this Act confeſſes that Interdictions, upon Conſent, are beyond the firſt Deſign of the Law.

It is obſervable, I. That Interdictions need not be intimated to the Party interdicted, or execute againſt him, *December* 11, 1622, *Seton* contra *Elleis*; tho' Inhibitions muſt be execute againſt the Perſon inhibited: The Reaſon of which Difference is, becauſe the Perſon interdicted having conſented, there needs no Intimation be made to him.

*Obſerv.* II. The Stile in all ſuch Letters is ordinarily the Rule of all Deciſions upon them; and yet Interdictions were found not to annul moveable Bonds, tho' the Letters did diſcharge the granting ſuch Bonds, and that becauſe Interdictions do naturally ſtrike only againſt Alienation of Heretage, our Law thinking Moveables of leſſer Importance; or elſe becauſe that would ſtop Commerce, and ſtraiten too much the Perſon interdicted, *July* 11, 1634, *Bruce* contra *Forbes*, *June* 20, 1671, *Crawford* contra *Hamilton*. And tho' an Inhibition did expreſly diſcharge the granting of Renunciations, yet a Renunciation of a Wadſet was not reduc'd, as granted after Inhibition, ſince the Wadſet was prior; and ſo the Renunciation by the Perſon inhibited depended upon a prior Obligation, *July* 16, 1667, *Elleis* contra *Keith*: But by a late Act of *Sederunt* the 9th of *February* 1680, it is declar'd, That if the Uſer of an Inhibition ſhall intimate to the Perſon who has Right to the Reverſion, that the Wadſetter or Annualrenter ſtands inhibited at their Inſtance, and ſhall produce the ſaid Inhibition duly regiſtrated at the Time when he intimates, that then the Renunciation or Grant of Redemption, tho' proceeding upon true Payment, ſhall not be ſuſtain'd without citing the Inhibiter.

There were no formal Inhibitions in the Civil Law; but the Doctors ſpeak of a *prohibitio alienationis* equivalent thereto, *Mævius de Arreſt. C.* 9. *Num.* 25. *Arreſtari poſſunt res mobiles, immobilium ſupervacaneum eſt arreſtum, cum loco moveri non poſſunt*; *ejus tamen vice quoad illas obtinet prohibitio alienationis, quæ impetrari ſolet a Judice, quoties juſtus metus eſt, ne alienando Debitor deteriorem reddat petitoris cauſam, efficitque ut non fiat alienatio ipſius rei, & Num.* 29. *Judex, ob æquitatem, talem inhibitionem decernere debet, & Num.* 32. *pro arreſto habetur in immobilibus Interdictio uſus eorum:* So that Interdictions and Inhibitions are a Reſemblance, if not a *Species* of Arreſtments; and I think with *Mævius*, that the Word comes from the Greek αρεϛον, *placitum, incorruptum vel inviolatum*; becauſe by all theſe Remedies the Obtainer's Rights are preſerv'd inviolable. Inhibitions have their Origine from the Canon Law, whereby if the Secular Judge did interpoſe in any Thing that was Eccleſiaſtic, the Eccleſiaſtic Judge did inhibit him to proceed. And Inhibitions are mentioned, *Cap. cauſam ext. qui fil. ſint legit. Cap. tuam ext. de ord. cognit.* and with us they were firſt uſed in the Matter of Teinds in the ſame Senſe; but now the Word is extended to Letters, whereby the Judge inhibits Debitors to ſell in Prejudice of Creditors.

The Publication of Interdictions comes not from the Canon Law, but from the *French*, where it is neceſſary that they be publiſhed in *Parœciâ & Mercatu*, as with us, *Vide Argent. tit. des Mineurs, Art.* 492. where he likewiſe determines, that if a third Party knew of the Interdiction, either by being a Witneſs, or by a private Intimation made to himſelf, that any Right made to him would be Null; with us alſo the raiſing of an Inhibition upon a Bond of Interdiction was found equivalent to a Publication; the deſign of the Letters of Publication

being

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being only to put the Lieges in *malâ fide*, 10. *November* 1676. *Stewart contra Hay* of *Gourdie*, where it was likewiſe found, that the Perſon interdicted might after Interdiction ſell his Land notwithſtanding thereof a third Party, if the Bargain was profitable, and that without the Conſent of the Interdicters: But in that Caſe the Bond of Interdiction was many Years kept up, and the Inhibition thereupon was never execute till about the very time the Communing begun for Sale of the interdicted Perſon's Lands.

*Obſer.* III. THAT albeit all Inhibitions and Interdictions are to be regiſtrated by this *Act* within Fourty Days; yet Inhibitions for Teinds need not to be regiſtrate, for an Inhibition for Teinds is but in effect a Summons or Warrant diſcharging the Party to lead, but not diſcharging third Parties to buy, and ſo needs not be regiſtrated.

*Obſer.* IV. THAT tho' by this *Act* they are to be Null if they be not regiſtrate in the Sheriffs Regiſter, yet by 264 *Act Parl.* 15. *Ja.* VI. It is ſufficient to regiſtrate them in the Regiſters of Stewards, or Lords of Regality within which they dwell; and now they may be regiſtrate in the general Regiſter at *Edinburgh*, which is not here mention'd, becauſe it was not extant the Time of this *Act*; and Regiſtration in the general Regiſter at *Edinburgh*, is allow'd by the 13 *Act Parl.* 16. Ja. VI.

*Obſerv.* V. WHEREAS this *Act* appoints them to be regiſtrate within Fourty Days after the Publication; it is doubted whether the Day whereupon the Letters were execute, or regiſtrate, is to be numbred amongſt the Fourty Days. But by the late Deciſions it is found ſufficient that either of theſe Days be free.

*Nota*, INHIBITIONS preſcrive from the laſt Execution, but not from the Date of the Regiſtration, for Actions might have been intented upon them before Regiſtration, 19 *February*, 1680. *Lutefoot* contra *Glencorſe*.

CXIX. THIS *Act* appointing ſuch as are abſent from the Convention of Burrows to be fyn'd, and that upon their Acts the Lords of Seſſion grant Letters of Horning, *&c.* is in obſervance, except in ſo far as theſe Letters are ordain'd to paſs at the Inſtance of the Burgh of *Edinburgh*, for by an unprinted Act of Parliament, 1607. Execution is allow'd to paſs at the Inſtance of the Agent of the Burrows, and the Letters are now ſtill raiſed in his Name.

THIS *Act* ordains the Burrows to be cited to their general Convention by a Miſſive Bill, but this is now done by a Miſſive Letter, in which the chief Articles on which they are to treat, are expreſt, to the end they may conſult on them with their Conſtituents, and theſe are call'd the Heads of the Miſſive, but this excludes them not from conſulting on new Emergents, which could not have been foreſeen.

CXX. THAT Part of this Act which diſcharges the conducting and fraughting any Strangers to the Iſles, under the Pain of Tinſel of Life, Lands, or Goods, is in Deſuetude.

CXXI. BY this Act Lords of Regality, and Magiſtrates of Burrows are appointed to ſet Prices upon all Stuffs, but that Part of the Act appointing ſuch Magiſtrates and Judges as are negligent herein to be puniſhed at Juſtice-Airs, or Courts, is not now obſerved; and yet that would not defend ſuch as might be pannel'd upon this Account; for the Negligence of Judges ſhould not defend them, ſeeing that would invite them to be negligent.

CXXIII. THIS Act appointing the Shooters with Guns to be puniſhed, is not in Deſuetude, but is ſeldom put in Execution; and it was thought that Fowlers had preſcrived an Exemption againſt it, ſhooting being their Trade, and their Deſign is not liable to theſe Suſpicions for which the carrying Guns is diſcharged by this Act, but yet ſince by a Proclamation 9 *June*, 1682. Fowlers are diſcharged to uſe Guns, and Setting Dogs, it ſeems this favourable Conſtruction ceaſes, and the bearing ſuch prohibited Weapons is ſtill ſuſtained as the Aggravation of other Crimes, but is not ſo ſuſtain'd as that it takes off the Strength of a Defence that would be otherwiſe relevant; and thus *Nicolſon* being pannel'd for Murder, 24 *June*, 1673. alledg'd that whilſt he was ſtruggling his Gun went off, without any Acceſſion of his, which Defence of his was ſuſtain'd, tho' it was reply'd, that carrying of Guns was unlawful in a Perſon of his Quality, and ſo *verſabatur in illicito & ex illicito nunquam exculpatio.*

CXXIV. THO' this Act prohibits the carrying Nolt and Sheep out of the Country, yet it is now allowed, and they pay Cuſtom to his Majeſty, for tho' before the Country was fully laboured and pleniſhed with theſe, it was fit to keep them in the Country, yet now the Country would be too much burden'd with them if they were not exported.

CXXV. BY this Act whoſoever renders the King's Caſtles for Money, are made liable to Repetition, and it is declared that their Heirs ſhall be liable, which laſt is the Speciality for which this Act was neceſſary, ſince the Perſons who received the Money were thereby liable to reſtore; and yet before this Act, Heirs were not liable by our Law, ſince the Crime

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Crime was extinguiſhed by Death, and thus *in Crimine repetundarum repetitio ad Hæredes extendit. l. 2. ff. h. t. nam turpe lucrum ab Hæredibus extorqueri debet licet Crimina morte extinguantur, l. 5. ff. de Calum.*

CXXVI. THAT mixing of Wines is juſtly by this Act made Criminal, and declared a Point of Dittay, and this is by *Carpzov. Tit. Falſ.* and other Lawyers declared to be a Species of Falſhood, and to be puniſhable as ſuch.

# *PARLIAMENT* VIII.

CXXIX. BY this *Act*, as by all the *Acts* of this Parliament, King *James* endeavoured to curb the Inſolence of ſuch Miniſters as being diſſatisfied with Epiſcopacy, became very Seditious and Turbulent; for at this Time *Spotſwood*'s Hiſtory tells us, that there being a Convention of Eſtates holden by King *James*, the Miniſters of *Edinburgh*, and others, deſired that nothing might paſs concerning the Church, till they were heard; and Mr. *Pont*, proteſted againſt the Proclamation of theſe *Acts*, and by this *Act* ſuch as decline the Kings Council, and refuſe to be judged by them in any Matter whatſoever, of whatever Degree or Function they be, are declared guilty of Treaſon. This *Act* was occaſioned by their frequent declining of the Council, upon Pretext that the Council were not Judges competent *in prima inſtantia*, to what was preached by Miniſters, and particularly by Mr. *Andrew Meldrum*'s Declinator; and upon this *Act* Mr. *James Gutherie* was Convict of Treaſon, for declining the King and His Council at *Stirling* in *Anno* 1651. and was execute therefore in *Anno* 1662.

THIS Opinion the Presbyterians did borrow from the *Romiſh* Church, who make Eccleſiaſtic Perſons only Judges in the firſt Inſtance, to what is ſpoke or written by Churchmen; and after they have found them guilty, then they deliver them over *brachio ſeculari*. For underſtanding theſe Exemptions that are claim'd by Churchmen from the Civil Juriſdiction of Laics; it is fit to know, that the King, *Deut. Chap.* 17. *Verſ.* 18. is commanded *to write the Law*, and that *David*, *Solomon*, *Joaſh* and others did reform the Prieſts and others ſerving at the Altar, and judg'd their Miſdemeanours, in Imitation of whom *Conſtantin* the Great, *Theodoſius*, and the firſt Chriſtian Emperors did regulate the Clergy, and judge Crimes till *Arcadius* and *Honorius*, did by an expreſs Law, ordain *quoties de Religione agitur Epiſcopos judicare, cæteras vero cauſas quæ ad ordinarios cognitores vel ad uſum publici juris pertinent legibus oportet audiri*, which were juſt Marches betwixt the Secular and Civil Powers: But *Juſtinian*, at the Inſtance of *Menna*, Patriarch of *Conſtantinople*, did in the Thirteenth Year of his Reign, by his 123. *Novel.* ordain, That Churchmen ſhould be only conveenable in Civil Caſes before their Biſhops; and as to Criminal Caſes, that they ſhould be only conveenable before their Biſhops in Eccleſiaſtic Crimes, Civil Crimes being cognoſced by the Judge as formerly.

FROM theſe Beginnings did ariſe the vaſt Pretenſions of Churchmen, whereby they endeavour'd to decline the Civil Judge in all Caſes, as well Civil as Criminal, in the firſt Inſtance, and to that Heighth, that *Panor in c. novit.* 13. *Decret.* Greg. *de Judiciis & in C. cauſam* 4. *Decret.* Greg. *qui filii ſint legit*, aſſerts, That both the Juriſdictions Spiritual and Temporal belongs to the Pope, which was firſt check'd by *Peter Cogniers*, the learn'd Advocate of *Philip* IV. King of *France*, 1329. It is declar'd by the 114. *Act*, 12. *Parl.* Ja. VI. That this Act ſhall not prejudge the Spiritual Office-bearers, as to the Power of Excommunication, Collation, or other eſſential Church Cenſures.

CXXX. THIS Act, declaring that ſuch as ſhall impugn the Authority of the Three Eſtates, or ſhall ſeek or procure the Innovations or Diminution of their Power or Authority, to be Treaſon, was occaſioned by ſuch as endeavour'd at that Time to exclude Biſhops from the Parliament, of which they were, and are the Third Eſtate. And it is obſervable, both by the Narrative and ſtatutory Part of this Act, that the deſigning to exclude One of the Three Eſtates, was the chief Deſign of the Act, tho' ſuch as impugn the Power of the Parliament in general, ſo far as relates to Caſes Spiritual, do likewiſe commit Treaſon. And as in the former Act, the controverting of the Power of the Council is declared Treaſon; ſo in this Act, the controverting the Power of the Parliament is much more treaſonable; and yet it is controverted, whether the denying any Branch of the Parliament's Power be treaſonable, ACT ſuch as is the quarrelling the Power or Conſtitution of the Articles; or whether the Subjects may appeal from the Seſſion to the Parliament? Or, if the Parliament has Power to reduce their Sentences paſt *in foro*? In all which, the Parliament's Authority may be alledg'd not to be controverted. But the Queſtion ſeems to reach only to the controverting its fundamental Powers; and if ſuch Caſes as theſe were treaſonable, the People might be diſcouraged to enquire even into what were otherwiſe lawful. And whatever may be ſaid againſt ſuch Debates, when they are merely factious, and officiouſly mov'd and proſecuted by ſuch as have no Intereſt, yet ſuch Debates in Parliament may be alledg'd not treaſonable by the 40. *Act*, 11. *Parl.* Ja. VI. and the Votes of Parliament are likewiſe by this Act declar'd to be free Votes. As to all which, I ſhall only ſay, that theſe and ſuch Caſes are to be determin'd by the reſpective Circumſtances; and therefore it is ſtill ſafer, not to approach too near thoſe Rocks on which we may ſplit.

CXXXI. THIS Act declares the convocating all Councils, Conventions, or Aſſemblies, Civil or Eccleſiaſtic, to be puniſhable by the Pains enacted againſt ſuch as convocate the King's Lieges; and it was occaſioned by the unlawful Church-Aſſemblies, holden at that Time in oppoſition to Epiſcopacy. And by the 4. *Act*, *Parl.* 1. Ch. II. this Act is ratify'd, and all ſuch Convocations declared puniſhable, tho' it be pretended by ſuch as hold them, that they deſign nothing but the Good of King and Kingdom; which Declaration was there made to condemn the falſe Pretences of our late Rebellion.

CXXXII. IT is obſervable from this Act, that the being Once or Twice drunk, is not a ſufficient Reaſon for Deprivation of a Miniſter; for the Act requires common Drunkenneſs, and deprives *ebrioſum ſed non ebrium.*

*Obſerv.* II. THAT tho' this Act ſay, *That Non-reſidence for the Space of Four Sabbaths, without the Allowance of the Ordinary, ſhall be Cauſe of Deprivation*; yet tho' there be no expreſs Allowance, the Non-reſidence will be no Reaſon of Deprivation, if the Reaſon was ſufficient, and the Ordinary could not be had, as the Common Law decides in this Caſe.

NON-RESIDENCE is a Cauſe of Deprivation by the Canon Law, *Decret.* Greg. *de Præb. Cap.* 17. and *Franciſcus Forrenſis* has writ a Learned Treatiſe, proving the Neceſſity of Reſidence to be *juris divini.*

THE Civil Law had formerly required Reſidence from Churchmen, *Nov.* 6. *Cap.* 2. & 123. *Cap.* 9. except where they had Liberty from the Emperor: And thus, with us, the King only may diſpenſe with Non-reſidence.

*Obſerv.* III. THAT Plurality of Benefices having Cure, is a ſufficient Reaſon of Deprivation, which is conſonant to *Cap. adhæc.* 13. *de Præbend.* But Exception is made, where one is not able to entertain the Incumbent. *Vide* Alphonſ. Hoieda *de compatibilitate beneficiorum.* The Pope might diſpenſe, ſo now may the King.

*Obſerv.* IV. THAT by this Act Commiſſioners to be appointed by the King are to have Power of depriving Miniſters, which is abrogated by the firſt *Act*, 12. *Parl.* Ja. VI.

CXXXIII. THO' this Act declares that Miniſters, who exerce or officiate as Notars, ſhall be depriv'd, yet it does not expreſly annul the Writ; and therefore a Contract of Marriage ſubſcribed by a Miniſter in place of a Notar, was the 12. of *July* 1631. *Haſſington* contra *Bartilme*, ſuſtained, tho' it was found that the Miniſters was thereby deprivable.

THIS Act diſcharging Miniſters to be Judges, was made to exclude Mr. *Pont*, who was then Lord of the Seſſion; for after the Reformation, Miniſters came in place of the Eccleſiaſtic Lords; and tho' they pretend now that Biſhops ſhould not ſit in Civil Judicatures, yet they deſir'd to be there.

CXXXIV. BY this Act, the uttering of ſlanderous and untrue Speeches, to the Contempt of His Majeſty, His Council's Proceedings, and Progenitors, is declar'd puniſhable, as Leaſing-making; and Leaſing-making is puniſhed with *Tinſel of Life and Goods*, by the 43. *Act*, *Parl.* 2. Ja I. *Vide Act* 83. *Parl.* 6. Ja. V. *Vide etiam Tit. Cod. ſi quis imperatori maledixerit*: For ſuch ſlanderous Speeches, the Party is ſometimes only baniſh'd or ſcourg'd, as *Tweidie* was, *March* 13. 1612. But one *Fleming* was hang'd for ſaying, That he *wiſh'd the King would ſhoot to dead, May* 15. 1615. *Spotſwood* relates, that this Act was occaſioned by Pamphlets and Preachings after *Gourie*'s Execution.

*Obſerv.* II. THAT all the Subjects are diſcharg'd to meddle in His Highneſs's Affairs, or in the Aſſairs of His Eſtate, that is to ſay, to make Enquiry curiouſly into what His Majeſty, or His Council does; for that is preſum'd to be done *malo animo.* And in all Ages ſuch Curioſity has been puniſh'd. Thus *Auguſtus* kill'd *Panarus, veluti curioſum*, Sueton. *Cap.* 27. and Plut. *L. de curioſ.* obſerves, that the *Locrenſes* fin'd ſuch curious Perſons. *Vide* Langl. *L.* 8. Semeſtr. *C.* 11. who treats on theſe Crimes learnedly.

BY this Act, no Sentence of Forfeiture for Treaſon committed againſt the King and His Eſtate, can be quarrelled upon Nullity of Proceſs, till the Crime for which the Forfeiture was led be pardoned. CXXXV.

*Obſerv.* I. THAT ſince this Act ſpeaks only of Crimes committed againſt the King and His Eſtate, it has been doubted, whether this Act can be extended to Treaſon merely committed againſt the King's Perſon; for by the King's Eſtate is ordinarily meant His Prerogative and Majeſty.

*Obſerv.* II. THAT that Part of the Act which diſcharges Advocates to plead, or conſult for any Perſon who ſtands forfeited, is abrogated, *Act* 38. and 39. *Parl.* 11. Ja. VI. but yet none uſe to plead for forfeited Perſons, till they get a Licence from the Judge before whom the Trial is to be.

THERE was a Commiſſion granted to conſider what Nullities could be objected againſt *Swinton*'s Forfeiture; and it was alledged, That the Decreet was null by intrinſic Nullities in ſubſtantial Points, and ſo the Commiſſioners might proceed, ſince this Act was only to be interpreted of Formalities and alledged Nullities, which could not be inſtantly prov'd, or did not appear by the Decreet itſelf, yet they would not proceed, becauſe the Forfeiture was not, nor could be purg'd, and the Crime was notour.

THIS Act, declaring all Remiſſions for Slaughter, Fire-riſing, and other odious Crimes to be null, is ſuitable to *Stat.* Dav. II. *Cap.* 50. and *Act* 7. *Parl.* 3. Ja V. but this Act is thought temporary, as is likewiſe *Act* 63. *Parl.* 6. Ja. IV. And notwithſtanding of theſe Acts, His Majeſty's Remiſſions for ſuch Crimes has been oft ſuſtained, *Vide Crim. Pract. Tit.* Remiſſions. CXXXVI.

THIS Act is in Deſuetude; for His Majeſty's Guards are paid out of the Exciſe; and I find this Act formerly eſtabliſh'd by an Act of Council. CXXXVII.

THIS Act is fully explained, *Crim. Tit.* Murder. CXXXVIII.

BY this Act Decreets of the Lords of Seſſion are diſcharged to be ſuſpended without Conſignation; but this being in Deſuetude, it is by the Regulations, *Article* 19. appointed, That Decreets *in foro* ſhall not be ſuſpended without Conſignation, or by the whole Lords in Time of Seſſion, or by Three Lords in Time of Vacance. CXXXIX.

IT may be doubted what this Act means, in appointing Letters of Poinding as well as Horning to paſs, not only for liquid Sums, but where the Execution conſiſts *in facto*, ſince Poinding can only be for a liquid Sum. To which it may be anſwered, That the Meaning of the Words are, that Poinding may be allow'd, tho' the Obligation was not originally for a liquid Sum, but *ad factum præſtandum*; but it is neceſſary in that Caſe, that the Effect ſhould be thereafter liquidate by a Sentence, elſe there could be no Commenſuration, and ſo no Poinding; and yet I cannot deny but the Clauſe is ill expreſs'd.

THIS Act, appointing that the Defender ſhall find Caution to enter the Juſtice-Court, but in ſober Manner, is now in Deſuetude, there being no ſuch Clauſe either in the Letters, or any ſuch Caution found; but tho' the Juſtices allows ſome Friends to enter the Pannel with the Defender, yet theſe muſt be very few, and diſarmed. CXL.

THIS Act, appointing that Salmon, Herring, and White Fiſh, ſhall be only ſold at the Staple here related, is in Deſuetude; and tho' the Town of *Aberdeen* has their own Gadges of Salmon conform to this Act, yet the Town of *Edinburgh* pretend a Right to be the ſole Gadgers of Salmon in all *Scotland*, by virtue of a Gift from King *Charles* I. which Gift the Town of *Aberdeen* have ſuſpended upon this Act; and this Act, in ſo far as it appoints Herring and White Fiſh to be brought to *Leith* and *Crail*, is expreſly abrogated by the 14. *Act*, *Parl.* 10. Ja. VI. CXLI.

THIS Act is explained in the Obſervations upon the 75. *Act*, 6. *Parl.* Ja. VI. CXLII.

# *PARLIAMENT* IX.

I. THIS Act was introduced to correct an ill Cuſtom which had crept in at the Reformation, whereby the Popiſh Prelates finding that they were to be put out, did demit their Benefices in favours of theſe with whom they entred in a Compact, and by virtue of which Compact they reſerved to themſelves their own Liferents. Likeas, according to the Canon Law, *Si quis reſignaverit beneficium retentis ſibi fructibus pro penſione non valet reſignatio, nam decet quod ipſe qui Altari ſervit de Altari vivat. Cap. cum ſecundum* 16. *de Præb.* And in Reaſon it muſt be concluded, that the Benefices muſt be ill ſerved when theſe who reſign, reſerve their own Liferent; for he who ſerves will have nothing in that Caſe, and he who ſerves not, ought to have nothing: Therefore by this Act all ſuch Compacts are declared null; and it is declared, that for the Future, all Rights to be made to Prelacies ſhall be null, except the Places be vacant by Deceaſe, Forfeiture, or ſimple Dimiſſion of him who poſſeſt the ſame formerly. Nor doth the King now accept of any Dimiſſion or Reſignation in favours of any other Party, for that is a real Invaſion upon His Royal Power, by which He diſpones upon all Offices according to His free Will.

II. WHEN Perſons are forfeited, they or their Children uſe to abſtract the Evidents of their Land, and therefore by the firſt Part of this Act it is declared, that the King or His Donator, ſhall have Right to all Lands, *&c.* peaceably poſſeſs'd by the forefeited Perſon for the Space of Five Years preceding the Forfeiture.

*Obſerv.* I. THAT this Privilege holds only in Caſes of Treaſon, but not where His Majeſty comes to have Right by any other Title: And it may be debated, if this ſhould hold where the Forfeiture proceeds upon all the Laws, whereby any Crime is ordain'd to be puniſh'd as Treaſon, but it is not declar'd to be Treaſon, ſuch as Theft in Landed Men, *&c.* for it would appear that this Privilege was only granted, where the Crime is declar'd to be Treaſon: But yet ſince theſe Crimes are puniſh'd as Treaſon, this Act ſhould extend even to theſe; for the Preſumptions inductive of this Act, *viz.* That they will abſtract their Evidents, holds even in this Caſe; and it cannot be denied but theſe Perſons are forfeited as Traitors.

*Obſerv.* II. THAT this Right introduc'd in Favours of the King, ſeems to be only preſumptive; ſo that if any Party ſhould ſhow a Backbond from the forfeited Perſon, who was Five Years in Poſſeſſion, the Perſon to whom the ſame was granted, or any who could inſtruct a better Right, might pretend to exclude the Donatar, even as a Church-man, who was *decennalis & triennalis Poſſeſſor*, might be excluded upon a better Right, or by proving that the Churchman poſſeſſed only by a Tolerance; but yet this Preſumption may be anſwer'd to be *juris & de jure*, and ſo to exclude all better Rights: *Et ſibi imputent*, who having ſuch Rights, ſuffered the forfeited Perſon for Five Years to poſſeſs without any Interruption; and if ſuch Competitions were allow'd, the King's Right might be eluded by an Hundred Contrivances. And though this Act may ſeem to be uſeleſs now, ſince the Regiſtration of Writs, which hinders Writs to be abſtracted, yet that was repelled 23. and laſt of *July* 1666, Earl of *Southesk* againſt the Marquis of *Huntly*; but by the 4. *Act*, *Parl.* 18. Ja. VI. it is declared, That Extracts of Rights, either diſponed or confirmed by His Majeſty, ſhall be valid, tho' the Principals cannot be produced; and yet if King and Parliament pleaſed, this Act might ſuffer ſome Correction, becauſe His Majeſty is much better ſecur'd now by Regiſtrations, than he was at the making of this Act.

*Obſerv.* III. THAT ſince this Act appoints this *quinquennial* Poſſeſſion to be proven only by the Retour of an Inqueſt, it was therefore well found that it could not be proven by Exception, 13. *June* 1666, *Home* contra Tenents of *Kello* and *Home*. Yet tho' there be not a Retour already made, the Lords will ſuperſede extracting, that betwixt and ſuch a Time the *quinquennial* Poſſeſſion may be retoured, as was found in that Caſe.

*Obſerv.* IV. THAT the Poſſeſſion condeſcended on in the Act is, where the forfeited Perſons were Five Years in Poſſeſſion, by labouring the ſame with their own Goods, ſetting the ſame to Tenents, or uplifting the Mails and Duties; ſo that it would ſeem that theſe Kinds of Poſſeſſions are requiſite in this Caſe, and that the Act of Parliament hath required them, becauſe they are palpable: And therefore civil Poſſeſſion *per conſtitutum*, by Reſervation, receiving of Annualrent from Principal or Cautioners, not relative to the Infeftment of Annualrent, but to the Bond, or otherwiſe ſeen, not ſufficient by the Words of this

ACT.

*Obſerv.* V. That ſince this Act is founded upon uninterrupted Poſſeſſion of the forfeited Perſon, that therefore where there are Interruptions, this holds not: And thus it was found, that the raiſing of an Inhibition was a ſufficient Interruption, 23. *July* 1666, Earl of *Southesk contra* Marquis of *Huntly*.

By the Second Part of this Act, it is appointed, that where the forfeited Perſon was in Poſſeſſion of Lands, Tacks, or Teinds, &c. the Time of the Forfeiture, albeit he had not been in Poſſeſſion Five Years preceding the Proceſs or Sentence of the Forfeiture; yet the Aſſiſe muſt retour what the Rebel did poſſeſs the very Time of the Proceſs or Sentence, and the King or his Donator is to be entred thereto ſummarily, and cannot be removed for the Space of Five Years, that in the mean Time he may ſearch and ſeek after the Rebel's Rights; for he cannot be preſum'd to know *quo jure* the Rebel poſſeſt. And albeit it may ſeem both by Reaſon and by this Act, that this ſhould only hold where Tacks or previous Poſſeſſion, tho' ſomewhat ſhorter than Five Years, by Virtue of a Right, could be proven; yet the Lords found that this Part of the Act holds even where no Right could be ſhown, if the forfeited Perſon was in Poſſeſſion, tho' for never ſo ſhort a Time: And it being alledg'd, that theſe Five Years in this laſt Part of the Act ſhould be counted from the Time of the Forfeiture, and not from the Time that the Donator enters to Poſſeſſion; for elſe he might, by lying out, prejudge the Creditors. The Lords found, That if the Rents were extant, he had Right thereto from the Date of the Forfeiture, tho' prior to his Poſſeſſion, 24. *January* 1667, *Home contra* the Tenents of *Kello*: But that Caſe being a Competition betwixt the Donator and an Appriſer from the Rebel, the Lords found the Donator might ſummarily redeem the Appriſer, and enter in Poſſeſſion, *ibidem*.

III. THE Reaſon upon which this Act is founded, is, that when any Perſon raiſes a Multiple-poinding, the Party who is troubled by many who pretend Right, ought to be ſecur'd, when he pays to that Perſon who prevails, *nam res judicata pro veritate habetur*, and he pays *authore Prætore*: And though Minors have, by the Civil Law and ours, a double Remedy, if their Tutors and Curators ſuffer a Decreet to paſs againſt them for Not-compearance, *viz.* That he may either reduce the Sentence, or purſue the Curators for Damage and Intereſt, in ſuffering the Decreet for no Compearance to go againſt them; yet in this Act it is declar'd, That if a Major, who competes with a Minor in a Multiple-poinding, be preferr'd to the Minor, becauſe of the Minor's Not-compearance; in that Caſe, the Minor has only Action againſt his Tutors and Curators, but cannot reduce the Decreet of Preference: But if the Minor have no Curators, it is declar'd, he ſhall be reſtor'd as accords of the Law, that is to ſay, he may reduce the Decreet, ſince in this Caſe he has no other Remedy; but if the Decreet of Preference be quarrellable for any Error in the Execution, or if the Party abſent can ſhow a neceſſary Reaſon for his Abſence, then the Decreet is quarrellable either by Majors or Minors; yet the Lords found that Payment *bona fide*, conform to this Act, does ſecure the Payer, not only againſt the principal Competers, but againſt their Aſſignies, *November* 24. 1676. *Weir contra* the Earl of *Callender*: But it has been debated, whether the Party who has been prejudg'd by the Decreet of Multiple-poinding, may be repon'd againſt the ſame by Way of Suſpenſion; or if a Reduction be neceſſary: And it has been found, *February* 1. 1670. *Watſon* contra *Simpſon*, that a Decreet of Multiple-poinding obtain'd againſt the Party, could not be taken away without Reduction at the Party's Inſtance; nor was a Suſpenſion at the Tenent's Inſtance ſufficient, becauſe the Narrative of this Act bears expreſly, *That the Parties uſed to crave to be reponed*, by intenting Reduction; and that the Party who obtains the Decreet is, by the ſtatutory Part only oblig'd to anſwer in the ſecond Inſtance, which the Lords found to be by Way of Reduction: And from that Deciſion it is very clear, that theſe Words, *The ſecond Inſtance*, in all Statutes, are only interpret by the Lords to be meant of Reduction, and not of Suſpenſion.

*Obſerv.* I. That the Party abſent will not be prejudg'd, if he have a neceſſary Cauſe of his Abſence; for it were unjuſt to puniſh a Man for what was not in his Power: And yet by this Reſervation, he who gets Payment is ſtill unſecure; but he who pays by Virtue of the Decreet, before Reduction be intented, can never be call'd in Queſtion.

*Obſerv.* II. That the Party preferr'd in the Multiple-poinding, is only thereby ſecure, as to the bygone Profits which are paid, and ſo in Effect *facit tantum fructus conſumptos ſuos*; and if the Sums be extant, unpaid to the Party ſo preferr'd, he who had the beſt Right before the Decreet of Multiple-poinding, will ſtill be preferr'd: And it ſeems by the Words of the Act, that if the Profits themſelves be extant, the beſt Right will be preferr'd; for the Words are, *Nor yet ſhall have any Right to the bygone Profits intrometted with.*

This is by the 19. *Act*, *Parl.* 10. Ja. VI. declar'd only to be extended to ſuch Actions of Multiple-poinding, as were intented after this Act was made.

IV. THE Firſt Part of this Act diſpenſing with the not Sealing of ſuch Papers as are to be regiſtrate, is explain'd in the 117. *Act*, *Parl.* 7. Ja. V. And whereas this Act declares, that a Saſine is ſufficient, if ſubſcrib'd before one Notar, and a reaſonable Number of

ACT Witneſſes, that reaſonable Number is underſtood to be Two, tho' by a vulgar Error it is believ'd, that a Saſine requires Four Witneſſes; and now, by conſtant Cuſtom, Four Witneſſes are always adhibit in Saſines, and by the 5. *Act*, 3. *Parl.* Ch. II. their Subſcriptions are neceſſary.

VII. BY this Act it is appointed, that all Kirk-lands ſet in Feu-farm ſhould be confirmed by the King, elſe they are null by Way of Exception.

*Obſerv.* I. THAT tho' the Narrative of this Act bears, That all Feus and long Tacks ſet ſince the Year 1558, ſhould have been confirm'd; yet the Body of the Act does not declare, that long Tacks need not be confirm'd. *Vide Manticam de ambig. convent. Lib.* 5. *Tit.* 10. And *Balfour* relates Deciſions, bearing, That Tacks for Three Nineteen Years are eſteem'd as Alienations, and ſo ſhould be confirm'd.

*Obſerv.* II. THIS Act declares, That of old all Kirk-lands ſhould have been confirm'd by King or Pope; yet the 190. *Act*, *Parl.* 13. Ja. VI. ſeems to inſinuate, that neither Confirmation of Pope or King was neceſſary, but that the King's Conſent was ſufficient; and that therefore the Act does ſtatute, That no Right can be quarrelled for Want of Confirmation, prior to that Act, where the King has conſented under the Privy Seal: But that the King's Confirmation was neceſſary of old, is clear, *R. M. Lib.* 2. *C.* 23. and the Reaſon there given is, *quia eorum terræ ſunt de Eleemoſyna Domini Regis*; and being preſum'd to have been given by the Kings, for praying for them, they ſhould not be appropriate to another Uſe, without their Conſent.

*Obſerv.* III. THAT only Feus of Kirk-lands are ordained to be confirm'd; and therefore the Lords inclin'd to think, that Feus of Salmond-Fiſhings ſet by Churchmen, were not null, tho' not confirm'd: And *January* 20. 1666. *Renton contra* Feuers of *Coldinghame*, the Lords found, that Gifts of an Office of Forreſtry granted by Kirkmen, needed not be confirm'd, theſe not being properly Feus of Kirk-lands, *ibidem*.

VIII. THIS Act appoints, that all Money and Victual aſſign'd to the Captains of the King's Caſtles, and whereof they have been in Poſſeſſion for Five Years, ſhall remain with them unqueſtionably; and this is like the Quinquennial Poſſeſſion given to the King in Caſes of Forfeiture.

*Nota*, THAT the King has a Duty paid to Him in Exchequer, call'd *The Caſtle-Wards*, ſo call'd, becauſe they are paid in for warding or keeping His Caſtles, and he has no Right to them but conſtant Payment, conform to the Exchequer-Rolls; and therefore yearly the Sheriffs are charg'd with them, and they get Letters of Relief: And it was found in a Caſe betwixt the Sheriff of *Hadingtoun* and Sir *John Niſbet*, *January* 11. 1678. That the ſaid Sir *John* had not preſcriv'd an Exemption as to theſe Caſtle-Wards, neither againſt the King nor Sheriff, tho' he had paid none for Forty Years, ſince there were Letters of Relief yearly granted. 2. It was alledg'd, that his Lands of *Dirletoun* having come once in the King's Hands by Forfeiture, and His Majeſty having of new given them out, that Servitude was thereby extinguiſh'd, ſince *res ſua nemini ſervit*, but was repelled; becauſe the King did of new only diſpone the ſaid Lands, as when they fall in His Hands by the Forfeiture.

# *PARLIAMENT X.*

X. MR. *Nicol Dalgleiſh*, and ſome other Presbyterian Miniſters, having reproach'd the King and His Government, this Act declaring ſlanderous Speeches and Writs, puniſhable by Death, as Sedition was made, and is more fully explain'd in the *Act* 134. *Parl.* 8. Ja. VI. and in my *Crim. pract. Tit.* Injuries.

*Obſerv.* I. SEDITION is a Name that receives different Puniſhments, according to it's different Degrees of Guilt; and therefore where it is deſtructive of the King's Authority immediately and deſignedly, it is puniſhable by Death, as here, tho' *L.* 2. *C. de ſeditioſis*; the Puniſhment of theſe, *qui ejuſmodi voces emiſerunt*, is more moderate: And as that Law well obſerves, Words ſpoke *in civitatibus & tumultuoſis clamoribus* are more puniſhable than the ſame Expreſſions would be, if ſpoken in private Places, or without Tumult; but yet by this Act ſuch ſeditious Speeches, whether ſpoken privately or publicly, are puniſhable by Death.

*Obſerv.* II. That when His Majeſty's Advocate deſigns not to purſue the Authors of ſuch Speeches to the Death, he libels only, That the Pannel did ſpeak or write what tends to reproach or ſlander His Majeſty's Perſon, or to miſconſtruct His Proceedings, but not that they actually did ſo; and in that Caſe the Guilt infers only an arbitrary Puniſhment, according to the Circumſtances that attend the ſame.

*Obſerv.* III. That tho' by this Act the depraving His Majeſty's Laws and Acts of Parliament, is declared puniſhable by Death as Sedition; yet all miſconſtructing Acts of Parliament, is not ſo puniſhable; and thus, tho' a Sheriff or other Judge would miſinterpret a Law, ſo as to make it infer a higher Mulct or Penalty than the Law deſign'd, that could not infer Sedition or Death, tho' it be likewiſe puniſhable; but the Deſign of this Act is, to declare the depraving and miſconſtructing of Laws, ſo as thereby to reproach the King or Government to be Sedition, and *Spotſwood* tells us, *Pag.* 243. That this *Act* was made for puniſhing theſe Miniſters who had declaim'd againſt the *Acts* of the former immediate Parliament, as deſtructive to their Diſcipline. Upon this *Act* the Lord *Balmerino* was found guilty in *December* 1634. for having diſperſed a Petition that reflected upon the Government; in which Proceſs, it being fully debated, that *dolus malus* ſhould be found in ſuch Caſes, where the Deſign of Defaming makes only the Crime; this was repelled, becauſe where the Words may of their own Nature, move Diſlike of, and Sedition againſt the Government, the Deſign needs not be prov'd; for if the People be Irritate, the Author ought to be puniſhed, and this Law conſiders the Effect, and not the Deſign, and he ought to blame himſelf, who meddles in Matters of Government without his Sphere.

It was likewiſe alledged in this Proceſs, That a Petition to the King Himſelf, could not be interpret a miſconſtructing; but this was alſo repell'd, becauſe both by the Common Law and ours, it has been found, that great Affronts have been put upon the Government, by way of Supplication. Upon this *Act* alſo, *Francis Tennent* was found Guilty in *Anno* 1680. and Mr. *Thomas Roſs*, in *Anno* 1678. and the Earl of *Argyle*, both in the Year 1662. and 1681.

*Obſerv.* IV. That in this *Act* mention is made of raiſing Diſlike betwixt His Highneſs, His Nobility and loving Subjects; which word *Nobility* was expreſly put in by the Lord *Hamilton* and other Noblemen, who then turned out Captain *James Steuart*, againſt whom this *Act* was partly deſigned, whereas in the *Act* 134 *Parl.* 8. Jam. VI. made the Year before, by the ſaid Captain *James*'s Influence, againſt Slanderers, there is no Mention made of the Nobility, as is obſerved by Mr. *Robert Macgil*, in *Balmerino*'s Proceſs.

XI. THIS Act diſcharging all Dilapidations of Benefices, runs only in the words of the Act, againſt ſuch as dilapidat Benefices, that are at His Majeſty's Preſentation; but yet *de praxi*, no Benefices that are even at the Preſentation of Laic Patrons, or Eccleſiaſtic Subjects can be dilapidated.

Dilapidations of Benefices were formerly diſcharg'd by the 101. *Act Parl.* 7. Jam. VI. but to elude that Act, benefic'd Perſons uſ'd not to give down any of the Bolls payable to the Benefice, but to convert theſe Bolls in Money, and to make theſe who were liable in Payment, only liable in very ſmall Prices, and therefore ſuch Converſions are diſcharg'd by this Act; but it may be alledg'd, that where the Converſion is for leſs than the preſent Price, as Victual now gives, it is unlawful ſince that Converſion was unneceſſary, and the benefic'd Perſon is prejudg'd, becauſe if no ſuch Converſion had been made, he had got the Bolls preſently, which could have maintained him better than the ſmall Prices, which theſe Bolls were worth the Time of the Converſion; and yet by our Deciſions, the Price that the Bolls gave the Time of the Converſion, are only conſidered, becauſe both Parties took their Hazard, and the Price mentioned in the Converſion, is preſum'd to be the full Price, except it could be proven that the Victual gave then greater Prices; for *in antiquis*, there can be no other Probation, *Vid. Obſerv.* upon the ſaid 101. *Act* 7. *Parl.* Jam. VI.

XII. BY this Act all Leagues and Bonds made amongſt His Majeſty's Subjects, without His Conſent, are diſcharg'd.

*Obſerv.* I. That tho' the Rubric bears, that all ſuch Bonds and Leagues are null; yet they are not expreſly annulled in the Body of this Act; but they are expreſly annull'd by the 4. *Act Seſſ.* 1. *Parl.* 1. Ch. II.

*Obſerv.* II. That the Puniſhment is not here expreſt, but in general, under the Pain of being holden as Movers of Sedition, and puniſhed with all rigour; nor is it more ſpecial in the foreſaid 4. *Act* Ch. II. which I admire; but yet I think that ſuch Bonds and Leagues are puniſhable by Death from the Words, *all rigour*, which may be very well extended to Death, eſpecially *in ſubjecto capaci*, as Sedition is; for certainly ſome Seditions may be puniſh'd with Death, as we ſee in the firſt *Act* of this Parliament, and by this ſame Act, ſuch Leagues are declar'd to be againſt all Law and Allegiance. Likeas by the 7. *Act Parl.* 1. Ch. II. the Subjects are diſcharg'd to take or renew the Covenant, which is a Bond or League, upon their higheſt Peril, and I wiſh the Act had determined what was the higheſt Peril, for generally Lawyers do not extend ſuch Statutes to Death.

ACT I find that the Nobility and others having enter'd into Bonds amongſt themſelves, whereupon His Majeſty was ſurpriz'd at *Ruthven*, there are ſeveral Acts of Council, and particularly a Proclamation iſſu'd out in *April* 1582. diſcharging all ſuch Bonds ſo enter'd into, and that none enter into ſuch Bonds for the Future; and that gave Occaſion to this Act, which ſays, *That theſe Bonds have given Occaſion to a great Part of the Troubles that have occurr'd ſince.* The Certification in that Proclamation is under the Pain of being *repute Favourers and Partakers with the Conſpirators againſt His Highneſs Majeſty.* The Act here related to is the 43. *Act*, 6. *Parl.* Queen *Mary*, but that Act properly extends only to Bonds of Manrent, but not to Bonds of Combination, as this does; ſo that this Act ſhould rather have been founded on the 30. *Act*, 2. *Parl.* Ja. I.

THERE is in that Proclamation, and this Act, Exception made of Bonds enter'd into with the King's Conſent, which was added becauſe the Nobility and Eſtates at the King's Deſire, enter'd in a League and Bond for Preſervation of Religion, which is regiſtrate in the Council-Book, *June* 8. 1585. but this Bond is ſubſcribed by very few of every Eſtate.

XIII. BY this Act Charges *ſuper inquirendis* are diſcharged; but it is a Miſtake to think that by that Act, the King or other Judges cannot examine Men without a formal Proceſs; for the Deſign of that Act is only to diſcharge the denuncing Men Rebels upon ſuch Charges without previous Trial; and yet if the chief Officers of State, or at leaſt Four of them concur, it would ſeem that by that Act, even ſuch Charges are yet lawful; and where the King or Magiſtrate has previous Informations of Crimes latent, it were againſt the Intereſt of the Commonwealth, that they ſhould not be allow'd to clear theſe by particular Interrogators.

IT was urg'd from this Part of the Act, That no Man could legally be impriſoned, even by a Warrant under the King's own Hand; and that this was very juſt in itſelf, ſince as Liberty is very precious, and the beſt Part of Property, it was fit to ſecure it ſo as that none could take it away but theſe who will be anſwerable, and the King could not in Law be made anſwerable; and therefore it was juſtly by this Act appointed, that no Man could be impriſoned by any Letter, even under the King's own Hand, except it were ſubſcribed by the Officers of State, who ſhould be anſwerable. To which it was anſwered by His Majeſty's Advocate, That this Act did not debar the King from granting ſuch private Warrants under His own Hand, for there might be ſome Caſes which He could impart to none of His Officers of State; as for Inſtance, if all His Officers were upon a Plot againſt Him, or if the Crime were the being upon a Plot with a foreign State, which the King were not yet in a Condition to reſent, tho' He might juſtly apprehend His Subjects who were in Acceſſion to it. But the Deſign of this Part of the Act was only to diſcharge the paſſing ordinary Letters in common Courſe under the Signet, except in this Method. And it might be much rather retorted, that ſince only Letters under the Signet are diſcharged to be paſt, except in this Method, therefore private Warrants from the King Himſelf are not diſcharged; for if the King and Parliament had deſigned any ſuch Thing, they would have expreſly diſcharged all Warrants under the King's Hand, which is not done in this Act. And it is clear by the 184. *Act*, 13. *Parl.* Ja. VI. that the King may give Warrants out of His own Mouth to apprehend Rebels, or others whom Magiſtrates are obliged to apprehend.

I find alſo, that this Act was paſt formerly in the Privy-Council the 23. of *June*, this Year 1585. and there the Act bears, *To have been made to prevent the obtaining of unformal Letters, at the Importunity and Malice of private Perſons*; which clearly evinces, that it was not deſigned to preclude the King from ſecuring ſuch Perſons who He had Reaſon to beweer obnoxious to the Government.

IT is obſerved in the Acts of *Sederunt*, that the King, 8. *June* 1581. by His Letter, ordain'd ſeveral Advocates to be impriſon'd *indicta cauſa*.

BY the ſecond Part of this Act Writers to the Signet are ordain'd to keep the old Stile unalter'd, for Arguments brought from Stile are a great Part of our Fundamental Law; and in all our Deciſions *Argumentum a Stylo* is ſtill very ſtrong, as from the Wills of Inhibitions, Interdictions, from the Forms of the Chancery, *&c.* and yet in ſome Caſes this Argument is not concluding, and thus Gifts of ſingle Eſcheat bear all Moveables preſent and to come, and yet they give only Right to what Moveables the Rebels have or ſhall poſſeſs within a Year after Rebellion; and tho' by the Stile of Gifts of Wards the Relief is diſcharged, yet that Diſcharge will not be valid. As alſo, the Stile of Inhibitions and Interdictions bears a Prohibition to alienate either Heretage or Moveables, and yet it extended only to Heretage.

*STILUS Curiæ* is by *Juſtinian* call'd *forma & obſervantia*, whence comes our Word, *Form of Proceſs*, *Stilus & conſuetudo fori vel judicii pro lege obſervari debet*, *L.* 1. *§ in honorar. de var. & extraord. cog. Vide* Voet. *de Stat. Sect.* 3. *C.* 3.

*Obſerv.* THAT tho' by this Act every Writer ſhould write his Name upon the Back of the Signature which he writes, which doubtleſs was introduced to the end that every Writer might be anſwerable for his Errors in Stile or otherwiſe; yet if at the paſſing of the Signature in Exchequer, the Writer ſubſcribes his Name, the Signature will be ſuſtain'd, which was found neceſſary, tho' it was alledg'd that this Act was in Deſuetude, as to this Point; for it was found not to be in Deſuetude. ACT

XIV. THIS Act explains the 141. *Act*, 8. *Parl.* Ja. VI. and diſpenſes with a Part of it; and that is the Act to which this Act relates, tho' it be not expreſly cited.

XV. THIS Act, appointing Licences to be null, except they be ſubſcribed by the Comptroller, is ſo far innovated that they muſt now be ſubſcribed by the Treaſurer and Treaſurer-depute, who are come in Place of the Comptroller.

XVI. BY this Act, Sheriffs, Stewards, Magiſtrates of Burghs, and others, are ordain'd to apprehend notorious Thieves, and if they refuſe, they may be purſued criminally as Partakers of their Guilt, or civilly for the Payment of their Debt, and generally all theſe are liable if they refuſe to apprehend any Rebel for Civil Debts. But it may be doubted, 1. If any Judge be obliged to apprehend a Man at the Deſire of any Perſon who cannot inſtruct the Perſon whom he takes to be a Rebel, by producing Letters of Caption, as he muſt do in Civil Caſes, and what makes a Thief a notorious Thief to this Effect. 2. If mere Negligence in not apprehending theſe notorious Thieves be ſufficient to found a Criminal Purſuit againſt the Refuſer as Partaker, nor have I ſeen this ſuſtain'd; but if any Perſon ſhall contribute actively to a Thief's Eſcape, he is puniſhable as Art and Part, but with a leſſer Puniſhment. *Vide* Clar. *Quæſt.* 9. *Num.* 7. & Bart. *ad L. furti, ff. de furto ait ſpem datam ad evadendum dici auxilium ad committendum.*

*Nota*, BY this *Act* all who are preſent and able to apprehend, are oblig'd to aſſiſt in taking Thieves, or if they refuſe they are to be repute Partakers with them; and tho' they may be puniſh'd with ſome ſmall Mulct, yet the Certification here ſet down is in Deſuetude as to them, *vid. Tit. Duels Crim. Obſerv. Num.* 8. *Idem eſt facere, & non prohibere cum poſſis*: And as the Law preſumes, every Man guilty who will not concur to puniſh what all Men hate ſo much, and that they would concur if they favour'd not the Guilt; ſo this Aſſiſtance is ſo profitable for the Commonwealth, that ſuch as deny it are Criminal. But that which is conſiderable in this *Act* is, that if any clann'd Man rob any peaceable Subject, and if the Sheriff, or Steward, *&c.* refuſe to aſſiſt him, not only is the Sheriff, *&c.* liable; but further, it is declared lawful to them who have their Goods ſtollen and reſt, to apprehend and intromet with the Goods of the Offender, or any other of the ſaid Clann, and retain them till Compt and Reckoning; and tho' it would ſeem that this taking or retaining by private Authority, is not allowable till the Sheriff be required to give Satiſfaction, and refuſe; yet in the Caſe *Moor* contra *Mackfadrick*, 29. *November* 1678. it was found, that theſe were ſeparate Clauſes, and that a Perſon purſued for a Spuilzie, might propone relevantly that the Purſuer being a notorious Robber, or holden and repute ſo, had rob'd him of as much, and ſo he might juſtly have ſeis'd upon the like Quantity of the Purſuer's Goods, tho' he had not firſt required the Sheriff to repair him; nor was this Act found to be innovate by the 100 *Act*, *Parl.* 11. Jam. VI. which appoints a new Method for Goods taken away by clann'd Men.

XVII. HERE is a Revocation of the King's Property in general, but I find in the Regiſters of Council, that upon the 22. of *March* 1684. the King revokes all Rights made by him of the Abbacy of *Dumfermling*, which Revocation is made with the Conſent of the Privy-Council, tho' ordinarily Revocations are made by the Conſent of the Parliament.

XVIII. BY this Act the neareſt Agnat, that is to ſay, the neareſt of the Father's Side ſhould be Curator to Fools, Idiots, and furious Perſons.

*Obſerv.* I. THAT this Act is extended to deaf and dumb Perſons, to whom likewiſe the neareſt Agnat is to be Tutor; and tho' their Tutors and Curators are to be ſerved by this Act, yet if the neareſt Agnat omit, or is uncapable to ſerve, there is Place for a Dative. Nor doth this Act exclude the Father from leaving Tutors in his Teſtament to ſuch Idiots, and furious Perſons, as are within the Years of Tutory, as he may do to other Children. And *Craig* obſerves, that if the furious Perſon, or Idiot, have Lands, the Superior will be preferr'd to the neareſt Agnat; but in this I differ from *Craig*, for the Agnat will be preferr'd to the Tutory of theſe, as he will be to the Tutory of Minors, and Superiors have by this Act diſpenſed with their Feudal Intereſt, if they had any.

*Obſerv.* II. THIS Act relates to the Common Law, by which the Curators are called *Curatores legitimi*; but by that Law, as by ours, if there be no Agnats extant, the Judge gives a Dative, who is preferr'd to all other neareſt of Kin, *Vide Tit. ff. de Curat. Furios.* And the Agnats by that Law, as by ours, are preferr'd according to the ſame Degree as they would ſucceed, which is moſt juſt, ſince the Law does prefer them to the Cuſtody of the Eſtate, becauſe of their Hope of Succeſſion; and therefore it may be doubted where there are Three Brothers, whereof one is furious, if his Eſtate be conqueſt, whether the elder Brother will be preferr'd to be his Tutor, becauſe Conqueſt aſcends; but I encline to think that the Heir of Line is ſtill to be Tutor of Law.

*Obſerv.* III. That this Law appointing the neareſt Agnat to be Tutor, holds only where there is not a legal Adminiſtrator, and therefore if a Wife who is an Heretrix become furious, the Husband, and not the neareſt Agnat will be her Tutor. And tho' *Papinian* thought the Husband ſhould not be Tutor, *L.* 14. *ff. de Curat. Furioſ.* yet the Cuſtoms of other Nations agree with ours, *Perez. Num.* 10. *h. t.* *Vide Act* 67. *Parl.* 8. Ja. III.

*Obſerv.* IV. THO' this Act equiparates the Tutors of Fools, Idiots, and furious Perſons, to other Tutors of Law allow'd to Minors, yet there ſeems this Difference betwixt them, That Tutors of Law to Minors muſt ſerve within Year and Day from the Time they are in Capacity to ſerve; but the neareſt Agnat may ſerve himſelf Tutor of Law to an Idiot or furious Perſon at any Time; and when he is ſo ſerv'd he will be preferr'd to a Tutor-dative, tho' the Lords will authorize that Tutor-dative to exerce till a Tutor of Law be ſerved, the Exchequer being in uſe in the *interim* to grant Datives, as the Lords of Seſſion are to grant Curators *ad lites*, 21. *January* 1663. *Stewart* contra *Spreul.* And tho' in that Caſe the Pupil was not then declared Idiot or Furious by an Inqueſt, and ſo there could not be a Tutor of Law; yet it ſeems that albeit there had been a previous Declarator, and ſo the Tutor of Law had been negligent, the Deciſion had been the ſame; and the Reaſon is, becauſe this Act prefers the Agnats; and yet it decides not *quid juris*, if they enter not. And what if the next Agnat require the neareſt Agnat to enter, and he refuſe *quo caſu*, either it muſt be ſaid that albeit the Exchequer make him Tutor-dative, yet he is not properly Tutor or Curator, but only a Curator *ad lites*, or elſe if he be once properly Tutor, the next Agnat cannot thereafter ſerve himſelf, *nam Tutorem habenti Tutor non dator.* *Vide Obſer.* on the 67. *Act*, 8. *Parl.* Ja. III.

XIX. IT is to be obſerv'd from this Act, that Laws ought not to be extended *ad præterita*, but only *ad futura*; and as the Act ſays moſt reaſonably, *Subjects cannot obſerve what is not yet made*; and not only ſo, but *argumento hujus legis*, it may be concluded, that Proceſſes are to be decided according to the Laws that were made before the Proceſs was intented, tho' the Law be made before the Deciſion in the Proceſs, which is very obſervable: A notable Inſtance may be ſeen in *Act* 94. *Parl.* 6. Ja. VI. where the Parliament makes an Act upon Occaſion of a Proceſs depending before the Seſſion, to be a Rule in like Caſes for the future, but leaves the Caſe depending to be decided as they think juſt. *Vide Obſerv.* on 10. *Act*, *Parl.* 3. Ch. II.

XX. IT is by this Act appointed, that no Signatures or other Writs ſhall be preſented to His Majeſty but by His ordinary Officers, to whoſe Office the ſame properly belongs. And it appears by the Regiſters of Council, that this Act was a Part of the Remedy of that Complaint mentioned in the 13. Act of this Parliament.

*Obſerv.* I. THAT by Officers here are meant Officers of State, for none elſe can preſent Signatures; and tho' a General, Major, or a Preſident be His Majeſty's Officers, they cannot preſent Signatures, and yet any Officer of State may preſent promiſcuouſly any Signature, tho' it would ſeem by theſe Words, *By His Majeſty's ordinary Officers, and to whoſe Office the ſame properly belongs*, that every Officer of State may not promiſcuouſly offer, but that the Treaſurer or Treaſurer-depute can only preſent Papers relative to the Treaſury, the Juſtice-Clerk to the Juſtice-Court, *&c.*

*Obſerv.* II. THAT tho' any Officer of State may preſent Signatures, yet by the 60. *Act*, 1. *Seſſ.* 1. *Parl.* Ch. II. any Officer who preſents ſuch Papers is obliged to ſend the regiſtrate Docquet to the Secretary, to the End His Majeſty be ſo informed as that He may not grant double Rights.

# *PARLIAMENT* XI.

XXII. BY this Act the King's lawful Age is declared to be 21 Years complete, which Act was made to prevent a Debate that had fallen out in *France* a little before that Time, where the Parliament of *Paris* had declared that the *French* King was not Major till he had completed the laſt Year of his Minority; whereas the Parliament of *Rouen* had declared him to be of lawful Age, when he had begun the laſt Year of his Minority, *nam in favorabilibus annus inceptus habetur pro completo.* And tho' Minors may revoke Deeds done at any Time before the laſt Moment of their Minority, and that *Minoritas computatur de momento in momentum*;

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yet it is advantagious for a King to enter upon the Government of his Kingdom as ſoon as can be. And tho' this be the Age for reducing of Deeds done by them, they have another Majority in relation to the Government, for we find that *Joſias* enter'd upon the Government at Eight Years, and *Solomon* at Eleven. *Cicero Philip* V. tells us, that the Kings of *Macedon* entred very early, and in *Anno* 1375. the Kings of *France* were declared to be Majors and capable of the Government at Fourteen, but by the Commiſſion of Regency ſet down in the *Act* 1. *Parl.* 1. Ja. VI. the Regency is declared to continue till Seventeen, at which Time the King is to take upon Him the Government; but yet King *James* VI. took it upon Him ſooner. Nor do I find any particular Time limiting the King as to this Point, and therefore there may be many Doubts amongſt us, whether the King or the Governor ſhould be obey'd betwixt the King's Ages of Fourteen and Twenty One; but before Fourteen no Pupil is thought fit by Law for Adminiſtration; and it may be ſtrongly urg'd, that Seventeen is the legal Age: For why was the Commiſſions inſert, it being only a temporary Right, and ſuch uſe not to be inſert amongſt our Laws?

By our Law Minority runs in all Perſons to the laſt Moment of 21. Years; whereas by the Civil Law it runs till 25. Years complete; and in this our King differs not from others: But becauſe by the 2. *Act*, *Parl.* 1. Ja. II. our Kings were declared to be in Minority till 21. Years, therefore by the 87. *Act*, *Parl.* 10. *Q.* Mary, 21 Years of Age complete was declar'd to be the perfect Age of our Queens, and by this Act it is declar'd to be the perfect and lawful Age of our Kings. It were to be wiſh'd, that, for proving the Age of all Minors, there were authentic Regiſters appointed, as in other Nations, and in ſome Parts of our own, ſince for Want of this, true Probation of their Birth periſheth, and falſe Probation is adduc'd.

XXIV. O*BSERV.* I. That by this Act the reſetting Perſons of the *Romiſh* Religion is not ſimply made Criminal, except they did reſet them for Three Days together, or at Three ſeveral Times, knowing that they were ſuch, which may be urg'd in all Caſes of Intercommuning, and reſetting of Rebels; and yet in other Caſes once and ſhort Intercommuning is ſufficient to infer a Crime.

*Obſerv.* II. That by the 164. *Act*, 13. *Parl.* Ja. VI. the reſetting excommunicate Papiſts, or trafficking *Jeſuits*, for Three Nights together, or Three Nights at ſeveral Times, is made ſufficient to infer, that they knew they were ſuch *per præſumptionem juris & de jure*; nor could the Knowledge of their being ſuch be otherways proven; and if it had been neceſſary to prove their Knowledge, the Law might have been eaſily eluded by induſtrious Ignorance: And by that Act likewiſe the Third Fault is declar'd puniſhable as Treaſon; and becauſe the Puniſhment was ſo great, it was juſt the Preſumptions whereby it was to be inferr'd, ſhould be ſtrong.

XXV. THO' by this Act only the Sellers and Diſperſers of erroneous Books are to be puniſh'd at our Sovereign Lord's Will, and ſuch Books to be burnt; yet by our Practice, the Bringers Home of Crucifixes, Popiſh-Beads, *&c.* are to be uſed in the ſame Way: And tho' there is only Warrant here given to a Miniſter and Magiſtrates of Burgh to ſeiſe and burn ſuch Books, yet Magiſtrates uſe frequently to ſeiſe without a Miniſter, and Sheriffs and other Officers do likewiſe ſeiſe: But ſince Burning ſeems to be an extraordinary Power, and ſo not to be aſſum'd without a ſpecial Statute, I think that no Officers, ſave Magiſtrates of Burghs, with the Concourſe of a Miniſter, can burn.

XXVI. THE Reaſon why Miniſters Benefices under Prelacies are declared to be free of the Firſt-Fruits and Fifth-Peny of their Benefices, is, becauſe in Time of Popery the Firſt Year's Fruits of every Benefice were due to the Pope, and are call'd by the Canoniſts *Annata*, againſt which ſeveral Councils have made large, but ineffectual, Repreſentations; and the Fifth-Peny was payable to the King. And tho' this Act diſcharges only the Exaction of theſe in Benefices under Prelacies, yet now even Prelacies are free from theſe Exactions in *Scotland*, tho' in *England* the Firſt-Fruits belong ſtill to the King.

Tho' the Prieſts were free from Subſidies amongſt the *Egyptians*, *Geneſis* 47. *Verſe* 22. and that *L. placet C. de Sacr. Eccleſ. nihil extraordinarium abhinc ſuperinductumve ab Eccleſia flagitetur*, yet this was only as to Tithes, and Things merely ſpiritual; but the Lands of the Church were liable to Impoſitions, laid on for the common Defence of the Country: And therefore the Canoniſts *ad C.* 1. *de immun. Eccleſ.* give as a Rule, That *in bonis Eccleſiaſticis quod clericos in patrimonialibus ut laicus tractandus*; and ſuch was this Fifth-Peny here mention'd: And with us Miniſters Stipends, but not Biſhops Lands, are now ordinarily freed from Impoſitions.

XXVII. O*BSERV.* I. That tho' ſuch as invade Miniſters, for the Cauſes therein exprimed, *viz.* For ſeeking their Stipend, or becauſe the Miniſter inflicted Church-Cenſures upon them, or any other forg'd Quarrel, are to be puniſh'd with all Rigour; yet if they invade them upon any Account that is not Eccleſiaſtic or premeditate, as in an accidental Scuffle, they are only in theſe Caſes puniſhable, as for Wrongs done to other Subjects.

*Obſerv.* II. Since the Act appoints that they may be puniſh'd *with all Rigour, and the Tinſel of their Moveables*, it is clear that ſuch Invaders may be puniſh'd likewiſe perſonally, beſides the Confiſcation of their Moveables; yet the Words, *With all Rigour*, ſhould not be extended to Death: But by the 4. *Act, Seſſ.* 2. *Parl.* 2. Ch. II. *The aſſaulting the Lives of Miniſters, or the robbing of their Houſes*, is declar'd puniſhable by Death; and by the 5. *Act*, 1. *Seſſ.* of the ſaid 2. *Parl.* the Parochioners are made liable for the Outrages done to Miniſters, if the Actors cannot be got.

*Obſerv.* III. From theſe Words, *That they may be puniſh'd at the Inſtance of the Miniſter, or any other that will purſue*, this Crime is made ſo far *crimen publicum*, that it may be purſued *per quemlibet ex populo*, tho' he be not otherways intereſted.

*Obſerv.* IV. That this Act being only againſt Invaders of Miniſters, it is extended to Invaders of Biſhops, and all ſuch as have Power to adminiſter the Sacraments, 7. *Act, Parl.* 1. Ch. I. in which Act there are many other Extenſions of this Law.

XXIX. THE Popiſh Clergy had Right to Lands that were mortified to or bought by them, and to Teinds which belong'd to them as Churchmen. The Teinds were call'd the Spirituality of their Benefices, becauſe they belong'd to them as Churchmen; and the reſt was all comprehended under the Deſignation of the Temporality of their Benefices; and upon the Abrogation of Popery, the King did begin to erect ſome of the Temporality of their Benefices in Lordſhips, which He diſponed to ſeveral Noblemen, who were moſt active in the Reformation, or to theſe whom He reſolv'd to oblige by their Intereſt to be active in it, and theſe were call'd Lords of Erection: But thereafter the Parliament reſolving to fix a conſtant Rent to our Kings, thereby to preclude the Neceſſity of Taxes, and to engage future Kings not to return to Popery, they annex'd the Temporality of all the Church-lands and Benefices to the Crown by this Act, excepting theſe mention'd in the Act.

*Obſerv.* I. The Reaſon whereupon this Act is founded, is, That the former Kings having mortify'd a great Part of their Revenue to Churchmen, and having thereby impoveriſh'd themſelves and their People, it was therefore juſt, that the Ends for which theſe Mortifications were made, being declar'd unlawful, the Benefices ſhould return. By this Reaſon, ſuch Mortifications as were made by private Families, ſhould have return'd to them; whereas here all returns to the King: But in Law, theſe Religious Houſes being demoliſh'd, all ought to have fallen in to the King; for *quæ nullius ſunt ea ſunt domini Regis*; and theſe were ſuch, for they belong'd not to the old Proprietars, ſince they were once diſpon'd, nor to theſe Houſes, ſince they were extinguiſh'd; and that being found a falſe Religion, what belong'd to it, did by the Law fall under Confiſcation.

*Obſerv.* II. Tho' all Benefices belonging to Archbiſhops or Biſhops are by this Act annex'd, yet they are reſtor'd by the 2. *Act, Parl.* 18. Ja. VI. And tho' all Benefices belonging to Chapters are annex'd, yet theſe are reſtor'd by the 2. *Act, Parl.* 22. Ja. VI.

*Obſerv.* III. From theſe Words in the Clauſe of Annexation, *viz. All and ſundry common Lands bruiked by Chapters of Cathedral Kirks, or whereof they have been in Poſſeſſion as Commonty*, that Poſſeſſion in Church-lands is very often repute a ſufficient Right, and to be *loco tituli*: For underſtanding whereof, it is fit to know, that both before and after the Reformation, a Churchman being in Poſſeſſion by the Space of Seven Years, tho' without a Title, has the Benefit of a poſſeſſory Judgment; ſo that his Right cannot be quarrelled without Reduction: Nor needs he produce a Title, as Laics are oblig'd to do in poſſeſſory Judgments, *July* 18. 1671. Earl of *Home contra* the Laird of *Riſlaw*. And if he be Thirteen Years in Poſſeſſion, that Poſſeſſion is to him in Place of a Title; for by a Rule of the Chancery (as we believe) *decennalis & triennalis poſſeſſio habetur pro titulo*, tho' I find no ſuch Rule in the *Roman* Chancery: But yet theſe Thirteen Years induce only a preſumptive Title, which does not exclude the true Proprietar, if he can inſtruct that the benefic'd Perſon poſſeſſed either by a redeemable Right, and produce the Reverſion, as was found in the Caſe of *Francis Kinloch contra* the Biſhop of *Dumblane*, *July* 11. 1676. or by a precarious Right, as was found in the Caſe of a Miniſter, who had caſten Peits for Thirteen Years by Tolerance from the Heretor; and tho' there be no Difficulty where the Right mortified does expreſly bear, that *it is redeemable or precarious*, yet in abſolute Rights there is greater Doubt, whether after Thirteen Years they can be qualified by correſpective Obligations.

The Reaſon of this Privilege given to Churchmen is, That they being imploy'd in Divine Matters, are ignorant and careleſs of their Right, eſpecially ſince their Rights are not to deſcend to their own Heirs.

It is fit here to take Notice, that by a vulgar Error *triennalis poſſeſſio* was thought to give the Benefit of a poſſeſſory Judgment, 12. *March* 1629. *Marſhal contra* the Laird of *Drumkilbo*, and *decennalis* of a petitory, and thus did they interpret the former Rule. At the Reformation alſo the Popiſh Clergy did either ſend their Foundations to *Rome*, or did by Colluſion with the Laics intereſſed, or in Hatred of the Reformed Clergy, deſtroy their Rights: And therefore by an Act of *Sederunt*, 16. *December* 1612. it is declar'd, That Ten Years Poſſeſſion before the Reformation, or Thirty after the Reformation, ſhould be a ſufficient Right, either to Churchmen, or to the King's coming in their Place, by Virtue of this Act; and conform thereto the Lords decided *July* 5. 1626. Laird of *Kerſe* againſt *Reid.*

*Obſerv.* IV. THAT becauſe the *Romiſh* Clergy were put from their Benefices, therefore they are by this Act freed from any Warrandice they had given for Church-lands diſpon'd by them; and by the 110. Act of the ſame Parliament, what is here ſtatuted as to the Warrandice of Lands, is there extended to Tacks, Penſions, and Aſſignations; and ſo theſe Two Acts are not abſolutely coincident, and the laſt unneceſſary, as they would ſeem to be: And tho' this was done *in majorem cautelam*, yet by the Common Law they would not have been liable in Warrandice, ſince no Man is liable in Warrandice, where the Eviction proceeded upon a ſupervenient Statute; for no Man can warrant againſt a ſupervenient Law.

*Obſerv.* V. THAT notwithſtanding that the Church-lands are annex'd, yet there is a Diſſolution in the ſame Act, warranting His Majeſty to feu any of the ſaids Church-lands during His own Time.

*Obſerv.* VI. THAT tho' by this Act all prior Diſpoſitions made of Church-lands by His Majeſty to Lords of Erection, are excepted from the Annexation, yet the Superiority of all the Erections, both before and after that Act, are annex'd to the Crown by the 10. *Act*, *Parl.* Ch. I.

*Obſerv.* VII. THAT the Spirituality of Benefices, *viz.* Their Right to the Teinds, is expreſly declared not to be annex'd, but to remain with Churchmen as formerly; for tho' by the 189. *Act*, *Parl.* 13. Ja. VI. it be ſaid that the Teinds of *Dumfermling* are annex'd to the Crown after the Form of the Act of Annexation 1587. by which all the Teinds of the remanent Kirk-lands and Prelacies of the Kingdom are annex'd, yet that Clauſe is only inſert by Miſtake, in my Judgment; for that is not the Deſign of the Act.

WHERE Stock and Teind are promiſcuouſly feued, it is declar'd by this Act, That His Majeſty remains Superior both as to Stock and Teind, the Churchmen having only Right to the Tenth Peny of the Feu-duty, the other Nine belonging to His Majeſty; for the Temporality being only annex'd to the Crown, and the Teinds being reſerv'd to the Church, it was very juſt that where a Duty was payable out of Church-lands, *cum decimis incluſis*, the King ſhould only have Right to a Ninth Part of that Duty, and the Tenth ſhould belong to the Churchman or Titular, in Contemplation of the Teinds: But ſtill *decimæ incluſæ* are ſo fully exempted from all Eccleſiaſtic Payments, that tho' there be not Sufficiency of Teinds in the Paroch, yet *decimæ incluſæ* are never burdened with the Payment of Miniſters Stipends, tho' Miniſters Stipends be the conſtant Burden of all Teinds: And for the ſame Reaſon it was found 21. *January* 1633. that no Valuation could be led of Land feued *cum decimis incluſis*, and not confirm'd before this Act, and that Laics might preſcrive a Right to them, but not to other Teinds, which ſhews that *decimæ incluſæ* are never lookt upon as Teinds. This was ſo decided before the Commiſſion in *January* 26. 1675. Heretors of *Tulliallan* contra *Colvill*: But afterwards in *March* 1684. the ſame Caſe being heard *in Præſentia* before the Lords, by a Reference from the High Commiſſion; it was found, That conform to this Clauſe in the Act of Annexation, reſerving the Tenth Peny to the Eccleſiaſtic Perſon, that therefore the Heretor having Right to his Lands, *cum decimis incluſis*, ſhould be liable to the Miniſter for the Tenth Part of his Feu-duty, with Relief to him againſt the Titular *pro tanto.*

FOR underſtanding the Origin and Nature of *decimæ incluſæ* with us, it is fit to know that by the Canon Law the Parſon or Incumbent, and the Paroch Church, were founded in the Right of all the greater Tithes, called *decimæ prædiales*, and that it was not lawful for any Man to abſtract their Teinds from it, *Cap. de decimis* 16. *Queſt.* 1. And albeit the Popes did pretend, that ſince the Biſhops had the Management of the Teinds, they as univerſal Biſhops might, by their ſupereminent tranſcendent Right, appropriate them to the Uſe of Monaſteries, Monks being the beſt of the Poor, and Teinds being naturally burden'd with the Maintenance of the Poor; yet our Kings who, in all the Tract of our Parliaments, own'd their own *Regalia*, and the Epiſcopal Order, againſt the Invaſions of the Popes, did by the 7. *Act*, *Parl.* 2. Ja. IV. declare it a Point of Dittay, that is to ſay, criminal for any Man to take a Right of Teinds from any, ſave the Parſon, Vicar, or their Farmers; ſo far they acknowledg'd the Parochial Churches to be founded in their Right to the Predial Teinds.

NOTWITHSTANDING whereof, the Popes to get the Monks to depend immediately upon them, did grant to thoſe Monks Exemptions from Payment of Tithes; for they, as well as others, paid to the Parſon or Incumbent, till Pope *Paſchal* II. granted thoſe Exemptions, but theſe Exemptions did thereafter ſo far diminiſh the Proviſion of the Parſon, (very many Lands being either mortify'd to them, or bought in by them) that *Theodoſius* and other Emperors were forc'd to make Laws againſt exorbitant Mortifications. And Pope *Adrian* was forc'd to limit the Exemptions to Four Religious Orders, *Ciſtertians*, *Hoſpitalers*, *Templars*, and Knights of St. *John*; ſtill allowing all of them Exemptions for their *Novalia* or

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Lands, firſt cultivated by themſelves. But Pope *Innocent* III. in the *Lateran* Council, thereafter ordain'd, that even theſe Four Orders ſhould pay Tithes for what Lands they ſhould acquire after that Time; which I the rather obſerve, becauſe it has been decided by our Seſſion, *July* 15. 1664. *Thomas Crawford* contra *Preſtongrange*, that Lords of Erection ſucceeding in place of the *Ciſtertian* Monks, ſhould be free from Tithes, as the Monks were, without adverting whether theſe Lands for which Exemption was pleaded, were beſtow'd on their Monaſteries after the Year 1120. And it ſeems that this Exemption ſhould not be allow'd to theſe Monaſteries, ſince they were not allow'd to the Temple-lands with us; and that ſuch Privileges are due to neither, becauſe this was a perſonal Privilege given to the Monks, as the Poor, and ſo ſhould not deſcend to the Lords of Erection. The Monks being thus Maſters of many Tithes, feu'd out their Lands and Tithes promiſcuouſly, for the Encouragement of the Labourers, who have always thought it a Loſs and a Slavery to wait till their Tithes be drawn.

LAICS alſo enjoy'd Tithes, and alienated them as their own Heretage for many Ages together, it being generally believ'd, as *Selden* contends, that the Tithes were not due to Churchmen, they having Right only to a Maintenance, *jure divino*; tho' others aſcribe theſe laical Infeudations to a Corruption begun by *Charles Martel* King of *France*, who, to gratify and pay ſuch as were to aſſiſt him in the Holy War, diſpon'd to them the Tithes *conſentientibus Epiſcopis*, who knew, that if the *Saracens* prevail'd, Religion would be deſtroy'd, and he promiſing to reſtore them. But after this Time it is undeniable, that *de facto* Teinds were diſpon'd to, and by Laics, till the *Lateran* Council 1169. in which the Canon was made, *Prohibemus ne Laici decimas cum animarum ſuarum periculo detinentes in alios Laicos poſſint aliquo modo transferre. Si quis vero perceperit & Eccleſiæ non reddiderit Chriſtiana Sepultura privetur*; but yet before that Time, laical Infeudations were diſcharged, *per Concilium Turon.* 1096. tho' we in this Nation conſider only the Diſcharge in the *Lateran* Council.

IT remains clear from theſe Informations, that our *decimæ incluſæ*, are in Effect the ſame with the *decimæ infeudatæ* in the Canon Law; and theſe are call'd *decimæ incluſæ*, where the Stock and Teinds were never ſeparated, but were feu'd jointly before the *Lateran* Council. But yet it ſeems that all *decimæ infeudatæ* are not eſteem'd *incluſæ* with us: For in a Caſe betwixt *Monimusk* and *Pitfoddels*, Teinds were found not to have the Privilege of *decimæ incluſæ*, tho' tranſmitted by Infeſtments, and call'd *decimæ incluſæ*, becauſe there was ſeparate a *Reddendo*, paid for the Teind and Stock, and ſo it could be known to be different from the Stock, albeit it was contended that *decimæ incluſæ* and *infeudatæ*, were *pares termini*; and a different *Reddendo* did not evince that the Teinds had ever been ſeparated from the Stock, but only that there was a different Duty, as is in Lands of the ſame Holding ofttimes. And it may in general ſeem ſtrange, why we ſhould add ſince the *Lateran* Council; for that Council did find that Laics before that Time were incapable of any Right to Teinds; and therefore all Feus of Teinds, whether before the *Lateran* Council or after, ſhould be null. And this Error, it ſeems, has been occaſioned by our concluding, That becauſe Laics were declared uncapable of them by that Act, therefore they were capable of them before it; and yet with us a Laic cannot preſcrive Teinds, becauſe he is not capable of them. And *Balfour* tells us a Deciſion, wherein not only Alienations of Teinds, but even Tacks of Teinds for Three Ninteen Years, were accounted Alienations, and ſo null; for elſe diſcharging Alienations might have been eluded by ſetting long Tacks: But now Teinds paſs by Infeſtments, as the Stocks do, ſince the Surrender, and His Majeſty's Decreet thereupon, wherein every Man may buy his own Teinds, and ſo may ſet as long Tacks of them as he pleaſes, or feu them out *cum decimis incluſis*.

BUT it may be alledged, this Tenth Part payable to the Eccleſiaſtic Perſon for Teinds, may be made liable to Miniſters Stipends, ſince this Tenth Part muſt be conſtructed as Teinds, and ſo ſhould be liable to all the Burdens of Teinds. But to this it is anſwered, That theſe *decimæ incluſæ* are conſider'd as a Part of the Stock, and ſo no more liable to Miniſters Stipends than the Stock is. This Diviſion of the Feu-duty doth not alter the Nature of the *decimæ incluſæ*, but is only inſert to regulate the Way of Payment of the Feu-duty, even as if after a Feu granted of Stock and Teind promiſcuouſly for a Feu-duty, the Churchman ſhould diſpone Nine Parts of the Feu-duty, and reſerve only the Tenth to himſelf, that Tenth Part could not be liable to Miniſters Stipends. 2. Since this Act, by the Death of the Titular, both Temporality and Spirituality came in His Majeſty's Hands, and ſo were diſponed to the Lords of Erection, and returned to them without this Diſtinction of Nine or Tenth Parts.

THO' by this Act Teinds are declared the Spirituality of Benefices, yet they may be ſold, and are appointed now to be ſold by the Parliament 1633, and the Heretors are to be inſeft in them as in their other Lands, which ſeems inconſiſtent with their being the Spirituality of Benefices, and the Patrimony of the Church. But it may be anſwered, that they are even in that Caſe burdened with Payment of Miniſters Stipends, till they be competently provided.

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*Obſerv.* VIII. By this Act all Lands and others mortify'd to Colleges, are excepted from the Annexation; and the Reaſon is, becauſe Kirk-lands remain ſtill to be ſuch, albeit they be mortify'd to Colleges, 12. *February* 1635. *Tock contra* the Parochiners of *Achtergoven*; and therefore it was neceſſary to except them. *Maiſons Dieu*, or Hoſpitals, are alſo excepted, and *Maiſons Dieu* are Hoſpitals dedicated to the Honour of God; it is a *French* Word, ſignifying the *Houſe of God*. The Canon Law calls them *Domus Dei*, and makes them Hoſpitals.

*Obſerv.* IX. Penſions likewiſe out of Church-benefices are excepted, if they be authoriſed either by Decreets, or Poſſeſſion, but Poſſeſſion of a Part is repute Poſſeſſion of the Whole; and by the 137 *Act*, 12 *Parl.* Jam. VI. this *Act* is ratified, and it is declared, that all Penſions out of the Spirituality or Temporality, neither clad with Decreet nor Poſſeſſion in the Prelate's Lifetime who diſpon'd the ſame before this *Act* of Annexation, ſhall be null; but if they be clad with Poſſeſſion in manner foreſaid, they are valid againſt ſingular Succeſſors, tho' Penſions granted by Laics are not valid, albeit they be clad with Poſſeſſion prior to the ſingular Succeſſor's Right, as was found the 11. of *December* 1662, *Clappertoun* contra the Lady *Ednem*; but by the *Act* 140. *Parl.* 12. Jam. VI. Penſions granted by Churchmen ſhould contain the particular Names of Tenents and Duties, *vid. Obſerv.* on the 62 *Act* of this *Parl.*

*Obſerv.* X. By this *Act* it is declared that the Bailly or Steward of the Regality ſhall have the ſame Power he had before to repledge from the Sheriff, or Juſtice-general, in caſe he hath prevented the Juſtice-general by apprehending or citing the Perſon before he be apprehended or cited by the Juſtices; but if the Juſtices have prevented, as ſaid is, then the Bailly of the Regality, or Steward, ſhall not have Power to repledge, but he may ſit with the Juſtice-general if he pleaſes: So that in effect by this *Act* there is this Difference betwixt the Eccleſiaſtic and Laic Regalities, that there is a Right of repledging competent to the Laic Regalities; whereas Eccleſiaſtic Regalities have not this Privilege, except they prevent the Juſtices, but otherwiſe the Bailly of Regality may only ſit with them; the Reaſon of which Difference is, that the Regalities having been only granted in Favours of the Religious Houſes, which were ſuppreſt, the Regalities became extinguiſh'd with them; and His Majeſty having *ex gratia* only reſerved their Offices to the Lords of Erection, he thought that they were abundantly gratified by this new Conceſſion, without allowing them the Power to exclude his own Juſtices, in Caſe of Prevention; and this was alſo a Favour to the Lieges in not troubling them with Two Courts; nor were the Lords of Regality much prejudg'd, for by this ſame *Act* they retain the whole Right to the Eſcheats, and Fines, even of theſe who are condemned by the Juſtices.

*Obſerv.* XI. That the Parliament has been ſo careful of the Vaſſals and Feuers of Kirk-lands, that becauſe the King, who is declared Superior by this *Act* of all theſe Lands, was a more powerful Oppoſite; therefore by a Clauſe in this *Act* it is provided, That the King ſhall not quarrel their Rights to theſe Kirk-lands, ſave by Improbation, or by a Reduction only for a Diminution of the old Penny-mail, *de liquido ad liquidum*; that is to ſay, That tho' ſuch Rights may be quarrelled as granted with Diminution of the Rental, or by unlawful Converſion, yet no Diminution ſhall reduce their Feus, except where the Diminution is of old Rentals, becauſe about the Time of the Reformation Feus granted for high Feu-duties, and theſe being renewed again for leſs than were once payed, the Feu might have been queſtion'd, becauſe tho' the Feu-duty was leſs than was once payed, yet it was not below the old Rental, *de liquido in liquidum*, as if Five Merks were taken when Ten was of old payed, without Conſideration of Converſions; ſo that tho' Ten Merks were taken in the Feu quarrelled in place of Ten Bolls, that would be no relevant Reaſon of Reduction: And ſince by the Act of Parliament, 1633. Kirk-lands are annex't to the Crown; the Lords found, That the Lords of Erection cannot now purſue Reductions or Improbations of their Vaſſals Kirk-lands, and that His Majeſty's Advocate could not inſiſt in any ſuch Actions, except he had an expreſs Warrant from the King, tho' it would appear that this Act is a ſufficient Warrant to purſue Improbations or Reductions for Diminution in the Terms of this *Act*, 24 of *June*, 1664. Laird of *Preſtoun* contra *Nathaniel Ebred*.

*Obſerv.* XII. That Lands belonging to the Benefices of Laic Patronages, are excepted alſo from this Annexation, by which are meant only ſuch Laic Patronages, as were lawfully eſtabliſht before the Reformation, and not ſuch as were diſpon'd by the King to Laics, and to which he had Right, as coming in place of the Pope, who was Univerſal Patron *in dubio*, before the Reformation; for theſe are ſtill accounted Eccleſiaſtic Patronages, ſince they were ſo originally, and ſo ought not to have been excepted from this Act: But whether all the other Patronages, which belonged formerly to Monaſteries, were annexed to the Crown by this Act, was fully debated 17. *November* 1677. in the Caſe of *Steuart* contra the Laird of *Watertoun*; and that they were annexed, was urg'd, becauſe by the firſt Words of this Act, the Abbacies, &c. and all Profits, Emoluments, whatſoever belonging to them were annexed, and there being nothing that the King and Parliament was more concerned in, than to have the Patronages depend upon the Crown, thereby to prevent the Influence that Schiſmatic private Patrons might have; It was moſt reaſonable to think, that when all Things belonging to Mo-

ACT XXIX. naſteries, were annex'd, theſe ſhould have been annexed. Likeas, Sir *Thomas Hope* among other Rights crav'd to be reduc'd, crav'd likewiſe that all the Rights made to the Lords of Erection of the Patronages belonging formerly to Monaſteries, ſhould be reduc'd as contrary to this Act, upon which Reduction the Lords of Erection did ſubmit their Rights to theſe Patronages, and in the King's Determination upon that Submiſſion, His Majeſty determined that the Lords of Erection ſhould have only Right to the converted Prices of their own Feu-mails, and Feu-ferms of their Superiorities, *&c.* It was likewiſe there contended, that the ſaids Patronages were likewiſe annexed by the 13 and 14 Acts of the Firſt Parliament *Charl.* I.

To which it was anſwered, That Patronages were never annexed as Parts and Pendicles, but where it was deſign'd they ſhould be annexed, they were ſtill annexed *per expreſſum*, as in the Annexation of the Abbacy of *Dumfermling*, *Act* 189. *Parl.* 13. Jam. VI. and it were abſurd to think, that ſince the foreſaid general Clauſe did annex Things of the meaneſt Conſequence, ſuch as Service of Tenents, *&c.* that it would have omitted Things of ſo great Conſequence, as were the Patronages of many Monaſteries; nor did any of the Leiges who had Right to ſuch Eccleſiaſtic Patronages from the King, crave ever a Diſſolution of them in Parliament, which certainly they would have done, if they had looked upon them as annex'd, nor were they annexed by the 13 and 14 *Acts Parl.* 1. Ch. I. becauſe theſe Acts do not mention Patronages *per expreſſum*, nor can they be comprehended under the general Word, *Pertinents*, expreſt even in theſe Acts, for the Reaſons foreſaids: And to evidence that His Majeſty had determined nothing as to the Patronages belonging to the Lords of Erection, His Majeſty does in the 1 *Parliament* 12 *Act*, Ch. II. expreſs theſe Words, *Likeas, alſo the remanent Points of our ſaid Commiſſion anent the Patronage of Kirks, &c. are not yet begun to be treated*; therefore, *&c.* This Debate came not to a Deciſion.

What the Condition of our Teinds is ſince this Act, ſhall be treated fully in my *Treatiſe of Teinds*, whether the Obligation of paying Teinds proceeds from the Moral, Judicial, or Common Law, alſo is not agreed to; but the moſt ordinary Opinion is, that they are due to Churchmen, before any poſitive Law, and the *Quota* of Tenths proceeds from poſitive Law, and D. *Thomas Part.* 3. *Quæſt.* 6. makes the Tenth to be due, becauſe as all *Digits* under Ten, are imperfect, and do tend to Ten as their Perfection; ſo Man being naturally loſt, we pay our Tiths to theſe Miniſters by whom our Perfection comes. And thus ſome Schoolmen conclude, That Tithes flow from the Moral Law, in ſo far as they are a neceſſary Maintainance for Miniſters; from the Judicial Law, in ſo far as concerns the Number of Ten; and Ceremonial, in ſo far as concerns the foreſaid Typicals. Nor can it be deny'd that *Abraham* paid Teinds (before any poſitive Law) to *Melchiſedec*, tho' the learned *Selden* interpretes this Place only to be the Tenths of what was taken by the War, and that from *Joſephus* and from *Heb. Cap.* 7. *v.* 2. and the *Greek* Word there uſ'd, does properly ſignifie *Spoils*, call'd by *Sulpitius Severus, decimam prædæ*. But yet I ſee not why that alledg'd Cuſtom among the *Jews*, of giving *the Tithes of their Spoils*, could have proceeded from any other Ground, than that which was common to all Tithes; nor can I believe *Selden*, who aſſerts that Tithes were not paid in the primitive Church, till the Days of St. *Auguſtin*, and S. *Ambroſe*; for if we do not controvert the Truth of all Authority, we will find the Payment of Tithes much elder.

Teinds were likewiſe accounted Spirituality by the Canoniſts. *Vide Rebuff. Queſt.* 2. *Num.* 9.

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How theſe Teinds came to belong to Monaſteries may be doubted, ſince naturally the Curates of the reſpective Paroches are founded *in jure communi quoad* the Right to their predial Teinds, ſo that they need not prove their Right thereto; and this was very juſt, becauſe they having the Cure of Souls, ought likewiſe to have had that which was given as an Encouragement of that Cure. And though to this the ordinary Anſwer be, That the Pope, who had only Right to alienate ſuch Teinds, did uſe to give them to Monaſteries, *nam licet ille jus divinum tollere non poteſt, tamen modificare poteſt*; yet I conceive that our Kings, and even our Laics with the Conſent of our Kings, did think they could beſtow the Teinds belonging to theſe Kirks, whereof they were Patrons, upon Religious Houſes, whereof I have ſeen very many Inſtances in our old Charters, one whereof I ſhall ſet down for an Example, *Alexander Dei gratia Rex* Scotorum, *&c. Sciant tam poſteri quam præſentes nos conceſſiſſe, &c. Deo & Eccleſiæ Sanctæ* Mariæ *de* Dryburgh, *Eccleſiam de* Lanarch (now *Lanerk*) *cum terris, & decimis, & omnibus rebus juſte ad illam pertinentibus.*

*Item*, How the other Church-lands became firſt to belong to Monaſtries, I ſhall, God willing, clear in an expreſs Treatiſe concerning Kirk-lands and Teinds.

XXXI. THIS Act is explain'd in the former Revocations; only here the Fees and Penſions granted to the Officers of the Crown are excepted from this Revocation: And the Officers of the Crown are declar'd to be, the Treaſurer, Secretary, the Collector (which Office is ſince join'd to the Treaſurer) the Juſtice, that is to ſay, the Juſtice-General, Juſtice-Clerk, Advocate, Maſter of Requeſts, Clerk of Regiſter, and the Director of the Chancellary, the

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Director of the Rolls is but his Depute. The Order wherein they are ſet down makes the Advocate to precede the Regiſter; and though the Juſtice-Clerk be nam'd before the Advocate, yet that is only, becauſe, in all this Enumeration, theſe of one Court are ſtill ſet together; and therefore the Juſtice, Juſtice-Clerk, and their Deputes, are ſtill ſet together: But it would appear that the Juſtice-General ſhould by this, precede both the Regiſter and Advocate. But by *Ch.* I. His Revocation, which is the 9. Act of His Firſt Parliament, the Regiſter and Advocate are ranked before the Juſtice and Juſtice-Clerk, & *poſteriora derogant prioribus*. ACT

*Nota*, The Privy Seal and Treaſurer-Depute are not here marked, tho' they be both Officers of the Crown. The Precedency amongſt the preſent Officers of State, was by Act of Council, *February* 20. 1623. thus determined; Lord Chancellor, Lord Treaſurer, Lord Privy-Seal, Lord Secretary; Lord Regiſter, Lord Advocate, Lord Juſtice-Clerk, Lord Treaſurer-Depute. By Act of Parliament 1661. the Preſident of Seſſion was then, and not till then, ordain'd to precede the Regiſter, Advocate, and Treaſurer-Depute; and the Regiſter and Advocate then were ordain'd to precede the Treaſurer-Depute.

By this Act of Revocation, all the Exceptions in any former Acts are likewiſe revoked; but under this Part of the Revocation do not fall the Exceptions in the former Act of Annexation; for King *James* was then Major: And tho' He had not been Major, yet theſe Exceptions being made by a public Law, it may be ſaid, that public Laws cannot be taken away by a Revocation; for the Revocation is but a private Act of the King's, whereby His Majeſty ſecures Himſelf againſt private Deeds done by Himſelf in His Minority, but not againſt what He conſented to as public Laws.

By the laſt Clauſe of this Act it is provided, That His Majeſty ſhall not be prejudg'd, by ſuffering any Party to poſſeſs any Lands or others fallen under the Revocation, but that His Majeſty may put His Hand thereto at any Time, but any Obſtacle: By the firſt Part of which Clauſe it is not meant, that Preſcription ſhall not be valid againſt the King, but only that the Poſſeſſors ſhall not have the Benefit of a poſſeſſory Judgment; and by the laſt Clauſe it appears, that our Kings having revoked, they needed not intent Reductions *ex capite Minoritatis*, but may *brevi manu* intromet with what falls under Revocation, even as they may do in their annex'd Property; for this ſame Clauſe is like to that contain'd in the Annexation, Ja. II. *Parl.* 11. *Cap.* 41. and which is repeted in all the other Acts of Annexation. See *Obſerv.* upon that Act. But it is more reaſonable to think, that the King needs no Reduction, becauſe he muſt prove Leſion, in caſe of Reductions *ex capite Minoritatis*; but the King needs prove nothing in the Caſe of Annexation: Yet our King is ſtill in Uſe to purſue Reductions, and not ſummarily to diſpoſſeſs theſe who have Right.

WHILST our Parliaments grew very factious in the Time of Queen *Mary*, the Popiſh and Proteſtant Party contending who ſhould prevail in Parliament, the Popiſh Clergy, who were very numerous in Parliament, ſince all the Biſhops and mitred Abbots did ſit there as Churchmen; each of them who had Lands and Heretage craved Two Votes, one as Churchmen, and another as Barons. To prevent which for the future, this Act was made, diſcharging any of the Three Eſtates to take upon him the Office of all the Three Eſtates, or any Two of them; but the following Words are not ſo clear, *viz. That every Man ſhall only occupy the Place of that ſelf-ſame Eſtate wherein he lives, and of which he takes the Stile*, which was deſign'd to keep Barons, who could not get themſelves choſen to repreſent their Shires, from being choſen as Burgeſſes of Parliament, tho' they were Provoſts, or Magiſtrates, as they then ordinarily were; and by it alſo a Burgeſs, who is ordinarily ſo deſign'd, may be debarred from being choſen as a Baron of a Shire. This Act was long in Deſuetude; but of late, by Acts of Burrows, all Burgeſſes are diſcharg'd from electing Gentlemen to repreſent them in Parliament, under the Pains ſpecified in theſe Acts; for they found that Gentlemen did not adhere to, nor underſtand the true Intereſt of Burghs; and the King found that none deſir'd to be ſo elected, except ſuch as had private Deſigns; albeit upon the other Hand it is repreſented, that this is the Way for Burgeſſes to have their Intereſt maintain'd by Lawyers or able Stateſmen, either of which they may chooſe; and the People of *England*, who are very jealous of their Privileges, do chooſe ſuch, by which likewiſe their Parliament is ſo conſiderable, and their Laws are made by ſo judicious Lawyers: But by an Act of the 3. *Parl.* Ch. II. it is determin'd, that only actual trading Merchants can repreſent Burghs-Royal in Parliament; and that Act was founded upon an expreſs Deciſion of the Seſſion. XXXIII.

THE Unlaws for Abſents from Parliaments here ſet down are 300 Pounds for every Earl, 200 Pounds for every Lord, 100 Pounds for every Prelate, and 100 Merks for every Burgh; but there is no Penalty appointed for Barons: And I think that they are comprehended under the Word *Lords*; for the Lords and Barons make but one State of Parliament, and *Laird* is but a Corruption of the Word *Lord*. Of old Ten Pounds only was the Unlaw or Amerciament, as is to be ſeen by the Preface of all the Acts of Parliament, which bears ordi- XXXV.

ACT dinarily theſe Words, *Alii vero quaſi per contumaciam ſe abſentaverunt, quorum nomina patent in rotulis ſectarum, quorum quiſque adjudicabitur in Americiamento decem librarum.*

XXXVI. THIS Act appointing every State of Parliament to have Three Apparels, conform to a Pattern to be made, was not made that every Man might have Three ſeveral Habits, but to the End each diſtinct Eſtate might have a ſpecial Habit; and yet Barons nor Burgeſſes have as yet no diſtinct Habit for Parliament.

XXXVII. FOR underſtanding this Act, appointing the Number of the Lords of Articles in every State to be equal, and that the moſt ſhall not exceed Ten, nor the leaſt be fewer than Six, it is fit to know, that by the 1. *Act*, 3. *Seſſ. Parl.* 1. Ch. II. the Lords of the Articles are ordain'd to be elected and conſtitute in Manner following, *viz.* The Clergy chooſe Eight of the Nobility, the Nobility Eight of the Clergy, and theſe Sixteen ſo elected, or ſuch of them as are preſent, do chooſe Eight Barons and Eight Burgeſſes, to whom are added the Officers of Eſtate, and the Chancellor preſides: And the Articles being ſo conſtitute, do prepare Laws, Acts, and Overtures, and order all Things remitted to them by the Parliament.

XXXVIII. BY the 135. *Act, Parl.* 7. Ja. VI. no Advocate could plead in Reductions of Forfeitures without a Licence, which is abrogated by this Act; but becauſe this Act gave Leave only to Perſons accuſed before the Parliament to have Advocates without Licence, therefore by the 90. Act, of this Parliament, Advocates are ordain'd to plead in all Criminal Caſes, and they do ſo upon Supplications. This craving a Licence, was founded upon 98. *Act*, 14. *Parl.* Ja. III. *Vide Crim. Obſerv. Tit.* Advocates.

XXXIX. THIS Act is fully cleared, *Crim. Obſerv. Tit.* Juriſdiction of the Parliament.

XL. IN this Act the King promiſes to do nothing that may prejudge the Liberty of Voting and Reaſoning; but yet if any Perſon ſhould offer to argue what is downright Treaſon, this Act would not defend him; for by Voting and Reaſoning jointly may be inferred, that that Reaſoning is only allow'd which relates to a ſtated Caſe, and to be put to the Vote, and nothing that is treaſonable will be allow'd to be ſtated in Order to a Vote.

XLI. THIS Act diſcharging all Contention for Priority of Place, relates only to Parliament, and the Diſturbance thereof; but by a Decreet of Ranking *in Anno* 1606. His Majeſty having ranked the Nobility, has commanded them to obſerve the Precedency there aſſign'd in all Places, and that under the Pain of being puniſhable as Contemners of His Authority.

XLII. THO', by this Act, all Actions of Moleſtations are ordain'd to be purſued before inferior Judges, as being naturally but Actions for cognoſcing of Marches, where the Controverſy being *facti* can beſt be underſtood upon the Place; yet now ſuch Actions are ordinarily purſued before the Lords, becauſe there is a Declarator join'd with the Moleſtation; for the Purſuer libels, That tho' ſuch Lands be his Property, yet he is moleſted in the Poſſeſſion thereof: And the Reaſon of this Invaſion is, becauſe Declarators of Property, as all other Actions concerning double Rights, can only be purſued before the Lords of Seſſion.

THE Form preſcribed to Moleſtations by this Act is, That the Lords ſhall direct Letters to the inferior Judges upon Fifteen Days Warning, who ſhall continue their Courts from Eight Days to Eight Days; and theſe inferior Judges having diſcuſs'd the Points of Law, they ſhall chooſe an Aſſiſe, the moſt Part whereof ſhall have Four Ploughs of Land, or 300 Merks of yearly Rent in the ſame, or neighbouring Paroches, if there be mutual Purſuits, the Judge ſhall diſcuſs both together, and chooſe an Aſſiſe out of the Aſſiſes cited by either Party equally, and the odd Man to be choos'd by Cavil: If the Judge Ordinar be ſuſpect, the Lords ſhall grant Commiſſion, by their own Act, or by a Commiſſion under the Teſtimony of the Great Seal, to unſuſpect Judges.

THIS Form is ſtill almoſt in Obſervance; only the Lords, in dubious Caſes, grant Advocations to themſelves where the Judge is ſuſpect: And after the Cauſe is debated, the Lords ordain the Ground to be viſited by ſome of their own Number, or grant Commiſſions to others, if the Lands lie very remote; but theſe Commiſſions, under the Teſtimony of the Great Seal are abſolutely in Deſuetude.

IF the moſt Part of the Inqueſt be not clear, the Lords find, That in that Caſe the Cauſe ſhould be Advocate to them as the Supreme Court, and they will judge according to the Probation already taken, or will grant Warrant to cite new Witneſſes, as they did 21. *July*, 1675, *Walſtoun* contra *Chieſly*. Tho' this Act appoints the Inqueſt to be choſen of Landed-men, having 4 Ploughs, or 300 Merks, and that in or near the Paroch where the controverted Land lies, yet the Verdict will be ſuſtain'd tho' they have not ſo much, and tho' they dwell not in that Paroch, albeit there be ſuch in the Paroch. This was formerly appointed § 14. *C.*

74. *L.* 2. *R. M.* where ſuch Cognitions are appointed to be *per fideles homines de viceneto.* And *Skene* there obſerves, that Perambulations differ from Moleſtations, in that Perambulations are petitory Judgments, and concern Property; but Moleſtations are only poſſeſſory Judgments, tho' both tend to the Trial of Marches.

*Nota*, THAT by the laſt Clauſe of this Act, the Members of the College of Juſtice are exeemed from Trial before Inferior Courts, which was formerly granted in Removings, *P.* 6. *C.* 39. Queen *Mary*, and is here extended to all Cauſes according to old accuſtomed Uſe. And tho' it was alledged, that theſe laſt Words were reſtrictive, and ſo the Members of the College of Juſtice could not Advocate their Cauſes from Inferior Courts, except in ſuch Caſes only as they could prove *old Uſe and Wont*; yet theſe Words are found exegetic, and to be equivalent, as if the Act had ſaid, Becauſe of old accuſtomed Uſe, granting them that Privilege. And this was very reaſonable, for ſince they are oblig'd to attend the Lords and their Clients, the citing them before Inferior Courts had been inconſiſtent with Both.

THE Action of Moleſtation is the ſame with us, that *finium regundorum* was by the Civil Law; and what can ſtop Perambulations in our Law, are ſet down, *Stat.* David II. *Cap.* 20. where amongſt other Things it is obſerved, that a Minor is not obliged to defend in Perambulations; and this is the only Place in our written Law, where that old Maxim is to be found, *Minor non tenetur placitare de hæreditate paternâ*; and yet it ſeems that a Moleſtation being declar'd by this Act to be *judicium poſſeſſorium*, a Minor ſhould be obliged to defend in this, as he is in all other poſſeſſory Judgments: But the Reaſon of this Exception in Moleſtations ſeems to be, becauſe ordinarily Moleſtations reſolve in Declarators of Property, or are join'd with them.

XLIII. BY this Act, the Defender is indefinitely to pay the Expence of the Obtainer of the Decreet, at the Modification of the Judge, *Vide Act* 110. *Parl.* 7. Ja. V. But tho' this Act be general, yet *Statutum quod diſponit ſimpliciter ut victus victori in expenſas ſit condemnandus, hunc ſenſum admittit, ſi non habuerit juſtam litigandi cauſam, hic quippe ſenſus juri communi eſt conformis & rationi conveniens.* Voet. *de Statut. Sect.* 7. *Cap.* 2. 116.

XLIV. BY the firſt Part of this Act, the Lords of Seſſion are made Judges to the Interpretation of the Act of Oblivion; whereas by the *Act* 67. *Parl.* 9. *Q.* M. ſeveral particular Perſons were named for that Effect. There is an unprinted Act, ſaying, That becauſe ſeveral of the Lords were dead, and that becauſe many legal Actions aroſe upon the Indemnity, therefore this Act was neceſſary.

BY the ſecond Part of this Act, Nine Lords of Seſſion are ſufficient to be a *Quorum*, and which is now obſerved, tho' by the 57. *Act*, 5. *Parl.* Ja. V. Ten Lords, with the Chancellor or Preſident, at the firſt Inſtitution, were neceſſary to make a *Quorum*.

XLV. THIS Act is fully explain'd in the 78. *Act*, 9. *Parl.* Q. *Mary*, except in ſo far as concerns the Obligation laid by this Act upon the Notars, to bring their Prothocals to the Lords of Seſſion, and which are to be kept by the Clerk-Regiſter and his Deputes: Theſe Prothocals are the Book, wherein Notars ſet down the Breviates of what Inſtruments they take, *Et Protocollum eſt memorialis tabellionis ſcriptura, qua in codice aliquo geſtus acti ſubſtantia breviter adnotatur. Vide Gloſſ. in Novel.* 44. *de tabel.* The Reaſon why they are ordain'd to be brought to the Regiſter, is, That falſe Papers may be hereby try'd, and loſt Papers may be made up; for if an Inſtrument be loſt, the Perſon in whoſe favours it was at firſt made, may raiſe an Action before the Lords, craving that it may be made up out of the Notar's Prothocal; and this being *nobilis officii*, cannot be done before Inferior Courts, *Vide* 22. *Act*, 22. *Parl.* Ja. VI.

UPON the 19. of *February* 1680. the Lord Regiſter *contra* Sir *William Primroſe*, it was found, That the Regiſter's Depute, called the Clerk for the Notars, was deprivable, for not calling in the Prothocals of deceaſed Notars by the Space of Five Years; to which the Lords found him actually oblig'd, tho' it was alledged, that by theſe Acts he was only obliged to receive the Prothocals when they were brought in, but not to call for them; nor was it poſſible for him to know when Notars dy'd; and therefore by this Act, Sheriffs, &c. are ordain'd to acquaint him of the Death of Notars within their Juriſdictions; for it was urg'd, that the Obligation to bring in the Prothocals being committed to this Clerk, and he being only intruſted with it, the Act would be eluſory, if he were not obliged to do Diligence, ſince none elſe could do it, and he might eaſily inform himſelf at leaſt once a Year.

IT was alſo debated, That by this Act the Clerk to the Notars was obliged to underſtand ſufficiently the Office of Notary; tho' it was anſwer'd, that he was no further oblig'd than to draw a Bill for their Admiſſion; and the Clerks of the Seſſion are not obliged to underſtand the Civil Law, which they are obliged to Minute.

ACT XLVI. MESSENGERS being grown too numerous, therefore by this Act they are reſtricted to 200, comprehending the 17 Heraulds, Macers and Purſevants in that Number; which Number is here divided amongſt the Shires; but the Number is now increaſ'd contrary to this Act, and to the great Loſs of the People.

THE Lyon is conſtituted by this Act ſole Judge to the Faults committed by Meſſengers, and to their Cautioners, whom they find for their good Behaviour at their Entry; which Power is ratify'd by the 125. *Act*, 12. *Parl.* Ja. VI. And the Lyon, with his Brethren Heraulds, are declared Judges to all the Malverſations of Meſſengers in their Offices, by the 21. *Act*, 3. *Seſſ.* 2. *Parl.* Ch. II. By which Act, tho' the Malverſation of the Meſſenger be puniſhable by the Lyon, yet he has not Power thereby to determine upon the Damages done to private Parties by Meſſengers, and to determine againſt the Meſſenger or his Cautioner, for the Sums for which the Meſſenger ſhould have uſ'd Execution; albeit the Lyon has private Ratifications from the Parliament, with this Privilege. *Vide June* 27. 1673. *Heriot* contra *Corbet*.

XLVII. BY this Act all Superſederies are diſcharg'd, for Protections againſt Execution of the Law were ſo call'd then. This Act is renew'd, 13. *Act*, 23. *Parl.* Jam. VI. By which the Granter is declared liable for the Debt, and by the 9. *Act*, 3. *Parl.* Ch. II. Theſe Acts are ratifi'd; and becauſe the laſt Act related only to the Seſſion; therefore the Privy Council, Seſſion, Commiſſioners of Juſticiary, and Exchequer, are declar'd liable, if they grant Protections, except to ſuch as are cited to anſwer before them; and ſo the Act protects not Purſuers, for they are not ſummon'd; and if Purſuers were protected, any Man might raiſe a Summons, and thereby grant himſelf a Protection; but yet if the Intereſt of the Commonwealth require that a Crime be proſecuted, I think they may after Inquiry, ſecure the Purſuer during the Dependence; for tho' His Majeſty's Advocate may purſue without an Informer, yet an Informer helps much.

ALBEIT that Act diſcharges the granting Protections, and makes the Granters liable; yet the Contemners of the Protection are puniſh'd; and a Writer to the Signet was ſuſpended in *November* 1678. for cauſing apprehend a Perſon, notwithſtanding of the Lords Protection; albeit it was there alledg'd, that tho' Protections might be granted by the Lords, upon depending Proceſſes, yet theſe Protections could not extend to ſecure them againſt delivering of Papers, which are in their own Power; and tho' a Protection granted by the King for Debt, does not ſecure againſt Things that are in the Receiver's own Power, as Exhibition of Papers, &c. yet if either the King or the Lords grant expreſly Protections againſt all Caſes whatſoever, then it will ſecure even againſt ſuch Exhibitions, until the ſame be expreſly recalled, tho' it ſeems that by that Act, Judicatures have only Power to grant Protections to ſuch as are cited before them, during the Time wherein they may come and return to obey the Judicature, in Caſes wherein their perſonal Preſence is neceſſary for the Adminiſtration of Juſtice, not exceeding a Month in all. It is alſo clear, that even the Defender may be apprehended, if he get not a Protection; for this Act does not protect, but is only a Warrant for granting one. And there is lately an Act appointing Protections that paſs under the King's Hand, to paſs the Great Seal, *per ſaltum.*

THE Council to prevent the granting of Protections, whereby the private Intereſt of the Subjects was ſo much deſtroy'd, and the Execution of Law eluded, did by an Act in *January* 1678. and ſigned by all of them, declare that whoever voted to any ſuch Protections, ſhould be liable to the Debt; to elide which, they thereafter changing the Name of Protections, granted Licences to Perſons to ſtay in the Country free from all Execution: And therefore the King by His Letter in *July* 1679. did diſcharge the Council to grant any Licences or Protections, except conform to theſe His Laws; and the 9. *Act*, *Parl.* 3. Ch. II. *Ordains all ſuch Licences, Protections, &c. to be ſign'd, and the Signers to be liable, &c.* It may be likewiſe doubted, whether the Commiſſion of the Kirk can grant Protections, ſince there is only Allowance by this Act granted to the Privy Council, Seſſion, Exchequer and Juſtice Court, but ſince the 61. *Act*, 1. *Parl.* Ch. II. declares, That the *Acts, Decreets and Ordinances of that Commiſſion, ſhall have the Strength of the Acts* and *Decreets* of *Parliament*, they are really a Commiſſion of Parliament: And therefore as the Parliament can grant Protections, ſo can they, eſpecially ſince without this they cannot exerce well the Juriſdiction intruſted to them by the Parliament; and it ſeems inherent in all Courts, that they ſhould be able to protect all whom they cite; and it is clear by this Act, that the ſupreme Courts of *Scotland* have Power before this *Act* of *Parliament*, to grant Protections: For this Act reſerves only their former Power, but grants them no new Power.

THESE Protections are thought the ſame with the *induciæ moratoriæ*, granted by the Civil Law, *L.* 4. *C. de precibus Imperator*, &c. which are not valid by that Law, *niſi idonea fideijuſſio ſuper debiti ſolutione præbeatur.* But I think theſe to be rather Suſpenſions, and that Cautioners in Suſpenſions, with us, aroſe from this.

ACT XLVIII. THIS Act anent teinding of Corns is explain'd fully in *Act* 73. *Parl.* 6. Ja. VI.

XLIX. BY this Act, he who accuſes another for Treaſon, and proves not, commits Treaſon.

*Obſerv.* I. THIS is only in caſe of malicious Accuſation; for the Act ſays, *That malicious Accuſers, &c.* and therefore if the Purſuer had probable Grounds for his Accuſation, he ſeems not to incur the Hazard of this Act.

*Obſerv.* II. THAT tho' the Act ſays, *Whoever accuſes*, yet the King's Advocate runs no ſuch Hazard, for he accuſes *ratione officii*; but to prevent this, he gets always in Treaſon a Warrant from the King or Council, upon reading the Depoſitions of the Witneſſes taken by way of Precognition, or elſe he has an Informer, who finds Caution to inſiſt, *ſub pœna talionis.*

*Obſerv.* III. THAT the Purſuer is only liable if the Party calumniate be call'd, accuſ'd, and acquit, therefore the Accuſer repenting and not inſiſting, it ſeems that he will not be liable in this Pain; but for not inſiſting, he will be only liable in the Sum under which he has found Caution, and poſſibly *in pœnam arbitrariam*, if Malice appear; and yet it may be urg'd that he ſhould be liable to the Pain of Treaſon, ſince not inſiſting was the Purſuer's Fault, and no Man ought to have Advantage by his own Fault, *nam qui dolo deſiit poſſidere pro poſſeſſore habetur.*

*Dubitatur*, IF this Act extends to ſuch as purſue only ſtatutory Treaſon; and ſure it does not, if they purſue not the ſame as Treaſon, tho' upon the Event it may prove ſo.

IT may alſo be doubted if a Witneſs, who has deponed againſt a Man in a previous Trial, as guilty of Treaſon, and thereafter depones he knows nothing of it, commits Treaſon: For this wrongs the Party as much as an Accuſation; yet if this Depoſition was not emitted ultroneouſly, but on a Citation, it cannot be call'd an Accuſation, nor puniſh'd as ſuch; but it ſeems puniſhable by Death, by *L.* 1. *in prin. ff. ad L. Cor. de falſ.*

L. LANDED-MEN convict of Theft, Reiff, or Reſet, commit Treaſon.

IT may be doubted if an appearand Heir be puniſhable in that Caſe as a Landed-Man, or if a Perſon once a Landed-Man, but denuded, be liable.

THO' Landed-Men may be thus puniſhed as Traitors, yet they are ordinarily purſu'd for ſingle Theft, and the King's Advocate doth reſtrict his Libel to ordinary Theft. But becauſe it may be puniſhable as Treaſon, therefore the Lords advocate Thefts againſt Landed-Men, tho' the Libel bear only ſingle Theft.

LI. THE murdering any Perſon who is under the Truſt, Power, or Aſſurance of the Slayer, commits Treaſon.

ASSURANCE is extended to ſuch as we have invited to our Houſe, or ſuch as we are under Triſting and Capitulation with.

THIS Act is likewiſe extended to Husbands killing Wives, Bairns, Servants, *& e contra.*

LII. THIS Act determining what is Uſury, is explained in my *Criminal Pract. Tit.* Uſury.

LIV. THIS Act declares, That ſuch as exact other Cuſtoms from the People than what is warranted by expreſs Law, or expreſs Warrant, or immemorial Poſſeſſion, ſhall be puniſhed as Oppreſſors.

IT is thought that Poſſeſſion for 40 Years is equivalent to immemorial Poſſeſſion, and warrants ſuch Exactions by Preſcriptions.

LV. SHIPS tranſporting Victual are confiſcated, and the Maſters and Clerks impriſonable during Pleaſure. This is now abrogated, for it is lawful to tranſport Corn even without a Warrant from the Exchequer, except where the ſame is diſcharged by ſpecial Proclamation becauſe of Dearth.

LVIII. THIS Act, diſcharging the eating of Fleſh in Lentron, is in Deſuetude, tho' till of late eating of Fleſh was diſcharged without a previous Warrant under the Hand of the Clerks of the Privy-Council.

LIX. THIS Act, appointing the Slayers of Deer, Corneys, *&c.* to be puniſhed as Thieves, is explained *Crim. Pract. Tit.* Theft, *Num.* 15.

LX. BECAUSE the People were oft-times miſtaken in executing their Brieves legally, thro' the Difference ariſing from ſeveral Juriſdictions, therefore ſome Places are here appointed to prevent Miſtake; and a General is ſubjoin'd, appointing Brieves to be executed

ACT either at the Head Burghs of Shires, or Stewartries, or where Brieves were moſt uſually ſerved.

From which laſt Words it may be obſerved, That Executions are ſufficient, tho' they be not at the real Head-Burghs, if they be at the Place where they uſed to be executed; and thus Executions at *Duns* were ſuſtained for the Shire of *Berwick*, tho' *Greenlaw* was really the Head-Burgh by the Erection; and Executions of a Warning were ſuſtained tho' not at the right Paroch Church within which the Lands lay, ſince it was executed at the Place at which Warnings uſed to be executed, 24. *January*, 1667. the Earl of *Argyle* contra *George Campbel*; ſo far the Preſumption of Habite and Repute prevails even over Truth.

LXI. BY this Act the Granter of a Wadſet is declared not to be prejudged by his Negligence, tho' he ſuffer an Eccleſiaſtic quietly to intrude, and to continue long, yea even 100 Years in the Poſſeſſion of laic Patronages to which he has Right, becauſe during the Non-redemption the Wadſetter did not look upon himſelf as Heretor.

The Reaſon of this Act has certainly been, becauſe Churchmen poſſeſſing *per decennalem & triennalem poſſeſſionem* preſcrived a Right; and the Act ſeems to imply, that becauſe the Granter of the Wadſet was not *valens agere* whilſt the Wadſet ſtood, therefore his Negligence ſhould not prejudge him; but I conceive that Churchmen now preſcriving a Right by 40 Years peaceable Poſſeſſion, will exclude all the Rights of laic Heretors, as well when the Lands (to which the laic Patronage is annex'd) are wadſet as otherwiſe.

LXII. FOR underſtanding Eccleſiaſtical Penſions, it is fit to know, that of old, when the preſent Incumbent was ſickly, the Synods allow'd him to reſign his Benefice, reſerving to himſelf a Penſion or Portion out of it, as is clear by *Balſamon ad Synodum Epheſinam*; but thereafter the Pope having reſerv'd to himſelf the Power of burdening Benefices with Penſions, Men did by Simony impetrate from the See of *Rome* immoderate and cauſeleſs Penſions, tho' it was pretended that there could regularly no Penſion be granted but for One of Three Reaſons, 1. The Favour of the Reſigner of a Benefice, that he might, after the Reſignation, live ſuitably to the Character he once bore. 2. That when Two Benefices were excambed, the greater Benefice might be burdened with a Penſion in favours of the leſſer. 3. When there was any Debate concerning the Benefice, it was lawful to burden the ſame with a Penſion. But notwithſtanding of this, Penſions increaſed ſo far as to be complain'd of as a Harveſt without Sowing; and our Law did take very much Pains to leſſen Penſions: And by the 1. *Act* of King *James* VI. His Firſt Parliament, in the black Acts, which is not now reprinted, the King reſerv'd to Himſelf the Cognition of Penſions obtain'd at *Rome*. And by the 4. *Act* of the 1. *Parl.* King *James* III. it is appointed, that no Penſion be purchaſed out of any Benefice, without Conſent of the Poſſeſſor, which was very juſt in itſelf, and was made to exclude the Pope's Power, who pretended that he could arbitrarily impoſe any Penſion he pleaſed, as is clear by *Gigas de penſionibus Eccleſiaſticis, Quæſt.* 4. By this Act it is declar'd, that the principal Gift of Penſion being improven, all Confirmations and Decreets following thereon ſhall fall in Conſequence. By the 29. Act of this Parliament it is likewiſe appointed, that Penſions ſhall not be prejudg'd by the Act of Annexation, they being lawfully authoriz'd by Decreets or Poſſeſſion: And therefore by the 137. *Act, Parl.* 12. Ja. VI. it is ordain'd, that all Penſions not authoriz'd by Decreet or Poſſeſſion in the Lifetime of the Prelate, alledg'd Diſponer thereof, ſhall be null: And by the Canon Law, Penſions impoſed upon Benefices of Cure, *extinguuntur morte gravantis.* But the Reaſon given by this Act is, Becauſe ſuch Penſions not ſo confirm'd in the Granter's Lifetime, are null of the Law, and may be preſum'd to be falſe. Another Reaſon that may be given is, Becauſe the Incumbent having no Power over the Benefice but during his Life, it were unjuſt that any Burden granted by him ſhould laſt longer than his Life; and if it laſted longer, it would prejudge very much the Care of Souls, becauſe the Burden of a Penſion would diſcourage the Intrant: And the Reaſon why it is preſum'd to be forg'd is, Becauſe it is very probable that if it had been a true Penſion, it had been own'd during the Lifetime of the Granter. By the 207. *Act, Parl.* 14. Ja. VI. all Penſions and Diſpoſitions out of the Temporalities of vacant Benefices ſince the Act of Annexation, are declar'd to be null, which ſhews that Penſions were never conſider'd as ſolid and unquarrellable Rights.

LXIII. OBSERV. I. Tho' this Act appoints the Exchequer to ſit till the laſt of *Auguſt*, yet it ſits ſometimes no longer than the laſt of *July*; and it being doubted whether the King could, notwithſtanding of this Act of Parliament, ordain the Exchequer-compts to begin upon the Firſt of *March*, it was reſolv'd that could not be done, becauſe by this Act of Parliament the not compting till the Firſt of *July* was introduc'd in favours of the Subjects, who are by this Act liable to no Compt till *July*, and ſo the King could not anticipate the Obligation, by making them compt in *March*, this being rather Matter of Property than of Government.

*Obſerv.* II. THAT Denunciations at the Mercat-Croſs of *Edinburgh*, againſt ſuch as do not compt in Exchequer, they being thereto liable, are equivalent, as if the Denunciation had been at the Head-Burgh of the Shire; but yet I conceive Eſcheats would not fall upon ſuch Denunciations, becauſe no Eſcheats fall by Denunciations upon general Letters: But it is alledg'd that Eſcheats may now fall upon ſuch Denunciations by the 15. *Act*, 3. *Seſſ. Parl.* 1. Ch. II. where this Act is renew'd, and ſuch Denunciations are there declar'd to be equivalent to Charges and Denunciations perſonally, and at their Dwelling-Houſe, and Head-Burgh of the Shire, and that as to all Intents and Purpoſes; and by that Act ſuch Letters and Executions may be regiſtrated either in the general Regiſter of Hornings, or in the Treaſurer's Regiſter, albeit generally all Letters of Horning ought to be regiſtrated in the particular Regiſter of the Shire, *Act* 75. *Parl.* 6. Ja. VI. or in the general Regiſter.

LXIV. THIS Act is explain'd in the 77. *Act*, 6. *Parl.* Ja. V.

LXV. EXECUTION by this Act may paſs at the King's Inſtance againſt Highlanders and Borderers, *ubi non patet tutus acceſſus*, upon Citation at the Head-Burgh of the next quiet Shire.

THO' this Act was only in favours of Executions at the King's Inſtance, which ſeems to be a Privilege *ob bonum publicum*, yet by a late Cuſtom, Diſpenſations are granted upon common Bills by the Lords, to cite at any Man's Inſtance, tho' it was not proven that there was not *tutus acceſſus*; and therefore the Lords did by Act of *Sederunt*, diſcharge the granting of ſuch Privileges upon common Bills, and ordain'd that ſomething ſhould be adduc'd for proving that there was not *tutus acceſſus*, and that ſuch Warrants ſhould only be granted *in præſentiâ*, 29. *June* 1666. *Macpherſon* againſt *Macleod*. *Per Clem.* 1. *de Judic.* & *Clem* 1. *de for. compet. citatio poteſt fieri per edictum, ubi locus non eſt ſecurus. Vide Marant. de jud. part.* 6. *Num.* 84. where he obſerves well, that theſe edictal Citations being ſo prejudicial, cannot be granted by inferior Judges: And thus if any Perſon be to be cited, as out of the Country, at the Pier of *Leith*, this cannot be done before inferior Courts, without Letters of Supplement from the Lords.

LXVII. BY this Act the Comptroller is liable for the Chamberlains whom himſelf nominates, but he is only liable for Diligence againſt heretable Chamberlains, becauſe he names them not. The Treaſurer is liable in the ſame Manner as the Comptroller was, tho' the Treaſurer be not here nam'd, becauſe the Treaſurer is now in Place of the Comptroller: But it may be doubted, if a Perſon who is repute ſolvent, and was really ſo, were nominated, a Chamberlain proving afterwards inſolvent, will make the Treaſurer liable.

LXVIII. BY this Act Rentals ſet by the King, not bearing Heirs, are not extended to Heirs, but reſolve in naked Liferents, though regularly *qui ſibi proivdet, & Hæredibus providiſſe videtur.*

*Nota*, THAT our Law has thought that this needed an Act of Parliament; and therefore in other Caſes where there is no Statute, it would ſeem that Rights granted to a Man ſhould regularly extend to his Heirs, *arg. hujus legis.*

*Obſerv.* I. Tho' this Act mention only Rentals ſet by the King, yet the Rentals ſet by Subjects, are not extended to Heirs, except Heirs be therein mentioned; and tho' a Rental mention Heirs indefinitely, yet it will only extend to the Firſt Heir, and will neither be accounted null for want of an Iſh, nor be extended to all Heirs, for then it would be equivalent to an heretable Right.

LXIX. THIS Act diſcharges the diſponing of the King's Caſualities in great, as the Caſualities of a whole Country, which is moſt reaſonable; and therefore all Gifts of Regalities may be quarrell'd as null, becauſe in them all the Eſcheats are diſpon'd; and tho' this Act diſcharges the giving away of Caſualities ariſing from any one Crime, yet this Objection was repelled againſt the Gift of Uſury in which were given away all the Profits ariſing to the King by Uſury.

LXX. ALL pecunial Pains are ordain'd to be taken up according to the rate the Money gave when the Fine was impos'd, or elſe the Fine is to be augmented, according to the Augmentation of the Money; and this Act was reaſonable, becauſe it was not juſt that Delinquents ſhould get Advantage by not Payment; and it was neceſſary, becauſe without this Act, Fines, as all other Debts, might be pay'd according to the current Money, at the Time the ſame fell due.

LXXI. THE Pain of negligent Sheriff-Clerks is Tinſel of their Moveables, and the principal Sheriffs are to pay 100 Pounds for them, beſides the Damages of Parties.

ACT *Obſerv.* I. THAT in the Time of this Act, Sheriffs had the Nomination of their own Clerks; but now ſince the Sheriff-Clerks are nominated by, and depend upon the Secretary, it is not juſt that the Sheriff ſhould be fineable for the Fault of the Clerk.

*Obſerv.* II. THAT tho' by this Act the Sheriff-Clerk is oblig'd to ſend an Inventar of all the regiſtrate Hornings yearly to the Treaſurer, yet this is in *Deſuetude.*

LXXII. THIS Act is in *Deſuetude,* as to the Price to be taken by Meſſengers; but they ſtill find Caution to the Lyon at their Admiſſion, *de fideli adminiſtratione.*

LXXIII. RELIEF is a *Duty due by the Vaſſal to the Superior at his Entry, for relieving his Fee out of the Superior's Hands.* By this Act it is appointed, that when this Caſuality ariſes to the King, it may not be compounded for, but that all that is due be taken; and the true Avail is a Year's Retour-duty in Ward-lands, and the Double of the Feu-duty in Feu-lands.

*HOPE* tells us, that tho' a Gift of Non-entry contain the Relief, yet the Donatar will not have Right thereto, becauſe ſuch is the Cuſtom of Exchequer, as he ſays; but I think that the true Reaſon is, becauſe this Act diſcharges this Caſuality to be gifted. When ere the Vaſſal takes out a Precept from the Exchequer, for infefting himſelf, he is liable for the Relief; and the Sheriff may be charg'd therefore, conform to the Reſponde-book: Or the Party may be ſummarly charg'd for it by this Act, and the Ground may be alſo poinded for it, as *debitum fundi,* when a Party gets a Precept, the Servants of the Chancery write down *Reſpondebit Vicecomes de, &c.* or *Reſpondebit* any Judge to whom the Precept is direct, and that is call'd the *Reſponde* here mention'd, by which Reſponde-book, the Sheriffs and their Deputes are charg'd yearly in Exchequer.

LXXIV. BY this Act the Sheriff did count for all Eſcheats yearly, for then he might have intromitted ſummarly, and had Letters of Intromiſſion; but now he is not countable, nor oblig'd to intromet; but the Eſcheats are gifted to Donatars.

LXXV. BY this Act all Commiſſions for judging Crimes, are ordain'd to paſs the Quarter-ſeal: But now Commiſſions are granted by the Council without any Seal; and tho' this Act diſcharges juſtly the granting Commiſſions for judging Slaughter, ordaining that Crime to be judg'd only by the Juſtices; yet now the Council uſes to grant Commiſſions even for judging Slaughter, Murder, Witchcraft, and all ſuch Crimes. But tho' the Council may grant ſuch Commiſſions for judging theſe Crimes, when they fall in under general Commiſſions that are granted by the Council, yet I ſee not how they can grant Commiſſions contrary to this Act, for judging Slaughter in ſpecial.

*Obſerv.* II. THAT all Commiſſions of the Juſticiary ſhould be under the Quarter-ſeal, to the end, as this Act of Parliament obſerves, there may be a Reſponde made thereupon; and yet the Council now uſes to grant Commiſſions, which have no other Warrant, but a Paper ſubſcrib'd by themſelves, and not by Way of Signature, as is here ordain'd, and the great Fault that is committed in granting theſe Commiſſions, is that the Proceſs is never ordain'd to be returned to the Juſtice-Clerk, to the end that both it may be known, whether the Proceſſes be legal, and that it may be known what is due to the King, for which the Reſponde mentioned in this Act was to be made, *Vid. Obſerv.* on 126 *Act Parl.* 12. Jam VI.

*Obſerv.* III. From theſe Words of the Act, *That no Commiſſion be granted to proceed in Slaughter, but that the Juſtice-General and his Deputes proceed thereupon.* It uſes to be urged that a Council of War cannot be a ſufficient Warrant for Soldiers to Judge Murders, and other Crimes committed by any of their Number againſt Country-Men, theſe not being Military Crimes, but being Crimes that ſhould be tryed by our fundamental Law in the Juſtice-Court, where the People have a double Security, both by learn'd Judges, and an Inqueſt of Neighbours, and a King's Advocate to be careful of the Probation; and it may as well be pretended that they may judge their own Soldiers in Civil Caſes; and that they may judge a Country-Man when he kills a Soldier, *Vid. Crim. Pract. Tit. Juriſdiction of Juſtices over Soldiers*; and the Council ordain'd *Burr* a Drummer to be delivered up to the Juſtice-Court for killing a Woman, tho' he had ſuffered two Councils of War, *November* 3. 1681. But to clear this, the King by His Letter to the Council, has declar'd, that Soldiers are only to be try'd for Military Crimes by a Council of War, and that for ordinary Crimes they ſhall be judg'd by the Juſtices, *&c.*

LXXVI. AS Parties may purſue Crimes without concourſe of the King's Advocate; ſo by this Act the King may purſue without an Informer, *ad vindictam publicum.*

LXXVII. THIS Act ordains that no Reſts be allow'd to the Treaſurer exceeding 20000 Pounds a Year, but that he ſhall Compt for what is above this Sum, ſo that he may do Diligence therefore as accords, but this is not obſerv'd.

The Second Part of this Act ordains that the King be not prejudg'd by general Ratifications in Parliament; for tho' Ratifications cannot prejudge Third Parties; yet they might have prejudg'd the King who paſt them, if His Majeſty's Intereſt had not been ſecur'd by this Act. ACT

THO' this Act diſcharges all Continuation of Juſtice-Courts, and ordains the Juſtices to proceed, notwithſtanding of ſuch Precepts; yet both King and Council uſe to command the Juſtices to continue their Diets, tho' this Act was objected in the Proceſs for *William Halyburton*'s Murder, *June 1676*. But it is neceſſary that in ſuch Caſes the King ſhould be inform'd by the Juſtices, what is to be ſaid on both Sides, before they continue ſuch Diets in Proceſs, at the Inſtance of private Parties: For the King and the Party having different Intereſts, and it being declar'd by Act of Parliament, that the Party may purſue without the King; it ſeems very reaſonable, that the Party's Proceſs ſhould not be ſtopt upon ſurreptitious Warrants, without acquainting the King. LXXIX.

I find in the Council Regiſter, *July 1582*. That becauſe His Majeſty had been troubled by the Importunity of ſuch as deſir'd not to be try'd before the Juſtice-airs, but at particular Diets, whereby they eſchewed ordinarily all Puniſhment; that therefore His Majeſty does in Council, *Statute and Ordain*, (this is oft-times the Stile in Acts of Council, as well as in Acts of Parliament) That the Juſtices ſhall proceed, without Reſpect to ſuch Warrants; and it ſeems that that Act of Council has given Occaſion to this Act of Parliament; and generally many Acts of Parliament have been at firſt Acts of Council, which ſhews likewiſe what Power the King has in His Council of this Nation.

THIS Act, appointing that Sheriffs ſhould yearly give in the Names of their Deputes and Clerks to the Lords of Seſſion, and find Caution in the Books of Council, is in *Deſuetude* as to both the Parts; for they neither find Caution, nor give in the Names of their Deputes. But *de jure*, I think Letters of Horning may be direct upon this Act for both Effects, it being moſt reaſonable that the Lords of Seſſion ſhould know whether the Deputes be able; and this Caution would keep them in Awe and ſecure the People, if they do Injuſtice. The Caution requir'd by this Act is Burgeſſes, Indwellers in *Edinburgh*; *Caution Burgoiſe*, as the *French* call the beſt Caution. LXXX.

BY this Act, the Form of holding Juſtice-airs is ſet down, but it is to be found more fully in the *Iter Juſticiarii*, and upon the Word, Juſtice-air, *de verb. ſignif.* and ſo needs not be repeted; but there are ſome Things fit to be obſerved, becauſe innovated. LXXXI.

*Obſerv.* I. That Commiſſions of Juſticiary are to be under the Teſtimonial of the Great-Seal by this Act, but now they are always under the Great-Seal, when granted by the King; but ſeldom or never under the Quarter-Seal, which is call'd the Teſtimonial of the Great-Seal; and when they are granted by the Council, they are only ſign'd by a *Quorum*, but under no Seal.

*Obſerv.* II. That albeit the Stewartries or Bailiaries be here appointed to come to the Head Burrows of the Shire, where Dittay is to be taken up; yet it has been found, that the Council may ordain them to come to other Places for the public Conveniency, when the Diets are ſo ſhort that the Juſtice-Clerk cannot ſtay at every Shire; and thus the Conſtabulary of *Haddington* was ordain'd to give up Dittay at *Edinburgh*.

*Obſerv.* III. That albeit by the old Form, Pannels were to be cited to Juſtice-airs upon 40 Days, *Iter. Juſt. Num. 6.* yet now they uſe to cite upon 15 or more Days, and then, as now, they are not cited peremptorily to one Day, as in ordinary Juſtice-Courts, but to any One of the Days in which the Court is to ſit in that Place to which they are cited, and all the Pannels are called every Day at that Place, and if they compear at any one of the Days, they are not declar'd Fugitives.

At the firſt Day of Juſtice-airs, all who are call'd muſt find Caution to appear at all the Diets of the Juſtice-airs, which ſome complain of. Albeit by the Form of our old Brieve, and the conſtant Practic, only Millers, Brewers, Smiths, and Officers of Courts, were cited to give up Dittay upon Oath, becauſe it was preſum'd that the beſt Intelligence is to be had from ſuch public Perſons; yet the Council did lately ordain that Noblemen and Gentlemen ſhould likewiſe be obliged to give up Dittay; becauſe the Crime being Treaſon, and Art and Part thereof, it was preſum'd that they ſhould underſtand the ſame better than mean People, and for detecting of ſo great a Crime, Perſons of all Qualities ſhould concur; and the former Cuſtom was not excluſive of calling Perſons of Quality. Likeas by the 94. *Act*, *Parl.* 13. Ja. III. the King is to call the Lords and Head-men of the Parts of his Realm, and to take Dittay of them (*id eſt*, by them) of notour Treſpaſſers.

ACT LXXXII. BY this Act, Hoghers or Slayers of Horſe, Deſtroyers of Plough Graith, growing Corns, &c. are puniſh'd as Thieves to the Death. *Vide Crim. Pract. Tit.* Theſt.

*Obſerv.* I. THAT this Act proves Theſt to be Capital by our Law, tho' we have no expreſs Law for making Theſt Capital generally.

*Obſerv.* II. THAT it may well be doubted, whether cutting of Corn, &c. in Landed-Men is Treaſon, ſince it would ſeem to be ſo; for by this Act it is declar'd puniſhable as Theſt, and Theſt in Landed-Men is, by the 50. Act of this Parliament, declar'd to be Treaſon; but yet I conceive that theſe ſtatutory Theſts are not puniſhable as Treaſon, ſince that were but *fictio fictionis, & duæ fictiones non cadunt in idem ſubjectum.* Likeas the Puniſhment is determin'd here to be the Puniſhment of ſimple Theſt, *viz.* Death; whereas if the Law had deſigned Forfeiture, it would have nam'd Forfeiture here, as in the former Act. It has been doubted upon this Act, whether the cutting of Corns ſown by a Stranger who had no Right, was a Crime in the Heretor, who may pretend that *ſatum cedit ſolo*; and it is thought that if the Heretor ſuffer'd a Stranger to poſſeſs for any conſiderable Time, he could not have cut them down ſummarly, no more than he could have removed that Stranger ſummarly from his Poſſeſſion, tho' unjuſt.

LXXXIII, LXXXIV. THESE Acts are explain'd *Crim. Pract. Tit.* Deforcement. *Vide Act* 150. *Parl.* 12. *Ja.* VI. and *Stat.* Will. *Cap.* 4. *V.* 5.

LXXXV. IT appears by this Act, that Letters of Lawburrows were of old granted by ſeveral Clerks; and by this all Caution for Lawburrows is ordain'd to be found to the Juſtice-Clerk, which was indeed moſt reaſonable, becauſe bodily Harm is there dreaded, and the preventing of that ſhould belong to the Juſtice-Court; but now the Council, Seſſion, and Criminal Court have the Power of cauſing Parties find Caution for Lawburrows; but the Act, in ſo far as it diſcharges Lawburrows to be granted againſt Complices in the General, is yet in Obſervance, and very juſtly; for it was not fit to leave it arbitrary to the Parties to charge any they pleaſed.

LXXXVI. THO' this Act appoints all Courts to be fenc'd at Eleven of the Clock in the Forenoon, yet it does not irritate and annul all Courts holden at any other Hour, and Courts are ordinarily held at other Hours; but it may be doubted, whether a Party cited to a peremptory Diet, and ſtaying till Twelve of the Clock, and taking Inſtruments thereon, could be unlawed in the Afternoon for Abſence; but if the Court once ſit, Parties are obliged to attend.

LXXXVII. THO' this Act appoints the Expences of Parties accus'd and acquitted to be modify'd by the Juſtice-Clerk and his Deputes, yet they are now only modifiable in full Court by the Juſtices: But it is doubted, whether the Juſtices can modify Expences where the Defenders are abſent, ſince the only Certification againſt Abſents is, that they ſhall be denounc'd Rebels: But yet the modifying Expences ſeems to be the neceſſary Reſult of all Proceſſes, and that *ineſt officio judicis.* It is alſo doubted, whether the Juſtices can *ex intervallo* modify Expences, none having been ſought the Time that the Letters were brought back, and the Party declar'd Fugitive, and the Juſtices are in uſe to do both; but the Caſe has not been yet fully debated.

LXXXVIII. BY this Act, the Roll of Aſſiſers was to be given by the Party Accuſer, or a Notar in his Name; but now by the Third Article of the Regulations, for the Juſtice-Court, the Aſſiſers are nam'd, and the Liſt ſubſcribed by the Juſtices; for it was thought too ſevere that the King's Advocate, or the Party Accuſer, ſhould have the Naming of the Aſſiſers.

LXXXIX. BY this Act, Cuſtomers paſſing cuſtomable Goods for Gratitude, are to be try'd Criminally, and their Moveables to be eſcheated, in caſe they be convicted.

*Obſerv.* II. THAT the King's Servants are only to be puniſh'd in caſe they tranſgreſs for Money, ſo that Negligence is not puniſhable except it be groſs; but yet if Cuſtomers ſhould wittingly and willingly paſs Goods for Friends or Relations, I think it would be puniſhable by a Fine. And ſince the ſtealing of Cuſtoms is Theſt, this Connivance, in ſtrict Law, ſeems a Theſt-bute, or Acceſſion to Theſt.

*Obſerv.* II. THO' this Act declares this Acceſſion puniſhable in a Juſtice-air, yet the Exchequer and Council do alſo puniſh the ſame by arbitrary Puniſhments.

ACT XC. THIS Act is explain'd fully *Crim. Pract. Tit.* Aſſiſes; but it is fit to add, That His Majeſty having written a Letter in *Anno* 1683. deſiring the Juſtices to examine Witneſſes in Treaſon, when the Council requir'd them, at any Time before inſiſting in the Proceſs, to the End His Majeſty's Advocate might know how to Libel, and to prevent the abſolving of Rebels, who were truly guilty by the Miſtake of citing the wrong Witneſſes: It was alledged, That the Deſire of that Letter was contrary to this Act, ordaining all Probation to be receiv'd only in Preſence of the Pannel.

II. THAT this would engage Witneſſes to adhere to the Depoſitions that might be elicited from them by the too great Zeal of His Majeſty's Servants, or the Influence of others. To which it was anſwered, That as to the *Firſt*, the Depoſitions to be taken in that previous Trial, were not to be made uſe of to the Aſſiſe, which was all that was diſcharg'd by this Statute.

AS to the *Second*, It was not to be imagin'd that the Judges, to whom only this was to be intruſted, would prejudge any Pannel, or be corrupted by any Influence; and before the Witneſſes depon'd, theſe Depoſitions ſhould be deſtroy'd, ſo that the Witneſſes could be under no Apprehenſions upon that Account; and the People were in a better Condition by this Letter than formerly, for it was ſecurer to truſt previous Examinations to the Judges than to the King's Advocate, who did always examine alone formerly. And this would prevent unjuſt Trouble, when there were no Witneſſes who could depone againſt the Perſons accus'd through Error or Malice.

XCI. THIS Act is alſo explain'd in the Title *Aſſiſes*: But it is fit to add, that *Blair* and others being convict of Error for aſſoillieing ſome Traitors wrongouſly, and their Eſcheats being gifted, they rais'd a Reduction of the Gift, as founded upon a Verdict that was null by this Act, in ſo far as the King's Advocate had ſpoke with the Aſſiſers after they were incloſ'd, which Reaſon was repell'd, becauſe the Juſtices had declar'd that the Advocate had only ſpoke to the Aſſiſers in their Preſence, when the Aſſiſers were deſiring to be ſolv'd of ſome Doubts which was ordinary and allowable, *December* 21. 1682.

IT may be alſo doubted, whether ſuch Verdicts can be reducible; for tho' the Act declare, that the Aſſiſers may aſſoillie, if any ſpeak to them, yet if they and the Juſtices proceed, it ſeems not quarrellable, or at leaſt before the Seſſion; for I remember that the Juſtices having declar'd a Bond of *Glenkindie*'s forefeited, for not producing ſome Witneſſes againſt himſelf; the Lords declar'd that the Juſtice-Court being a ſupreme Court, their Acts and Sentences were not quarrellable before the Seſſion. *Queritur*, if both theſe may not be quarrell'd before the Parliament? and I think they can not, except the Decreets of the Seſſion can.

XCII. THIS and the following Acts to the end of this Parliament were made for quieting the Borders and High-lands, as to which the ſame Courſes are to be taken, tho' now the Borders are governed by a Commiſſion of both Kingdoms, ſo they are not put to find Caution as they were by theſe Acts; but the Acts here ſet down are generally obſerv'd as to the High-lands ſtill, except in ſo far as I ſhall here obſerve upon the reſpective Acts.

*Obſerv.* I. THO' this Act appoints that the Firſt Day of every Month ſhall be appointed for hearing Complaints concerning the Borders and High-lands, yet that is in *Deſuetude* as to both.

*Obſerv.* II. THAT, that Part of the Act ordaining a ſpecial Regiſter to be made for Borders and High-lands, is in obſervance, *quoad* the High-lands, by a late Act of His Majeſty's Privy Council.

XCIII. BY this Act all the Lands-lords contain'd in this Roll, are ordain'd to find Caution, which Roll is ſubjoin'd to the Acts of this Parliament; but that Roll is now very much alter'd, for many others are now ordain'd to find Caution, who are not therein ſpecify'd; but are now in the Proclamations of Council, *March* 17. 1681. *&c.* becauſe the Heretors mention'd in the Acts of Parliament, are often extinct, and the Lands for which they were to be bound, are diſpon'd to others. And whereas by theſe Acts, theſe Land-lords and Chiefs of Clans were ordain'd to produce their Delinquents before the Juſtice or his Deputes, they are now to produce them before the Council, or elſe to pay the Debt, which are great Arguments to prove that in Matters of Government *de facto* we conſider more the Reaſon, than the Letter of the Law.

THO' this and the 103. Act of this Parliament, which is coincident with this, may ſeem ſevere, becauſe the Innocent is bound for the Guilty; yet Neceſſity and Public Intereſt has introduc'd theſe Laws by the ſame Reaſon, that in *England* the Paroch is liable for the Robberies committed therein betwixt Sun and Sun: And thus theſe who have Power of Juriſdiction from the Emperor, are liable, *vias publicas a latronibus purgare. Gail. Obſerv. 64. Lib. 2. Vid. etiam, l. 3. l. congruit. ult. ff. de Officio Præſidis.*

ACT It has been doubted, whether the Council could in other Caſes not warranted by expreſs Acts of Parliament, oblige the Subjects to give Bond to live peaceably conform to Law, and particulary that their Tenents ſhould not keep Conventicles, but ſhould go to Church, and pay Fifty Pound *Sterling* for every Conventicle kept upon their Ground, or ſhould preſent their Delinquents. And it was alledg'd, that the Council cannot; becauſe, regularly, one Man is not liable for another Man's Crime; nor can this Inverſion of Property and Natural Liberty be introduced by a leſs Power than a Parliament; nor had Acts of Parliament in this Caſe been neceſſary, if the King and Council could have done the ſame by their own Authority. But yet ſince the King has by expreſs Act of Parliament, the ſame Power here that any Prince or Potentate has in any other Kingdoms, and that Government belongs to Him; as Property does to us, nor can the Peace be ſecured otherwiſe than by allowing Him to take all Courſes for ſecuring the Peace, and preventing Diſorders, that therefore this joined with the Practice of the Council, is a ſufficient Warrant for exacting ſuch Bonds, the Practice of our King and Council, being the beſt Interpreter of the Prerogative, eſpecially where the Things for which Bond is to be taken, are not contrary to expreſs Law; and it is implyed in the Nature of Allegiance, that Land-lords ſhould entertain none, but ſuch as will live regularly; and if they tranſgreſſed, the Maſter could not in common Law thereafter recept them without being liable, as we ſee in Spuillies; or if the King pleaſed, He might denounce the Tranſgreſſors Rebels, and ſo might put the Maſter *in mala fide*. And tho' there be no ſuch particular Laws warranting the taking of ſuch Bonds, yet it will appear by many Inſtances in this Book, that Laws are extended *de caſu in caſum*; and thus this Power ſeems inherent in the Crown; likeas the Matter of Property is ſufficiently ſecured by the Alternative foreſaid, of either preſenting or paying the Damage, which Alternative ſeems to be founded upon the ſame Principle of Juſtice, with *actiones noxales* mentioned in the Civil Law, *Domino damnato permittitur aut litis æſtimationem ſufferre aut ipſum ſervum noxæ dedere*, *Vid. Tit.* 8. *Lib.* 4. *Inſtitut.* I find many Inſtances in the Regiſters of Council, wherein the Subjects are charg'd to ſecure the Peace, under the Pain of Treaſon, as in the Caſe of the Lord *Teſter*.

XCVIII. BONDS given by Cautioners for broken Men, do oblige the Heirs and Succeſſors of the Cautioners, tho' they be not mention'd in the Bond.

*Obſerv.* I. In Law he who obligeth himſelf to pay a Sum, obligeth his Heirs; for as in Law, *qui ſibi providet, & hæredibus providet, ſic qui ſe obligat, & hæredes obligat*: And therefore a Man having bound himſelf and his Heirs Male, it was found, that the Creditor was not thereby excluded from purſuing the Heirs Female, or any other Heirs, but that he was only bound to diſcuſs firſt the Heirs, who were ſpecially nam'd in the Obligation, 18 *February* 1663. *Blair* contra *Anderſon*; but yet Obligations for performing a Deed, ſuch as to preſent a Thief, are of their own Nature perſonal; and therefore this Act was neceſſary.

XCIX. THE taking of Surety from Chief of Clans doth not looſe the Obligation taken from Land-lords, & *e contra*; and the Reaſon why this Act ſeem'd neceſſary, was, becauſe this ſeem'd to be an Innovation, and it ſeem'd not juſt that both the Chiefs and Landlords ſhould be liable, ſince they could not both have abſolute Command over the Perſon to be preſented: But yet this Act was moſt ſuitable to Law, ſince *novatio non præſumitur niſi ubi hoc expreſſe actum eſt*, *L. ult. Cod. de Nov.* And the Tenents in the Highlands are influenc'd both by Chiefs and Landlords. But to make this Law more juſt, the Council gives Action of a Relief againſt the Lands-lord, if the Lands-lord harbour, or to the Lands-lord againſt the Chief, if the Chief reſet him.

C. BY this Act, if Goods be taken away by any clan'd Man, and reſet in the Country of their Chief, for the Space of Twelve Hours, to his Knowledge, the Chief ſhall be liable *in ſolidum* for all the Goods taken away, tho' there were but very few of his Men preſent; as was found in a Caſe purſued by *Francis Irving* againſt *Glenurchy*, before the Council; all ſuch Chiefs being liable *in ſolidum*, and not *pro rata* only, from the Wrongs committed by their Clans.

CI. BY this Act no Magiſtrate may keep a Thief, or Malefactor, in Arms with him, albeit he pretend he is his Priſoner; but he muſt detain him in a cloſs Houſe, both becauſe *ſqualor carceris* is a Part of the Puniſhment due to Malefactors, and becauſe if this were allow'd, Magiſtrates might by Colluſion ſuffer Malefactors to enjoy their Liberty.

CII. IS explained *Crim. Pract. Tit.* Theft.

CIII. THIS Act, ordaining Maſters to preſent their Tenents upon the King's cloſs *Valentines*, (or Orders in little Papers like *Valentines*) is obſerv'd in the whole Regiſters of Council.

ACT CIV, CV. THESE Two Acts, diſcharging the Borderers of *Scotland* to marry with the Borderers of *England*, or to labour their Lands, are abrogated by the Union.

CVII. BY this Act, the Landlord doing Diligence by obtaining Decreet of Removing, uſing Horning, and doing all other Things that was in his Power after the Fact comes to his Knowledge, is no further liable.

*Nota*, BY this Act the Landlord muſt be put in *mala fide* by Intimation of his Tenent's Crime. 2. *Dubitatur*, whether this Privilege ſhould not likewiſe extend to Chiefs of Clans, ſince they have leſs Intereſt in the Delinquents than the Landlords?

CVIII. BY the 100 Act of this Parliament, ſuch as committed Slaughter, Mutilation, or other Hurt upon Thieves, are not liable; but by this Act an Indemnity is likewiſe granted to ſuch as raiſe Fire againſt them, that being there forgot.

CX. THIS Act is explained in the Obſervations upon the 29. Act of this ſame Parliament.

CXI. BY this Act the Burrows pay the Sixth Part of the Impoſitions of *Scotland*, which is yet in Obſervance, and becauſe of this Burden they have the only Privilege of Trading; and therefore they juſtly pretended, that their Privilege of Trading could not be communicable to the Burghs of Barony and Regality, who bore no Part in this Burden.

*Nota*, THAT tho' by this Act the Taxation of the Burrows is not to be altered, that is only meant of the Sixth Part which is to be born by the Burrows in general; for notwithſtanding of this Act the Convention of Burrows do alter the Taxation of any particular Burgh according as the Number of Burghs increaſeth, or according as any particular Burgh grows unable; and they divide this Sixth Part amongſt themſelves according to the Total of 100 Pound *Scots*, which as the imaginary Standard of *Aſſis*, and each Burgh pay accordingly, ſome being valu'd at 6 ſh. ſome at 12 ſh. *&c.* And if any Burgh reſign its Privileges, they muſt alſo reſign in favours of the Burghs-Royal their Common Good; after which Reſignation, and not otherwiſe, their Proportion is divided amongſt the reſt; for it were unjuſt that they ſhould retain their Common Good which was to pay the Proportion of public Burden, and yet be free from the Burden itſelf.

CXII. BY this Act, a Burgh ſelling any Part of their Freedom without Conſent of His Highneſs and His Three Eſtates, loſes their whole Freedom.

*Obſerv.* I. THAT the Reaſon given by this Act is, becauſe they as Vaſſals cannot ſell without Conſent of the King their Superior, and ſo this ſeems to be a Kind of Recognition, and it would have appeared reaſonable that therefore the King's Conſent might have ſeem'd ſufficient, becauſe He is only Superior; but the Reaſon why by this Act the Parliament's Conſent is declared neceſſary, ſeems to be, becauſe Burghs-Royal bear a Part of the Taxation of the Kingdom, and ſo alienating any Part of their Freedom, they ſeem to leſſen the Subject-matter out of which the Taxation is paid.

*Obſerv.* II. IT may be doubted, whether a Poſterior Confirmation or Ratification by the Parliament will be a ſufficient Conſent.

*Obſerv.* III. THAT Magiſtrates and Council cannot alienate the Privileges of a Burgh, and therefore Alienations made by them would not infer this Forfeiture or Recognition, and therefore all the Inhabitants behoved to be cited by Touck of Drum to ſuch Alienations, as they were *per ſonitum Campanæ*, in the Civil Law, *Tit. Cod. de venditione Bon. Civit.*

CXIII. BY this Act, the Parliament having referred to the King to determine who ſhould repreſent the Barons, (which ſhews what great Deference our Predeceſſors had to their King) His Majeſty determines, that none but ſuch free Barons as are Freeholders, holding of the King, and reſiding within the Shire, ſhall repreſent the Shire; but by an Act of Parliament 1669. it was declared, that ſuch as are free Barons might elect or be elected, tho' they were not actual Reſidenters, and that notwithſtanding of this Act, which is thereby abrogated as to that Point, and moſt reaſonably: for their Intereſt in the Shire ceaſes not by their not Reſidence; and conform to this Act the Convention decided in all Elections, *June* 1678.

*Nota*, ALL Elections are to be ſubſcribed by Six Barons at leaſt, and tho' in controverted Elections theſe who have Six will be preferr'd to theſe who have Five, and if neither of the Competitions have Six, a new Election will be order'd, becauſe both are unlawful; yet if all the Barons were cited, and fewer than Five were only preſent, a Commiſſion by theſe Five may ſeem ſufficient, becauſe the Abſence of Barons ſhould not prejudge the Shire; yet in the Convention 1678, many inclin'd to think that a new Election ſhould be order'd in that Caſe, becauſe of this Act, and that that Shire ought not to have a Vote who would not ſend legal Commiſſions.

THO' by this Act, the Miſſives for calling Parliaments or Conventions (which are here called General Councils) ſhould be directed to ſuch as were the laſt Commiſſioners, in Place of the Sheriffs, yet now they are ordinarily directed to the Sheriffs, and ſometimes to any the King pleaſes, as in the Parliament 1661.

BY this Act the Commiſſioners are to be chooſ'd at *Michaelmaſs* Head Court, and failing thereof, at any other Time the Freeholders meet, or when His Majeſty requires them; and therefore it may be doubted, if every Shire are oblig'd to chooſe at *Michaelmaſs*, ſince that ſeems to be ordered here, and the other Diets are only ordered to be, failing of that Head-Court: But yet many Shires in *Scotland* uſe not to chooſe at *Michaelmaſs*, but delay Elections till they be requir'd.

THO' by this Act the Names of ſuch as are elected are ordain'd to be notified in Writ to the Director of the Chancery, by the Commiſſioners of the laſt Year, yet that is not now in Obſervance, ſince His Majeſty uſes no more to call Parliaments and Conventions by Precepts out of the Chancery, but by general Proclamations.

IT is to be remembred, that where there are Elections at *Michaelmaſs*, the Shire cannot chooſe of new, as was found in the Convention 1678. in the Caſe of the Shire of *Perth*; and ordinarily the Proclamations bear as it did there, that the Shire ſhould chooſe where they had not formerly choſen at *Michaelmaſs*, and ſo theſe Elections were made without Warrant. But it may be doubted, whether ſuch Elections would be invalid, if the Proclamations mention'd nothing: As to this Point it was there alledged, that the Shire might make a new Election; becauſe the Commiſſioners then choſen were denuded, and were become no Barons. To which it was anſwered, That this ſhould have been repreſented to the Council, who would have ordered a new Election; but the Shire could not proceed to elect by their own Authority contrary to the Proclamation.

CXIV. THO' this Act has adjuſted the Weights and Meaſures of the whole Nation, and ordain'd the *Linlithgow* Firlot to be the Standard as to that Meaſure; yet it is expreſly provided by this Act, that if any Perſons be founded by Infeſtment, Tack, or Contract, in a different Meaſure, that Meaſure contain'd in their private Right ſhould ſtand, but ſhould be proportion'd to the *Linlithgow* Meaſure, without Prejudice to either Party; that is to ſay, they ſhould have Right to the old Meaſure fully, but it ſhould be paid according to the new Meaſures: As for Inſtance, The Boll of *Galloway* being Six Firlots, the Maſter ſhould have Six Firlots paid in to him; which Exception was moſt juſt, becauſe of the intrinſic Value of the Lands, to which the old Tacks, &c. were proportion'd: But yet the Lords ſuſtain'd in Mills a Multure, tho' much greater than the ordinary Fourth Part of a Peck, becauſe of conſtant Poſſeſſion; and found, that this Act did not extend to Mills, ſince therein different Meaſures are uſed according to the Proportion of the Service: Nor was this Act ever obſerved in any Part of *Scotland*, as to Mills.

IN conjunct Fees and Liferents alſo, the Husband being oblig'd to provide the Wife to particular Lands, which he obliges himſelf to make worth ſo many Chalders of Victual, it has been found, that he is oblig'd to make them worth ſo many Chalders, according to the Meaſure of the Country where the Land lies, becauſe his own Rent is ſo paid: And Miniſters in *Galloway* and other Places, where great Meaſures are uſed, will get their Stipends according to theſe Meaſures: The Reaſon of all which I conceive to be, that theſe Meaſures were made greater at firſt, becauſe of the Inſufficiency of the Victual of theſe Countries; and ſo the Greatneſs of the Meaſure does only equal the intrinſic Value.

THIS Act having fallen in Deſuetude as to the *Linlithgow* Meaſure, is again renew'd by the 16. *Act*, *Parl.* 23. Ja. VI. And many wiſh that Corn were now ſold by the Weight, and not by Meaſure, Weight being the only ſure Rule of the intrinſic Worth of Corn: But this being propon'd in the *Parl.* 1681. the Overture was rejected by a Vote. *Vide Obſerv.* on *Act* 96. *Parl.* 6. King *James* IV. *ſupra.*

# *PARLIAMENT* XII.

CXIV. FOR underſtanding this Act, it is fit to know, that upon the 22. of *May* 1592. the Presbyterian Party taking Advantage of the King's being engag'd againſt *Bothwell*, and in other Difficulties, they held a *General Aſſembly* at *Edinburgh*, wherein they drew up ſeveral Articles to be preſented to the King and Parliament, whereof *Spotiſwood* names only Four, 1. That the Acts 1584. againſt the Diſcipline of the Church, ſhould be abrogated, and the preſent Diſcipline eſtabliſh'd. 2. That the Act of Annexation ſhould be abrogated, and the Patrimony of the

Church reſtor'd. 3. That Abbots and Priors, *&c.* nor none having Commiſſion from them ſhould vote in Parliament, as repreſenting the Church. 4. That the Land ſhould be purg'd of Blood.

THE King rejected the Second and Third, but in Compliance with the Firſt Article He did, becauſe of His preſent Difficulties, as *Spotiſwood* obſerves, allow the preſent Church Diſcipline by General Aſſemblies, Synods, and Presbyteries; but yet he does not here expreſly abrogate Epiſcopacy, only the Preſentations are not ordain'd to be directed to them, but to Presbyteries; which Preſentations are again reſtor'd to Arch-biſhops and Biſhops, by the 1ſt *Act, Parl.* 21. *James* VI. And *Spotiſwood* tells us, that ſeverals of the Biſhops poſſeſt even then by their Titulars.

EPISCOPACY was again reſtor'd, ſo that the Biſhops did ſit in Parliament, by the 231 *Act, Parl.* 15. *James* VI. but they were not fully reſtor'd to their Spiritual Juriſdiction, till the 2 *Act, Parl.* 18. *James* VI. but in that Act, this Act is not abrogated, as it would certainly have been, if this Act had abrogated Epiſcopacy; but this Act is abrogated by the *Act* 1. *Parl.* 21. *James* VI.

BY this Act the Collation and Deprivation of Miniſters is declar'd to belong to the Church *jure divino*; but theſe Words, *Or any ſiklike eſſential Cenſures, having Warrant from the Word of God*, are too general, and may be abuſed.

THIS Act is now abrogated totally in all it's Heads, Clauſes, and Articles, by the 1. *Act*, 2. *Seſſ. Parl.* 1. Ch. II. which ſeems too general; for tho' this Act eſtabliſhes Presbytery, yet there are many Clauſes in it in favours of the Proteſtant Religion, and to which no Anſwer can be made, but, That what this Act has eſtabliſh'd in favours of the Proteſtant Religion, was formerly eſtabliſhed by other Acts; but the Truth is, Theſe Acts are not ſo full as this.

CXV. PETRIE in his Hiſtory tells us, That by the Seventh Article of the foreſaid Aſſembly, it was deſir'd, that Tacks ſet by the depoſed Miniſters ſhould not ſtand; but by this Act it is only declared, that when Miniſters are deprived, their Deprivation excludes them, *tam ab officio quam beneficio*, which has been doubted, becauſe Suſpenſions are only *ab officio*.

BY this Act, tho' the Perſons be deprived, yet it is declared, that their Deprivation ſhall not be prejudicial to Tacks lawfully ſet by them before their Deprivation; and the Lords do expone the Word *lawfully* ſo as to extend to the Setter himſelf; ſo that his Succeſſors can only quarrel theſe Rights upon ſuch Reaſons as the Setter himſelf could have quarrelled them. *Vide Hope's Major Pract. Tit.* Kirk.

CXVI. THIS Act is explained by the 48. *Act*, 3. *Parl.* Ja. VI.

CXVII. BY this Act, the Woman divorced for the Crime of Adultery committed by her, cannot diſpone her Eſtate to her Adulterer, if ſhe marry him, or to the Children procreate of that pretended Marriage, which has been introduc'd, not only as a Puniſhment of the Adultery when committed, but to diſcourage any from committing Adultery, upon Hopes that their Children might ſucceed to their Eſtates, with whom they committed Adultery, which is conform to the Canon Law, by which *non licet eam ducere in uxorem, quam quis polluit adulterio*; and by the Civil Law, that Woman could not inſtitute that Servant her Heir, with whom ſhe had committed Adultery, *Inſt. de hæred. inſtit. in princip.* Theſe Marriages are likewiſe declar'd null by the 20. *Act*, 16. *Parl.* Ja. VI. *Vide Crim. Pract. Tit.* Adultery, *Page* 182.

CXVIII. THO' regularly Liferent-Eſcheats do not fall while after Year and Day, yet ſuch as commit Slaughter within Kirks or Kirk-yards, and the Reſetters of them loſe their Liferent-Eſcheat immediately after Declarator, and this Liferent falls to the King, tho' in other Caſes Liferents fall to the Superior, of whom the reſpective Lands hold.

CXIX. IT was uſual to mortifie to *Abbacies* formal and eſtabliſhed Patronages of Kirks, which were formally erected in Parſonages, and to theſe the Monks preſented Parſons, and were only in Place of Patrons: At other Times Teinds were mortified and given to them. And after the Reformation, tho' Teinds were declar'd the Patrimony of the Church by the Act of Annexation, yet thereafter the Lords of Erection did prevail, by their Importunity with the King, to erect theſe Teinds in Rectories, or Parſonages, whereof the Patronage was given to the Lord of Erection: But there can be nothing ſo unjuſt or illegal as theſe Patronages were; and therefore by this Act, the Parliament finding this Abuſe was growing, did declare, that all Erections of Kirk-lands, and Teinds in temporal Lordſhips and Livings, to the Prejudice of the Kirk, and Hurt of His Majeſty's Eſtate, and Privilege of His Crown, were null, which is founded upon excellent Reaſon; for ſuch Erections of Teinds were extremely to the Prejudice of the Church, Teinds being clearly by former Laws declared to be the Spirituality, and ſo the Patrimony of the Church.

II. Laics having Power to preſent whom they pleaſed, ſuch Erections did much hurt the Church, ſince it gave to Laics the Power of preſenting.

III. It is too well known, that ſuch as are preſented by theſe Patrons, do ordinarily grant Tacks in Favours of the Patron, and to his behoof, which has been always lookt upon, as not only Simony, but as moſt prejudicial to the Intereſt of the Church, making the Miniſtry deſpicable, and tempting them to ill Shifts, and diſcouraging Worthy and Honeſt Men from ſeeking ſuch ſlaviſh Benefices, and therefore the Church has been alwiſe an Enemy to ſuch Impropriations, even when made in favours of Religious Monaſteries; for Pope *Alexander Anno* 1170. *Cap. Avaritiæ. Extra. de Præbendis*, ſays, *Intelleximus quod in Eccleſiis veſtris penſiones percipere conſueviſtis & antiquos reditus minoraſtis ideo mandamus ut antiquos reditus cum conſenſu Archiepiſcopi ad integritatem priſtinam revocetis*: And therefore the ſame Pope *Alexander* in the *Lateran* Council, made a Canon againſt this Abuſe, which was ſeconded by Pope *Clement II. Cap. ſicut Extra. de Supplen. Neglig. Prælat.* and by *Clement IV. Anno* 1240. *Cap. Suſcepti de Præbend.* in 6. But this was perfected by *Clement V. Cap. Conſtitut. de jure patronatus in Clementin*, where it is appointed, that *ſi certa portio* (called conſtantly in the Canon Law *congrua portio*) *non fuerit aſſignata per preſentantem tunc in pænam preſentantium ad Dioceſanos ipſos poteſtas hujuſmodi aſſignationis devolvatur*. And ſince there was ſo great Hazard in putting theſe Preſentations in the Hands of Monaſteries, what may be expected from Laics?

These Erections likewiſe of new Patronages, are extremely diſadvantagious to the People, becauſe one Gentleman has thereby Right to force a Miniſter upon all the other ancient and great Heretors of the Paroch. Likeas, by being Patron, he comes to have Intereſt in all their Teinds; and ſince the great Deſign of the Submiſſion and Surrender, was, that every Man might have Right to his own Teinds, this could never have been fully done, except the Patronages had been ſurrendered, for the Patron ſtill would be in effect Titular, by getting Tacks.

Likeas, by the Submiſſion, as in the beginning of it, they ſubmit, as having, or pretending Right to the Parſonage, Vicarage, or Patronage of Kirks pertaining to the Erections, ſo in the Words of the Submiſſion, they ſubmit how they may be denuded in His Majeſty's favours *omni habili modo*, of all and ſundry Tiends, which they have of any other Men's Lands, by whatſoever Right or Title they poſſeſs the ſame. And becauſe His Majeſty will take into His Princely Conſideration, what Satisfaction they ſhall have for their Tacks, Rights, and Patronages, according as His Majeſty ſhall find the Validity thereof; therefore they ſubmit, and His Majeſty conſiders in the Decreet Arbitral, all the Patronages as ſubmitted; and the Reaſon why he determines nothing, eſpecially for the Patronages, is, becauſe conſidering all the Erection together, he determines Satisfaction for that which is the true pecuniary Intereſt, nor needed the Act of Parliament expreſs Patronages, becauſe it only expreſſes theſe Things, for which a pecuniary Intereſt was to be given; or theſe Rights which were to be ſalved, but Patronages was neither of theſe: But the Act having annexed all the Superioties of Kirk-lands, and Pertinents thereof, pertaining to whatſoever Abbacy, *&c.* according to the Tenor of His Majeſty's general Determination, and the Conditions therein expreſt, it has thereby annexed all the Patronages; and it is obſervable, that tho' Reſervations are made, yet there is no Reſervation of Patronages.

*Nota*, That the King's Advocate in his Summons of Reduction, calls for all Rights of Patronages *per expreſſum*, and then ſays, And true it is that the ſaid Kirk-lands, and others Libelled were annext to the Crown by the Act of Parliament.

CXX. THIS Act *is* explain'd *Crim. Pract. Tit.* Hereſie, *Num.* 4.

CXXI. THIS Act regulating the Thirds of Benefices is now in *Deſuetude*.

CXXII. *Obſerv.* I. THAT Mercats are by this Act only diſcharged on *Sunday* in the Country, and not in Burghs Royal: For this Act is declar'd *to be without prejudice of the Liberties of Burghs Royal*; but this Diſcharge is extended to all. *Act* 159. *Parl.* 13. Jam. VI.

*Obſerv.* II. From the Words, *not being the Mercat Day of the next Burgh*, that even the Parliament would grant no Liberty to hold Fairs in prejudice of Fairs granted formerly to other Burghs; and upon this Principle of common Equity, *& ne quid fiat in æmulationem vicini*; the Lords reduced a Fair granted to *Glenbervie* by the King, becauſe it was upon the ſame Day that His Majeſty had granted a Fair formerly to *Glenfarquhar*, and within a Mile of the other: And another granted to the Earl of *Aboyn*, becauſe upon the ſame Day, and within a Mile of an old Fair at *Birſe*, tho' it was alledged that the River of *Dee* was here interjected, which by it's great Torrents about *Michaelmaſs*, ſtopt all the North from coming to the Fair. And *Friτſ. de nundinis* treating this Queſtion, Confeſſes that a Fair cannot be ſaid

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to be *in æmulationem vicini*, where the Reaſon why it was granted, could be attributed to any public Good, or Utility. It was alſo urg'd, that the granting Fairs being a mere gratuitous Conceſſion, the King could not be bound up from granting a new Fair; and thus we ſee that the King erects new Burghs-Royal within a Mile of other Burghs, and erects the Suburbs of Towns to be Burghs of Barony, albeit theſe may be ſaid to be *in æmulationem alterius*; and really they are very prejudicial, nor can that Maxim hold any where, ſave in private Deeds done by one Neighbour to another, principally in Prejudice of another; but yet that Burghs cannot be erected in Prejudice of other Burghs, and what may be ſaid to be granted in Prejudice of other Burghs, and how far this general may extend, is to be ſeen in *Fritſius de nundinis*.

*Obſerv.* III. It has been urg'd that as by this Act, theſe who had Mercats upon *Sunday*, may hold them upon a Week-day; ſo if any Perſon indite a Court, and cite to a Day then lawful, tho' that Day be thereafter declared a Holy-day, yet the Perſons thereto cited are bound to appear the next lawful Day, even where the Diets are peremptory.

CXXIV. BY this excellent Act, Sheriffs and other Judges Ordinary are commanded to ſearch Rebels, not only within their own Juriſdiction; but to advertiſe the Sheriffs of the Four Halfs about, and that under the ſame Pains that the Traitors or Rebels themſelves incur; and the recovering Decreets is not ſufficient, but they muſt ſeek, follow, purſue and preſent them to Juſtice. This Act is but ill obſerved, tho' moſt neceſſary and reaſonable; and by the 15. *Act*, *Seſſ.* 3. *Parl.* 1. Ch. II. It is declared, that not only by Law, but by the Nature and Duty of their Office, Sheriffs, Stewarts, and Baillies of Regalities are obliged to put the Laws in Execution againſt the Contemners of His Majeſty's Authority, as His proper Officers.

CXXV. BY this Act, the Lion and his Brethren Heraulds, are ordain'd to viſit the whole Arms, and as to this Part, I have explain'd it in my Book of Herauldy.

By this Act alſo Letters of Treaſon are ordain'd to be executed by Heraulds or Purſevants, bearing their Coats of Arms, or Macers; which Solemnities were found only neceſſary in Execution of Letters, that is to ſay, Summons of Treaſon, but not in the Execution of Inditements of Treaſon, *December* 5. 1666. And the Reaſon of the Difference ſeems to be, becauſe Acts of Parliament are *ſtricti juris*, nor can an Inditement be call'd Letters of Treaſon. Likeas, the Reaſon of theſe Solemnities in executing of Letters of Treaſon, is, that the People may take Notice who are cited for Treaſon, *as the weightineſs thereof requires*, which are the Words of the Act; but Inditements being only given to ſuch as are in Priſon, there needs no Solemnity; and yet for the more Security, Inditements of Treaſon are alſo executed againſt Priſoners by a Herauld.

That Part of the Act which relates to the Deprivation of Meſſengers is formerly explain'd, *Act* 46. *Parl.* 11. Jam. VI. Only it may be obſerv'd, that tho' the Lion by this Act is ordain'd to deprive Meſſengers by Advice of the Lords of Seſſion; yet he uſes to deprive them by his own Authority, and in his own Court: And tho' he publiſhes the Deprivation at the Mercat-croſs; yet Executions after that Publication have been ſuſtain'd, if the Meſſenger, after that Publication was habite, and repute a Meſſenger, *November* 10. 1676. *Steuart* contra *Hay*. And tho' it may be alledged, that this Publication ſhould put the Lieges *in mala fide*, as well as the Publication of Interdictions and Inhibitions; yet the anſwer is, that there are public Regiſters in theſe Caſes, which may inform theſe who are to Tranſact, which cannot clear them as to the Deprivation of Meſſengers.

CXXVI. THO' this Act appoints, that the Juſtice-Clerk or his Deputes, ſhall within Six Days after Criminal Letters are returned, deliver the Names of the Perſons denounced, with a brief Note of the Cauſe of their Denunciation to the Treaſurer; as alſo, the Names of ſuch as are unlawed for Abſence from Aſſiſes; yet this is not now in Obſervance, all that is obſerved now being only, that upon a Command from the Treaſury; theſe Liſts are given in ſo, that this Act is rather forgot than in Deſuetude.

By the laſt Part of this Act, all Commiſſions of Juſticiary, for longer Space than the particular Affair for which it is granted, are diſcharged; and therefore by this Act it would appear, that Commiſſions for Juſticiary, granted for a Year, or any definite Time, and not for a particular Buſineſs, are null.

It is likewiſe appointed by this Clauſe, that ſuch as procure Commiſſions of Juſticiary, ſhall find Caution to reproduce the Proceſs, and to pay that Part of the Commodity, which by the Commiſſion is deſtinated for the King's Uſe, which is moſt rational, becauſe this would likewiſe oblige theſe who get the Commiſſion to do Juſtice, knowing that the Proceſs may be reviſ'd, when it is lying *in publica cuſtodia*, that is to ſay, in the Books of Adjournal, for ſuch Proceſſes ought to be brought back, and are uſually regiſtrated there; but this is ofttimes neglected; and it was debated in the Caſe, *Turnbul* againſt the Lord *Cranſtoun*, *July*, 1678. That the Tenor of a Decreet of Forfeiture, pronounced upon a Commiſſion granted to the Earl of *Dumbar*, could not be proven, except the Proceſs were produced, whereupon it proceeded, conform to this Act, ſince all that the Witneſſes could prove, was, that they had ſeen ſuch a Decreet, which is not ſufficient, for elſe an unjuſt Decreet of Forefeiture might be pronounced and loſt, to the end, the Tenor thereof might be proven without any poſſibility of quarrelling the Warrants, whereupon it proceeded.

It may be doubted what is meant by that Part of the Commodity, which belongs to the King; and I conceive that when ſuch Commiſſions of Juſticiary are granted, the whole Eſcheat belongs to the King, and the Commiſſioners have only Right to their neceſſary Expence, *tanquam mandatarii*, except a particular Quota be condeſcended on in their Commiſſion, tho' ſome are of Opinion that theſe Commiſſioners have Right to the ſame Quota's that Sheriffs have, ſince they are Sheriffs in that Part.

CXXVII. BY this Act the Comptrollers Conſent is requiſite in all Infeſtments of Feu-ferm, or Confirmations of the King's proper Lands; and tho' there be no Comptroller now, yet the Conſent of the Commiſſioners of the Treaſury, or Treaſurer, if he were, ſupplies the ſame. Hence it is that this Act appoints all Feu-ferms and Confirmations to paſs the Comptrollers Regiſter, which is likewiſe ratify'd by the 171. *Act, 13. Parl.* Ja. VI. It is fit to know that the Treaſurer and Comptroller had different Regiſters, but now there is but one Clerk to all the Exchequer, who is called the Treaſurer's Clerk, and he keeps but one Regiſter, each Volume whereof is divided in Two Parts, the one whereof contains only Gifts that paſs the Exchequer, and the other, all other Signatures of Confirmation, &c.

CXXVIII. BEASTS found is His Majeſty's Forreſts or Parks, may be *brevi manu*, intrometted with, *Vid. Act, 12. Parl. 4.* Ja. V. But ſince Forreſts are not now fenc'd, it ſeems unreaſonable that a Beaſt ſtraying ſhould be eſcheated, tho' where Beaſts are deſignedly driven into a Forreſt, it deſerves Puniſhment; and this Act ſeems only to ſpeak of fenced Forreſts, for it ſays, *Parks, or Forreſts*; and it requires Advertiſement, before Beaſts even found in theſe, can be Eſcheat, *Vid. Argent. Tit. des* Aſſiſe, where this Matter is fully treated.

CXXIX. ALL *Engliſh* Goods may be ſearched for, and if they be not ſealed by the Cuſtomers, may be confiſcated; which Act being put in Practice at *Edinburgh*, in *Anno* 1664. occaſioned a great Tumult, and the Act was alledged to be in Deſuetude. The Word *Selling* in this Act is wrong printed in the laſt Impreſſion, for it ſhould be *Sealing*.

*Nota*, This Act ratifies only an Act of Privy-Council, which ordained formerly Confiſcation; and this ſhews how great the King's Power was of old in the Matter of Trade, *Vide Act* 24. *Parl.* 16. Ja. VI. which renews again this Act.

CXXX. *VIDE* laſt *Act*, 1. *Parl.* Ch. I.

CXXXI. THIS Act is temporary, but from it, it is obſervable, that as the King may, as Superior, call for Production of any Vaſſals Rights and Infeſtments, in a Reduction or Improbation, and even by way of Exhibition, which is conform to the Feudal Law, and to *C. 24. Quon. Attach.* ſo the King may, by Act of Parliament, ſometime call for Production of all the Rights of His Vaſſals of Kirk-lands together, as in this Act, or of all the Rights of any particular Place, as of the Iſles, *Act* 262. *Parl.* 15. Ja. VI. And I think the King might have call'd for them without this Act, by Proclamation. And albeit it be ſaid, *C. 25. Quon. Attach.* that the Vaſſal ſhall only be obliged to ſhow his Evidents once in his Life to the King, this is not now obſerv'd, and the true Meaning of it is only deſign'd againſt too frequent troubling of the Lieges, which, as no Calumniouſneſs, is never to be preſumed in the King or His Officers.

CXXXII. THIS Act appoints Lords of the Seſſion not to be admitted till they be 25 Years of Age, which agrees with the Law of *France*, *Langley Semeſtr. C.* 10. and with that of *Venice*, *Contar. L. 3. C.* 3. whereas of old the *Romans* admitted no Senators till 35. which *Auguſtus* retrenched till 30, *Sueton. C.* 32. *Vide* 93. *Act, Parl.* 6. Ja. VI. but that Part of the Act, appointing that none ſhall be admitted Lords but ſuch as have a Thouſand Merks of Rent, or Twenty Chalders of Victual, is not now ſtrictly obſerv'd, tho' this was an Act to prevent the Temptation of Bribing, and that Parties injur'd by them may have ſomewhat, out of which they may expect Reparation, *ſi judex litem ſuam fecerit*.

CXXXIII. THE antedating of Warrants of Signatures is here puniſh'd by the Puniſhment of Falſhood and Treaſon, Three Parts to the King, and the Fourth to the Party griev'd; from which it may be argued, that where no Party is grieved, the Puniſhment cannot be inferr'd, eſpecially ſeeing in that Caſe it is preſumeable there was no *dolus*, or Fraud. *Vide Cap. 9. Statut.* Robert III.

ACT CXXXV. THO' Reverſions be *ſtrictiſſimi juris*, (which was the *ratio dubitandi* in this Act) and albeit the Contract bear, *That there ſhall be no Redemption without Payment of more than Ten for every Hundred, as Annualrent*; yet it is here declared, *That Ten for the Hundred ſhall be ſufficient*, and now Six of the Hundred will be ſufficient, tho' this Act does not generally ſay, that the Conſignation of the ordinary Annualrent ſhall be ſufficient.

CXXXVII. THIS Act is explained in the 62. *Act, Parl.* 11. Ja. VI.

CXXXVIII. BY this Act, generally all unlawful and impoſſible Conditions in Contracts, or Obligations amongſt private Parties, are diſcharg'd in general, which is conform to the Civil Law; by which impoſſible Conditions adjected in Teſtaments are held as not adjected or mentioned, but annul not that Part of the Teſtament to which they are adjected, § 10. *Inſtit. de hæred. Inſtit.* but in Contracts the adjecting of an impoſſible Clauſe does annul the Obligation itſelf, *L. 7. de Verb. Oblig. L. 31. de Oblig. & Act.* And the Reaſon of this Difference is, becauſe the Law preſumes, that where Men adject impoſſible Conditions in Contracts, they are not ſerious, and they reſolve not to oblige themſelves; but it is to be preſum'd, that all Men being ſerious in their Teſtaments, the adjecting of ſuch Conditions did proceed from a Miſtake. *Conditio turpis*, and unlawful Conditions are judg'd in Law as impoſſible, *L. 15. de Cond. Inſt.* and yet in this Act the Obligation ſubſiſts in Contracts; and the impoſſible, or unlawful Conditions thereto adjected, and not the Contract itſelf, are irritated and declared null. But the Particular that gave Occaſion to this general Part of the Statute, was, that ſome Perſons did declare by a Clauſe in the Bonds which they took, that it ſhould be lawful to them to charge their Debitor at the Mercat Croſs of *Edinburgh*, and not perſonally, and that too upon ſo ſhort a Time as the Party charged could not know; ſo that their Eſcheat fell, and they loſt *perſonam ſtandi in judicio*, without knowing, or being able to know their Danger; which Clauſe is declared unlawful and impoſſible: And yet it may be alledged this is not unjuſt; for when a Man lends his Money to one living in *Zetland*, or the remote Iſles, and the Debitor ſuffers the Day of Payment to elapſe; it ſeems unreaſonable, that for Debts which may be very ſmall, he ſhould be obliged to ſend to theſe remote and dangerous Parts, to charge the Debitor perſonally, and the Debitor may conſtitute a Procurator at *Edinburgh* to pay, *& ſibi imputet* that he did not pay. And it is preſumed, that at *Edinburgh*, which is *Communis Patria*, every Man hath a Procurator, elſe Citations at the Pier and Shore of *Leith*, upon Sixty Days, where the Man is in the *Indies*, were as unlawful as this is, and the Performance as impoſſible.

NOTWITHSTANDING of this Act, I find that a Charge of Horning upon Six Days, by a Conſent in the Clauſe of Regiſtration, was ſuſtained, tho' the Perſon denounced offered to prove that he could not obey the Charge, he living in ſo remote a Place, *January* 1675. *Meldrum* contra *Tolquhon*. And tho' by this Act it be appointed, that the Denunciations upon ſuch unlawful Obligations ſhall be null, and that the Uſers ſhall be oblig'd to denounce and charge of new, according to the Cuſtom of the Realm; yet I ſee not how this can be, for the Clauſe of Regiſtration inſert, being upon Six Days, or a ſhorter Time, cannot be a ſufficient Warrant to charge upon more Days, and ſo that new Charge would want a Warrant, except this Act of Parliament ſhall be ſaid to be the Warrant thereof.

CXXXIX. NOTWITHSTANDING of this Act, appointing all Executions to be ſubſcribed; yet in Inferior Courts verbal Executions are oft ſuſtained.

THO' the Word *Executions* is not derived from pure *Latin* or *Roman* Cuſtom; yet it ſeems founded on *L. 2. ff. de re Jud.* and is derived to us from the *French*, who have, and do always uſe it in the Senſe we do. *Vide Argent. Tit. des* Executions.

CXL. *VIDE Act* 29. *Parl.* 11. Ja. VI.

CXLI. BY this Act it is juſtly ordain'd, that Compenſation be receiv'd, if inſtantly verified by Writ or Oath of Party before Sentence, but that it be not at all receiv'd after Sentence, by Way of Suſpenſion or Reduction; ſo that the only Remedy in that Caſe is to purſue the Debt as accords: Which Act is extended to Decreets of the Seſſion, as well where the Decreets are in Abſence, as where they are *in foro, July* 25. 1676. *Wright* contra *Sheill*; ſuch Reſpect is given to the Decreet of the Lords: But yet if Contumacy be purg'd, it is thought that Compenſation may be receiv'd by Way of Reduction, *Had. December* 20. And generally Compenſation is receiv'd againſt Decreets in Abſence before inferior Courts, *June* 18. 1662. Earl *Mariſchal* contra *Bray*. This Decreet was *in foro*: And *Stairs* aſſerts, that Competent and Omitted before Baron Courts is not conſider'd.

THO' by the Civil Law, *compenſatio tollit debitum ipſo jure*, and ſo that it may ſeem that this Exception is ſtill receivable any Way, even as the Exception of Payment, which is receivable againſt Decreets of the Seſſion in Abſence; yet even by the Civil Law *compenſatio debet*

ACT *opponi,* becauſe it is *facti,* and ſo *ſibi imputet,* the Debitor that compeared not to propone it. I find this Act is *in terminis* obſerv'd in *Holland. Vide Neoſtad. Deciſ.* 95.

CXLIII. THE Intrometters with Eſcheat Goods, as well as the Donator, are oblig'd to pay the Debt contain'd in the Horning, whereupon the Gift proceeds.

*Obſerv.* I. That tho' generally the Donator is only thought liable in this Caſe, yet all Intrometters with any Part, tho' never ſo ſmall, are liable; and this is a Kind of vitious Intromiſſion, which makes the Intrometter liable *in ſolidum,* and not *in quantum lucratus.*

*Obſerv.* II. That the Donator will not be found liable till after general Declarator, becauſe it is only general Declarator that puts the Donator in the Rebel's Place, as *Spotiſwood* obſerves, *March* 20. 1626. But if the Donator delay to purſue a Declarator, I think his Negligence ſhould not prejudge a Creditor. For the ſame Reaſon alſo, a Donator is not liable if the Horning be null, except he has intrometted; but if he has intrometted, *res non eſt integra;* and ſo his offering to renounce the Gift will not be ſufficient, *March* 15. 1631. *Fletcher* contra *Kid.* It hath likewiſe been found, that the Donator will not be ſubject in Payment of Annualrent due after Denunciation, becauſe the Act appoints him only to be liable for the Debt contain'd in the Horning, and this Annualrent is due only after the Horning, *March* 15. 1631. *Fletcher* contra *Kid.* But this Deciſion may be doubted, ſince he being by the Act liable for the Debt. *acceſſorium ſequitur principale:* And if the Debitor had got the Eſcheat himſelf, he had gotten Payment of all.

*Obſerv.* III. That this Act appoints Letters to be direct againſt the Donator and Intrometters, for Payment upon Six Days.

CXLIV. BY this Act, ſuch as reſet, ſupply, or intercommune with declar'd Traitors or Rebels, are declar'd liable in the ſame Pains, for the which they are forfeited, or put to the Horn; and it is ordain'd, that all the Subjects are liable to ſearch, ſeek, take, or apprehend them, till they be out of the Shire where they live, and to intimate to the next Magiſtrate, to whoſe Bounds they have chaſed them.

Item, *If any Vagabonds or ſuſpect Perſons come to the Shire, every Man is oblig'd to advertiſe ſome Magiſtrate.*

*Obſerv.* I. That here the Subjects are obliged, without being deſired by the Magiſtrate, to ſearch for, and apprehend Rebels, and ſo the Objection againſt the Bond appointed by the Council, *January,* 1678. wherein it was aſſerted, That no preſent Subject was bound to take, or ſearch for Rebels, was a moſt illegal Objection, expreſly contrary, not only to this Act, but to the true Intereſt of the Commonwealth, which obliges every Man to do his utmoſt Endeavour to keep the Country quiet: Nor can there be any Thing more reaſonable than that theſe who enter in a Society ſhall promote the good of the Society, by all poſſible Means, and that theſe who have the Protection of the Law, ſhould perſecute all ſuch as oppoſe it; and this Duty to the King, in taking ſuch as are Rebels to Him, ſeems to be implied in the very Nature of our Allegiance. But it may be argued, that this ſhould only be extended to ſuch as are Traitors, or at leaſt to ſuch as are Intercommuned, which is contrary to the expreſs Words of this Act, whereby all Men are diſcharged to reſet Traitors, or Rebels, contemnantly remaining at the Horn, ſo that the reſetting all who remain at the Horn, is here puniſhed; and this Act being deſigned, as the Act bears, as a further Addition to the former Law, muſt be extended againſt all Rebels, for the Common Law did formerly reach this far againſt the reſetting of Traitors, and intercommuned Perſons. *Vid. Act* 97. *Parl.* 7. Jam. V. And whereas it may be pretended, that this Act obliges only the Lieges to aſſiſt Magiſtrates in taking ſuch Perſons. It is anſwered, that that was ſufficiently ſecured by former Laws; and this Act obliges all the Lieges ſimply.

CXLV. BY this excellent Act, it is provided that all Gifts of Eſcheat taken ſimulately, either by the Rebel himſelf, or by others, to the Behoof of the Rebel, ſhall be null; for elſe the falling of their Eſcheat would be no Puniſhment to Rebels, nor Diſcouragement from Rebellion.

This Simulation may be prov'd, either directly by the Oath of the Donator; or may be inferred from Preſumptions, as all other Frauds and Simulations are, ſince the Deſign of Fraud and Diſſimulation, being to palliat and cover a Cheat, if Preſumptions were not ſuſtained to aſtruct the Simulation, it could never be diſcovered.

The Firſt Preſumption is, That the Gift is granted to the Children of the Rebel, and if the Children be *unforis familiat,* it is concluded to be a ſimulate Gift, *Preſumptione juris;* and yet if a Child *in familia,* have *a peculium* of his own, it may be alledg'd that his Father as Adminiſtrator, being Debitor to him, he has taken his Eſcheat in his Son's Name for his Security: But tho' the Children be *foris familiat;* yet by this Act of Parliament, there lyes *preſumptio juris* againſt them, if this Rebel continue in Poſſeſſion; and therefore the Children muſt prove that they have it for an onerous Cauſe: And thus is to be underſtood that Deciſion of *Dury, March* 20. 1623. Lord *Keith* contra *Denholm;* where it was found that no

Contingency of Blood, no not the being a Son, was ſufficient to infer Simulation; but if this were ſuſtained ſimply, as ordinarily it is, then Creditors may be eaſily cheated, and the Donator might ſtill continue to have the Advantage of the Eſcheat, tho' not the Poſſeſſion of the Goods.

Likeas, by this Act of Parliament, it is expreſly provided, that the Treaſurer may intromet with the Goods, if they be in the Poſſeſſion of the Rebel, his Wife, or Bairns; which ſhews that the Parliament lookt upon this as a Preſumption to infer Fraud.

The Second Preſumption is, That the Gift was expede upon the Expence of the Rebel, tho' the Donator was Creditor, except in ſo far as the Donator made uſe of the Gift, being Creditor for his own Security, *March* 11. 1624. And if yet the Creditor was only Creditor, by buying of Land from the Rebel, and knew that there was a prior Right granted to another Perſon; the Lords declared that his Gift ſhould not prejudge that prior Right, *June* 22. 1669. And if the Rebel did once take the Gift blank, tho' he thereafter filled up a lawful Creditor's Name therein, the Rebel procuring the Gift ſo upon his own Expence, this will infer it to be ſimulate, and extinguiſh the Right, tho' the Donator was truly a lawful Creditor, *December* 17. 1670. *Lantoun* contra *Scot*. By which it may be concluded, that tho' originally the Rebel may expede a Gift upon his own Expences, for the Behoof of a lawful Creditor, where the Rebel takes the Gift himſelf, and thereafter fills up a lawful Creditor's Name, that will not make it reconvaleſce, *nam quod ab initio vitioſum eſt tractu temporis non poteſt convaleſcere.*

That the Gift was paſt upon the Rebel's Expence, is probable *per membra curiæ, viz.* The Servants of Exchequer, and Keepers of the Seals, except the Donator has made Faith at the paſſing of the Gift, that it was truly to his own Behoof, the Simulation having been then ſuſpected, becauſe he who ſought the Gift was the Rebel's Son, *December* 4. 1669. And generally if the Donator in Fortification of his Gift and Debt, offer to make Faith that the Gift is truly to his own Behoof, this would be ſuſtain'd to purge any Preſumptions of Simulation, *December* 12. 1673.

The Third Preſumption is the Rebel's retaining Poſſeſſion; but how long Poſſeſſion would be ſufficient to infer this Simulation, is *in arbitrio Judicis*; for the ſuffering the Rebel to remain ſome Time in Poſſeſſion, is no Preſumption, even againſt a Son, ſince the Donator muſt have ſome Time to purſue, and recover Decreets: But if the Donator ſuffer him to continue very long, this is *præſumptio juris & de jure*; for tho' there were no Simulation in the Caſe, yet the Negligence of the firſt Donator would make Place for a Second; and even the Donator's ſuffering the Rebel to poſſeſs Three Years, has been found to be *præſumptio juris* for inferring Simulation, *June* 1666. *Oliphant* contra *Oliphant*.

There is a Title in the Civil Law *de colluſione detegenda*, which, tho' it run there only againſt Colluſion *inter dominos & ſervos*, yet the whole Matter of Colluſion is there treated by the Doctors, and it is defin'd to be *ſub ſpecie litis luſus. Vide Bartholl. Cæpoll. de ſimulationibus*, where this Subject is fully treated.

By the laſt Clauſe in this Act it is provided, That the Treaſurer or his Deputes may cauſe ſecure the Houſes of the Committers of the Crimes, upon the Expences of the readieſt of the Eſcheat Goods; that is like that *annotatio bonorum* allow'd by the Civil Law in Criminals againſt Abſents. And tho' the Act of Parliament ſpecifies only, that this may be done in Crimes, yet I conceive that all Rebellion is comprehended under the Word *Crimes*; for in all Caſes, even for Civil Rebellion, not only may the Treaſurer ſeal till Caution be found, but even the Lords of Seſſion will, upon a Bill, allow the Sealing of the Rebel's Goods at the Donator's Inſtance, till Caution be found.

WILFUL ſetting of Fire in Coal-heughs is Treaſon. *Vide Crim. Pract. Tit.* Fire-raiſing. CXLVI.

THIS Act is explain'd, *Crim. Pract. Tit.* Beggars and Vagabonds. CXLVII.

THIS Act againſt Foreſtalling is fully explain'd, *Crim. Pract. Tit.* Foreſtallers. CXLVIII.

THIS Act puniſhing the Carriers of Wool, Nolt, and Sheep into *England*, by eſcheating the Tranſgreſſor's Moveables, is not abrogated by the Union of the Crowns, the Nations being ſtill diſtinct. CXLIX.

THIS Act againſt Deforcers is explain'd, *Crim. Pract. Tit.* Deforcement. CL.

THIS Act is explain'd, *Crim. Pract. Tit.* Art and Part, *Num.* 2. CLI.

THIS Act declaring that none but actual Burgeſſes ſhall traffic, is fully explain'd, 5. *Act*, 3. *Seſſ.* 2. *Parl.* Ch. II. CLII.

ACT CLIII. BY this Act, all Manner of Perſons, Inhabitants of Burghs, exercing any Manner of Traffic or having Change therein, ſhall bear Stent; which Act was found not to extend to Indwellers, tho' they have the Benefit of the Mercats, and had never any other Reſidence but within Burgh, and have the Benefit of Seats in the Kirks, and ſo ſhould at leaſt pay Contribution for the Miniſter's Stipend, *January* 11. 1678. Town of *Aberdeen* contra *Leſk*. And by the 275. *Act*, 15. *Par. Ja.* VI. all ſuch as have an Hundred Pounds of yearly Rent, may be ſtented; but by the 276. *Act* of that Parliament, they are only to be ſtented according to the Value of that Rent they have within that Burgh, and not according to what they are worth elſewhere: But it may ſeem, that by the 275. *Act*, all who have an Hundred Pound to ſpend, ought to be ſtented; that therefore Indwellers are to be ſtented, though they have not an Hundred Pound of Rent in Houſe-Mail, or Trade; for the Act ſays, *if they may ſpend*, and not, if they have: And therefore that the Perſons who come in accidentally, to live in Town, ſhould not pay; yet if they have no other conſtant Dwelling, ſave in Burgh, that in that Caſe they ought to pay, becauſe it is juſt all Subjects ſhould bear ſome Burden, and they bear none elſewhere. To which nothing can be anſwered, but that the Act ordains only ſuch to be ſtented, as have Rents and Livings copulative.

*Obſerv.* THAT by this Act one of every Craft is to be exeem'd, as His Majeſty's Servant, from all Taxation, Watching, and Warding, ſuch as the King's Taylor, His Smith, &c. And yet this Act does not exeme them actually, but only allows His Majeſty to exeme, if He pleaſes; ſo that except theſe be actually exemed by their Gift, this Act will not exeme them. This Privilege is renew'd, *Act* 275. *Parl.* 15. Ja. VI. And His Majeſty by His Gifts to His Workmen, declares them to be exem'd, conform to theſe Acts; whereupon the Council in *Anno* 1680. did find they ſhould not be ſtented; and all theſe Privileges are again ratify'd in the Parliament 1681. But there being a Declarator rais'd of theſe Privileges before the Lords of Seſſion in *Anno* 1684. it was objected, *Firſt*, That becauſe theſe Acts being made in favours of the King's Servants, whilſt our Kings lived in *Scotland*, and they actually ty'd to Service, the ſaids Acts ſhould not now take Place, but ſhould ceaſe with the Service whereupon they are founded.

II. THO' Wrights, Maſons, &c. who are actually at preſent ty'd to ſerve, may plead this Privilege; yet the ſame cannot be crav'd by the King's Barbers, Shoemakers, &c. who never ſerve.

III. THE ſaid Exemption could extend no further than to the Value of the Employment they had from the King; but if the King's Smith, &c. have from the People the Employment that other poor Smiths ſhould have, it were not juſt that he ſhould be exem'd, which were to make them pay the Value of the Impoſitions that ſhould be put upon him.

IV. THAT theſe Laws could not exeme from paying for their other Trades; ſo that if the King's Maſon be likewiſe a Vintner, he ſhould pay for his Gain in that Trade.

V. THESE Acts of Parliament could only free from Watching and Warding, which are inconſiſtent with perſonal Attendance, but ſhould not be extended to Stents and Impoſitions, which were not uſual before theſe Acts, ſince the general Words of Laws are ordinarily reſtricted to what ordinarily happens in the Time.

VI. THO' theſe Exemptions could ſecure againſt Impoſitions laid on by the Town, yet they cannot ſecure againſt Impoſitions laid on in Parliament by voluntar Offers made by the Subjects themſelves, in which thoſe Tradeſmen muſt be conſidered as voluntary Offerers, as well as others, ſince they are repreſented in Parliament as well as others; and in which Act, Colleges and Hoſpitals are only exem'd, and not they. This Debate is as yet come to no Deciſion.

CLIV. BY this Act, the Craftſmen living in Suburbs of Free and Royal Burrows, are diſcharg'd to work, and their Work declared confiſcable; but this Act is not extended to Suburbs that are erected in a Burgh of Barony; for theſe are privileged by their Erection, and are not mere Suburbs, but diſtinct Juriſdictions, *July* 21. 1629. and there is a Decreet-arbitral betwixt *Edinburgh* and the Suburbs, wherein there is a Liberty allow'd to theſe who live in their Suburbs to work to Strangers, but not to Townſmen. This Act of Parliament has likewiſe been extended, not only to Suburbs, but to all who were within the Liberties and Privileges of Burrows-Royal, tho' the ſaids Places be not properly Suburbs; and that the Act of Parliament diſcharges only the Exerciſe of ſuch Crafts in Suburbs adjacent to the ſaids Burrows, *July* 7. 1671. Town of *Stirling* contra *Polmais*, whoſe Tenents and Tradeſmen in St. *Ninians* lived a Mile from the Town of *Stirling*. *Vide etiam* Durie, *March* 21. 1628. and the Reaſon of this Deciſion was, becauſe ſuch unfree Men as live within the Privileges, do as well abſtract the Trade of the Inhabitants, as thoſe who live within the Suburbs.

It may be doubted whether, ſince this Act of Parliament allows only the Provoſt and Bailies, or the Officers, to intromet with and eſcheat the Materials ſo wrought, if therefore the Craftſmen within Towns may intromet, they being neither named in this Allowance; and becauſe they are too intereſted to have had this Power committed to them.

It may be alſo doubted whether, tho' they may eſcheat the Goods when they are actually taken, if they may, by virtue of this Act, purſue the unfree Men; for tho' there be no ſuch Warrant in this Act, yet it ſeems that without they have this Allowance, the Privilege granted by the Act would be uſeleſs, ſince it would put them to keep more Servants to catch the Inbringers than the Privilege deſerves.

*VIDE Nota's* on *Act* 74. *Parl.* 14. Ja. II. & *Crim. Pract. Tit.* Remiſſions. CLV.

THIS Act diſcharging the Tranſporting of Skins forth of the Realm, under Pain of Confiſcation, is ſtill in Force, and was introduc'd to Encourage our own Manufactures; theſe Skins when carry'd out, being wrought by Strangers into ſeveral uſeful Commodities, and ſold back to our ſelves at great Rates; tho' this Act diſcharges only the carrying out of Calf-skins, Hudrons, and Kid-skins, yet by the 178. *Act*, 13. *Parl.* Jam. VI. This is extended to all other Skins; and tho' by this Act, the Confiſcation is to be for His Majeſty's Uſe, yet by that Act, the Half belongs to the Apprehender.

*Obſerv.* II. Not only the tranſporting, but even the packing and pielling is found to be a ſufficient Ground of Confiſcation; for packing and pielling is *preſumptione juris*, concluded to be in order to Tranſportation; but it is not *preſumptio juris & de jure*, ſince to elide the Confiſcation, it is ſufficient to alledge that the Skins were packed and pielled, in order only to an inward Tranſportation from one Place of the Kingdom to another.

*Obſerv.* III. That by the 45. *Act*, *Parl.* 1. Ch. II. *The Exportation of all wild Beaſts Skins, and Shorlings*, are expreſly diſcharg'd; and by Shorlings are meant, Skins which have the Wool pluckt off, and comes from the Word *Shearing*; but by that Act, Power is given to the Exchequer to give Licences for exporting of Skins as they ſhall find Cauſe: And tho' the Power to grant ſuch Licences, may ſeem to caſt looſe all theſe Acts, it being very preſumable that they would be purchaſs'd for Money; yet that was thought neceſſary, becauſe if our Tradeſmen knew that no Skins could be exported, they would leſſen the Price as they pleaſ'd, and ſometimes the Tradeſmen cannot make uſe of all the Skins in the Nation, and Skins are a conſiderable Part of ſome Men's Rent; nor ſhould the Exchequer give Licences in any other Caſe.

THIS Act renews the 54. *Act*, 6. *Parl.* Queen *Mary*, *diſcharging all Perſons to ſtop the Way to Free-burrows, or Sea-ports, under the Pain of being purſu'd as Oppreſſors*, and allows the Lords of Seſſion to purſue the Contraveeners ſummarily without any Aſſiſe; which Act was neceſſary, becauſe all Actions of Moleſtations, ſuch as this, was formerly ordain'd to be try'd by Aſſiſes, and before inferiour Judges, 11. *Parl. Act.* 42. Ja. VI. From which Act theſe Tryals are excepted, becauſe of their great Importance, and that they require preſent Expedition; for which Cauſe the Civil Law allow'd ſeveral Interdicts againſt Stoppers of High-ways, *Vid. Tit.* 10. *l.* 43. *ff. de Via Pub.* By the 38. *Act*, 1. *Parl.* Ch. II. All High-ways to Mercat-Towns are ordain'd to be Twenty Foot of Meaſure, and the Juſtice of Peace are ordered to ſee the High-ways made to have that Latitude at leaſt: And by the Civil Law, *Via privata debet eſſe octo pedum in porrectum* & 16. *pedum in anfractum l. viæ Latitudo ff. de ſervit. præ. ruſticorum via autem publica ſeu conſularis tam lata eſſe debet, ut currus obvii ſibi invicem cedere poſſint Cæpol. de ſervit. ruſticis, Cap.* 3. I find this Law for ſecuring the High-ways to Royal Burrows was very old in *France*, *Argentorat. Pag.* 201. where he very well obſerves, that, *Ita fit ut itinera quæ ab agris parœciis aut Pagis inchoantur, licet in Mercatum ducant, Publica dici non debeant, cum a Mercatu ad Mercatum non ducant, ut hoc textu, ſed etſi ab urbibus incipiunt nec tamen in urbes aut alios Mercatus ducant, Publica hac quidem lege non ſunt.* I find always, that Ways leading to Burghs had a particular Privilege, by the Civil Law. CLVI.

THIS Act allows the Admiral no more Juriſdiction than he exerciſed before the Death of King *James* V. notwithſtanding of any Specialities contained in their Infeftments; and it may be doubted whether the Admiral is to prove, when he is challenged, that that for which he is challenged was exerciſed by his Predeceſſors in the Time of King *James* V. or if ſuch as challenge the Admiral, are to prove what was the Cuſtom then: But the Admiral's Juriſdiction is now fully clear'd by the 16. *Act*, *Parl.* 3. Ch. II. CLVII.

THIS Act is explain'd, Act concerning Provoſtries. Ch. II. *Parl.* 1. *Seſſ.* 1. *Act* 54. CLVIII.

# PARLIAMENT XIII.

CLIX. THIS Act, diſcharging Mercats and Fairs on the Sabbath Day, was made at the Deſire of the General Aſſembly, as our Hiſtory obſerves. *Vide Spotiſwood's* Hiſtory of the Reformation.

CLX. THIS Act, appointing ſuch as contemn the Decreets of the Kirk to be denounced Rebels, is ſtill in Force, tho' it relates only to the Decreets of Presbyteries, and Presbyterian Judicatures, and tho' theſe be now abrogated.

CLXI. THIS Act is formerly explain'd in the *Act* 48. *Parl.* 3. Ja. VI.

CLXII. IT may be doubted whether this Privilege granted to Miniſters, freeing their Stipends of all Impoſitions, can be taken from them by Conventions of States, ſince Conventions cannot derogate from Acts of Parliament, and they can only offer their own Money, but cannot make Laws; and yet the Convention 1666. did burden Miniſters Stipends with the Impoſition then laid on.

THE Anſwer to this Doubt is, That the Act of the Convention *Anno* 1665. doth not make either ſtipendiary Miniſters, or Miniſters having modified Stipends, liable to Impoſitions, but only ordains benefic'd Perſons to be tax'd: And the Convention 1667. having ordain'd the Impoſitions then laid on to be levied, according to the Valuation led *in Anno* 1660. and not according to the retoured Duty (which was the old Way) did ordain that Benefices ſhould be valued, and pay, in ſo far as theſe Benefices exceeded the modified Stipend, and ſo they are burdened in both theſe Acts as benefic'd Perſons, and not as ſtipendiary Miniſters, of whom this Act only ſpeaks.

CLXIV. IT is obſervable from this Act, that ſome Crimes which are not capital of their own Nature, become capital by Reiteration, tho' many Civilians doubt of this Point, and yet *creſcente malitiâ creſcere debet pœna, L.* 4. *C. de ſervis fugit, & plus punitur qui ſæpius deliquit, L.* 8. § 2. *C. ad L. Jul. de vi pub.*

CLXVI. BY this Act the Pains of ſuch as find Caution to anſwer in Criminal Diets, and report Criminal Letters for Lawburrows, are heightned, every Earl or Lord Two Thouſand Pounds; every great Baron a Thouſand Pounds; every Freeholder a Thouſand Merks; every Feuar Five Hundred Merks: And theſe are call'd in our preſent Stile, The Pains of the new Act of Parliament.

*Obſerv.* I. THAT it has been debated from this Act, whether this Caution ſhould be found according to the Quality of the Purſuer or the Defender: As for Inſtance, If an Earl were purſuing a Feuar, ſhould he find Caution according to the Sum ſpecified for an Earl, or for a Feuar? And it was found, that Caution ſhould be found for Five Hundred Merks only, according to the Condition of the Defender.

*Obſerv.* II. THE Quality of a Burgeſs is not here ſpecified; and if he hold Land-Burgage, he is *de praxi* conſider'd as a Freeholder, elſe he is conſider'd as an unlanded Gentleman; and if he holds Feu of the Burgh, he is conſider'd as a Feuar.

*Obſerv.* III. THE Unlaw of ſuch as compear not at the firſt Juſtice-air is to be Twenty Pounds; that is to ſay, the Maſter who preſents not his Tenents is to pay Twenty Pounds, over and above all other Puniſhments, which is relative to the 6. *Act*, 3. *Parl.* Ja. V. and is there explain'd. *Vide ſupra Obſerv.* on Ja. I. *Parl.* 11. *Act* 129. Ja. III. *Parl.* 1. *Act* 5. Ja. IV. *Parl.* 3. *Act* 27.

CLXVII. THIS Act annexing all Annualrents payable to Prelacies to the Crown, is abrogated, in ſo far as concerns Biſhops, by the Act reſtoring Biſhops *in Anno* 1606.

CLXVIII. NOTA, that ſuch Cuſtomers and Searchers as cheat the Cuſtoms, are only puniſh'd by Deprivation, and Eſcheat of their Moveables; and therefore it ſeems that they are miſtaken who think that ſuch may be puniſh'd by Death, this being an extraordinary Theft, both as to the Value, the Preparative, and the ordinary Puniſhment not excluded.

It may be likewiſe doubted, whether ſuch as enter in Compacts with Cuſtomers and Searchers, to defraud the Cuſtoms, may be puniſh'd by the ſame Puniſhment, becauſe they are Art and Part.

CLXIX. REMISSIONS are, notwithſtanding of this Act, paſt without previous Letters of Slains, or Conſents from the Parties; but the Party may get an Aſſythment, albeit the Remiſſion be paſt. All Remiſſions are at preſent regiſtrated in the Treaſurer's Regiſter, conform to this Act, and in the Secretary's Regiſter alſo, as all Papers are that paſs His Majeſty's Hand.

CLXX. THO' this includes the Members of the College of Juſtice in the Privileges granted to the College of Juſtice with the Senators, yet of late by the 8. *Act*, 2. *Seſſ.* 2. *Parl.* Ch. II. Freedom from Impoſitions is renew'd to the Senators only. *Vide Obſerv.* on that Act, where it is debated, That tho' Advocates be not there mention'd, yet they are not thereby excluded.

CLXXII. IT would ſeem by the Narrative of this Act, that all Patronages gifted after this Act ſhould be diſcharged; and yet the Act diſcharges only ſuch as are granted without the Conſent of the benefic'd Perſons: Nor can I ſee how theſe Patronages ſhould have been declar'd null, for Want of the benefic'd Perſon's Conſent, ſince the benefic'd Perſon being once provided, the King's diſponing the Right of Patronage, could not prejudge them who were already entred, tho' the Act ſays, *That theſe Rights were granted to the great Hazard of the the Perſons provided*; for they being once entred, no poſterior Right could prejudge them; and Declarators upon prior Rights might have prejudg'd them however: But it ſeems that the Reaſon why the Conſent of the living Incumbent is requiſite, is, becauſe it is preſumable that he would, and could inform truly to whom the Patronage belong'd. And in all Church-Benefices, when diſpon'd, either the Demiſſion, Reſignation, or Conſent of Churchmen, has been thought requiſite.

The ſtatutory Part of this Act was wrong printed in *Skene*'s Impreſſion; for whereas it ſays, *That all ſuch Rights, where the benefic'd Perſon was alive, and their Conſent had and obtain'd thereto, ſhall be null*; it ſhould have ſaid, *Not had and obtain'd thereto*: But this is helped in the laſt Impreſſion.

CLXXIII. VIDE *Crim. Pract. Tit.* Murder. But it is fit to add, That this Act ordaining ſuch as ſtrike or hurt a Man within the King's Palace, to be puniſh'd with Death, is conſonant to *prætor cum L. ſequen. ff. de injuriis. Vide etiam L.* 23. § 2. *ad Leg. Juliam de Adulteriis*, and to the Law of Nations, *Fritz. de palatiis principum*, *Cap.* 12. where he cites as the Law of *Scotland*, *Cap.* 6. *Stat.* Will. By which he who draws a Knife in the King's Court, is to be ſtruck through the Hand, and he that draws Blood is to loſe the Hand, and he that kills any Man is to pay Twenty nine Cows to the King, and to aſſyth the Party; which certainly is meant of a Slaughter committed, where the Killer ſhould not die, as in accidental Slaughters, or Slaughter committed in Self-defence; for otherwiſe that Statute had been ridiculous, as 'tis now obſolete and innovated by this Act of Parliament: And yet I think, that even by this Act of Parliament, he who ſtrikes any Man in Self-defence would not die; and if the King be abſent, ſome think that Statutes puniſhing Offenders within the Palace extend not to ſuch Caſes, as *Placa. L.* 1. *Epit. Delict. Cap.* 8. tho' *Menochius* does extend thoſe Statutes even to that Caſe. But to prevent this Debate, this Act 173. bears expreſly, *The King's Palace, where His Highneſs makes His Reſidence for the Time*; and it expreſſes the *Inner-gate*, to cut off the ordinary Debates *de confiniis palatii*.

Tho' this Crime may be purſu'd criminally, yet the Lords may take a Precognition of it, to the End it may be known how far they will remit the ſame to be puniſh'd by the Criminal Judges, in ſo far as concerns the ſtriking any Man in their Preſence, as in Sir *John Hay*'s Caſe and *Sibbald*'s.

CLXXIV. VIDE *Crim. Pract. Tit.* Remiſſions. *Vide ſupra Obſerv.* on *Act* 74. *Parl.* 14. Jam. II.

CLXXV. IT would ſeem by the Narrative, that only ſuch Writs as were not written by Notars and common Clerks, who are notourly known, ſhould have been declar'd null for want of the Writer's Name; and yet the ſtatutory Part declares all Writs to be null without Exception, which want the Writer's Name.

*Obſerv.* I. This Act is not by the Lords found to annul Saſines, and other Acts of Office, written by common Clerks and Notars, tho' the Writer's Name be not deſign'd in them, but only Writs amongſt private Parties, *June* 6. 1634.

ACT *Obſerv.* II. That tho' the Writer's Name be not condeſcended on, yet the Lords will allow the Uſer of the Writ to condeſcend who was the Writer; and tho' this Act of Parliament appoints that before the inſerting of the Witneſſes; yet if it be inſert in any Place it is ſufficient. And tho' the Act appoints that it ſhall condeſcend upon the Writer's Name, particular remaining Place, and Diocy; yet Diocies are now only condeſcended on in Inſtruments of Notars; but ſtill there muſt be ſome Deſignation beſide the Name and Sirname, ſuch as *A. B.* Servitor to ſuch a Man, which is ſufficient; and if there be more of one Sirname who were Servitors at that Time, yet is not the Uſer of the Writ obliged to condeſcend which of the Servants it was; but he who offers to improve the ſaid Writ, muſt relevantly alledge, that of the Date of that Bond, he whoſe Servant the Writer is deſign'd to be, had no Servant at that Time who did write ſuch a Hand; and for proving of this, muſt produce the Hand-writs of all theſe Servants at that Time, *February* 7. 1672. *Kirkhill* contra *Kettleſton*. But now by the 5. *Act, Parl.* 3. Ch. II. all Writs not condeſcending upon the Writers in the Body, are abſolutely null, and not ſuppliable by a Condeſcendance, *ex poſt facto*.

CLXXVI. It was debated upon this Act, whether the Lands of *Duncow*, tho' here annexed by a public Law, were ſufficiently annexed ſo as to exclude the Earl of *Nithſdale*, who pretended that a Year before this Act he had a valid Right under the Great-Seal from the King, and ſo could not be prejudg'd by a poſterior Annexation, which behov'd to be *ſalvo jure quoad* him. To which it was reply'd, That this Annexation being by a public Law, was not of the Nature of Ratifications, which were *ſalvo jure*; and ſuch Acts of Annexation were in Effect the King's Charter, and being granted by a public Act of Parliament in favours both of King and People, they could not be taken away but by another Act of Parliament, *& ſibi imputet*, he who had the prior Right and compeared not at the Time of this public Law, and objected it; but now after ſo many Years, the King had at leaſt preſcrived a Right by virtue of this Act. This Caſe was not decided, but the Lords inclined to think that there was a great Difference betwixt original Annexations, where ſpecial Lands were annexed, as falling in the King's Hands by a ſpecial Forfeiture, or other Cauſe which they thought could not be quarrelled by the Seſſion, or other Inferior Judicatory; and general Acts, where Lands formerly annex'd, are only repeted, ſuch as this is, in which Lands belonging to private Parties may be, by Miſtake, repeted.

*Nota*, The Lands of *Duncow*, annexed by this Act, came to the King upon Forfeiture of *Robert* Lord *Boid*, *Anno* 1477.

CLXXVII. Before this Act, Decreets pronounced by Magiſtrates within Towns could not be the Ground of a Charge of Horning, till a Decreet conform had been firſt obtained before the Lords; but by this Act, Letters of Horning are ſummarily appointed to be granted upon ſuch Decreets.

It is obſervable, that tho' this Act ſays, *That Letters of Horning ſhall be granted upon the Decreets of Burrows in the ſame Way as upon the Commiſſars Precepts*; yet it would ſeem that Commiſſars had no ſuch Privilege at the Time of granting this Act; for that Privilege is only granted them by the 7. *Act*, 21. *Parl.* Ja. VI. To which nothing can be anſwered, but that Commiſſars had that Privilege, even at the Time of this Act *de praxi*, tho' *de jure* it was only granted them by that Act for their further Security.

CLXXVIII. *VIDE Act* 155. 12. *Parl.* Ja. VI.

CLXXIX. This Act, giving the King Twenty Shilling of Cuſtom of every Tun of imported Beer, is explained in the Obſervations upon the 2. *Act*, 4 *Seſſ. Parl.* 2. Ch. II.

CLXXX. It is obſervable, that by this Act the Dean of Gild is founded in the Power of judging all Caſes betwixt Merchant and Merchant, and is here declar'd to be the moſt competent Judge, becauſe the moſt knowing Judge in ſuch Caſes, and declar'd to have the ſame Power that the like Judges have in *France* and *Flanders*; and in *France* ſuch Caſes are judg'd by theſe who are call'd *les Conſuls des Marchants*. The Lords have found, that according to this Act, the Dean of Gilds Court is a Sovereign Court *in ſuo genere*, and not ſubordinate to the Town's Court, *July* 21. 1631. and they uſe to Advocate Cauſes from the Admiral to the Dean of Gild's Court, upon this Act, it being declar'd that he is Judge to all Actions betwixt Merchant and Mariner, tho' it be alledg'd by the Admiral that theſe general Words ſhould be reſtricted by the Nature of the reſpective Juriſdictions, and ſo the Dean of Gild ſhould be only Judge competent betwixt Merchant and Mariner, in Caſes which fall out at Land, but not at Sea.

CLXXXI. THE Act related to here is the 36. *Act*, 3. *Parl.* Ja. IV.

ACT CLXXXII. IT is obſervable from this Act, that it is there declar'd in general, That Acts of Parliament ſhould only in Reaſon and Equity extend *ad futura* for regulating future Caſes; for tho' declaratory Acts may oft-times extend *ad præterita*, yet ſtatutory Acts ſhould only extend *ad futura*.

CLXXXIII. THIS Act differs not one Word from the 170. Act of this ſame Parliament, and has been only repeted here by Miſtake.

CLXXXIV. BEFORE this Act, ſuch as were at Feud with one another, us'd ordinarily to fight together upon the Street of *Edinburgh*, and us'd to beat the Magiſtrates or their Officers when they came to rid them; and that truly gave Riſe to this Act, tho' the Narrative here bears only, *That ſeveral Perſons uſed to deforce the Magiſtrates in their Execution of their own or the Council's Decreets*.

BY the Act it is declared, *That whoſoever diſobeys, or oppoſes the Command of the Provoſt and Bailies of* Edinburgh, *when they are executing the King's Commands, or Letters from the Secret-Council, or Seſſion, or the Ordinances of their own Burgh, ſhall be puniſhed as Committers of Deforcement, as Seditious and Perturbers of the Commonweal.*

IT has been found, That naked Aſſiſtance at ſuch Tumults, without Arms, is not puniſhable by Death, tho' a Perſon be kill'd in the Tumult, *December* 1666. But Convocation at all ſuch Tumults with Arms, is puniſhable by Death, if a Perſon be murder'd, as was found *September* 11. 1678. And the acting any Thing either by Word or Deed, was found to infer Death.

*Obſerv.* THAT the uſing Fire-weapons within Town is diſcharged by this Act; and long Weapons, that is to ſay, Halbards, Picks, *&c.* are only allow'd, leſt innocent Perſons paſſing on the Street might be kill'd; but yet if Soldiers ſhoot in Defence of their Priſoners on the Streets, they are not puniſhable. And this Act was found not to militate againſt the King's granting Commiſſions to the Magiſtrates of *Edinburgh*, to raiſe a Company with Firelocks within the Town; for the Act diſcharges only Firelocks without the King's Conſent, and a Commiſſion implies His Conſent.

CLXXXV. THE Act here related to is the 159. *Act*, 12. *Parl.* Ja. VI.

CLXXXVII. THIS Act is explain'd in the 7. *Act*, 9. *Parl.* Ja. VI.

CLXXXIX. *VIDE Obſerv.* on the 29. *Act*, *Parl.* 11. Ja. VI.

CXC, and CXCI. THE Abbacy of *Dumfermling* was diſponed by *James* VI. in a Morning-gift to Queen *Anne*. This Lawyers call *Morganeticum*: And King *Charles* the Firſt was infeſt in theſe Lands, as Heir to his Mother.

*Obſerv.* THAT this Confirmation was under the Great Seal, and under the Seals and Subſcriptions of the States. We have this Cuſtom of *Morning-gift* from the *Germans*, which is call'd in their Language, *Morgengab*, and is learnedly treated by *Milerus* in his *Gamologia perſonarum illuſtrium*, *Cap.* 6. where he defines *Morgennatica* to be *donum matutinale, quod olim apud* Germanos & Francos *una cum dote proprium patrimonium erat uxoris. Vide Pag.* 160.

# *PARLIAMENT* XIV.

CXCIII. THIS Act ſeems very ill conceiv'd; for it appears, that willful Hearers of Maſs ſhall be executed to the Death, how ſoon they ſhall be found guilty, or declared Fugitive; ſince no Man by our Law dies upon his being denounc'd Fugitive, except in the Caſe of Treaſon; and willful Hearing of Maſs is not Treaſon, even by this Act.

*Obſerv.* II. THAT as this Act is conceiv'd, the willful Hearing or Concealing is puniſhable by Death, either by Conviction, or being denounc'd Fugitive before the Juſtice-General, or the Lords of Privy Council.

*Obſerv.* III. That willful Hearers are only puniſhable, and the Word *willful* was added, becauſe many go to the Maſs out of Curioſity, or may be preſent by Accident: And in all Things that concern Religion, ſpecial Hereſie owning and continuing makes the Crime, *ubi hærent dogmatibus ſuis*; and therefore the Defender may purge himſelf by his Oath as to his Intention, which cannot be otherwiſe proven: And *a fortiori*, I think this ſhould hold with theſe that are preſent at Conventicles, either in Fields or Houſes, ſince theſe are leſs Crimes; for they being Men of known good Principles, may go to get Intelligence, or from Curioſity, but it is ſafer to intimate this previouſly to ſome of the King's Servants.

*Obſerv.* IV. It is generally obſerv'd, that all theſe Acts concerning the Maſs were of Deſign ill conceiv'd by Chancellor *Seton*'s Influence, as is reported, and that by them this Crime can never be prov'd, ſince it can only be prov'd *per ſocios criminis*, and theſe cannot be admitted Witneſſes: But this is a Miſtake; for there may be many preſent out of Curioſity, or the Apprehenders may be Witneſſes; and even ſuch as were preſent upon Deſign *in criminibus occultis* may be receiv'd, ſince when Law allows any Thing, it muſt allow the Means by which it can be prov'd: And in Hereſie, leſs Probation is ſufficient than in other Crimes, *Clarus* § Hereſie, *Num.* 20.

CXCIV. BY this Act the Liferent-Eſcheats of Papiſts being denounc'd, are declar'd to belong to the King, tho' ordinarily the Liferents fall to the reſpective Superiors. This is again renew'd to the King, *Act* 197. the ſame Parliament.

CXCV. ALL Erections of annex'd Property of the Temporalities of Benefices, are here declar'd null, except as to the Lands excepted in the Act of Annexation 1587. which it ſeems muſt be underſtood, even tho' Diſſolution proceeded; for otherwiſe there needed not an Act of Parliament, ſince all Diſpoſitions of annex'd Property without Diſſolution, are *ipſo jure* null: But thereafter all ſuch Erections are for quieting the Minds of His Majeſty's good Subjects, ſecured and confirmed at the Reſtauration of Biſhops, *Act* 2. *Parl.* 18. James VI.

CXCVI. COMMON Kirks are ſuch as belong in Common to all the Dignities of a Chapter, and whereof each of them had a Part of the Stipend; to which common Kirks the Chapter did not preſent as Patron, but did nominate and collate; upon the Firſt Suppreſſion of Popery they were to be conferr'd to Miniſters as ordinary Benefices; and the King, or ſuch as had Right from him, became Patron, as coming in Place of the Popiſh Clergy: And by this Act they are ordain'd to be preſented by the ordinary Patrons, to Miniſters who ſhall ſerve the Cure; and the Reaſon is, becauſe there was not then Chapters: But by the 2. *Act*, 22. *Parl.* Ja. VI. the ſaids Chapters are likewiſe reſtor'd to whatſoever Teinds, &c. which pertain'd of old to the Chapters in Common.

CXCVII. THIS Act ordaining the Eſcheats and Liferents of excommunicated Perſons to be null, if granted to their near Relations, ſeems ſuperfluous, becauſe the ſame was formerly ſtatuted in general by the 145. *Act*, 12. *Parl.* Ja. VI. Nor find I any Difference betwixt the Two Acts, ſave that the Eſcheats of other Rebels are by that Act declared null, if purchaſs'd by their Friends, or Well-willers; and this Act declares only the Eſcheats of excommunicated Perſons null, if granted to their Bairns, or conjunct Perſons; ſo that it ſeems the Eſcheat of an excommunicated Perſon could not be declared null, tho' gifted to a confident Perſon, ſince a confident Perſon and a conjunct are different, for Blood only makes conjunct Perſons, but Truſt makes confident Perſons.

CXCVIII. *VIDE Obſerv.* on 83. *Act*, 6. *Parl.* Ja. IV.

CXCIX. THO' by this Act, when Manſes and Gleibs are deſign'd out of Church-lands only, the reſt of the Heretors of Kirk-lands are to contribute for the Relief of him, out of whoſe Lands the Deſignation is made; yet this was extended in *Anno* 1644. by Act of Parliament, for the Relief of theſe, out of whoſe Temporal Lands Deſignations were made, who were therein to be reliev'd by the Heretors of other Temporal Lands. I find that Lands mortify'd to Colleges ceaſe not thereby to be Kirk-lands; and therefore were found liable to Relief as other Kirk-lands by this Act, *February* 12. 1635. But *Dury* obſerves there, as the Reaſon of the Deciſion, that theſe Kirk-lands were feu'd by the College for a ſmall Feu-Duty; and therefore it was more juſt that they ſhould have been liable to Relief, as other Kirk-lands; and ſo it may be yet doubted, if Kirk-lands mortify'd to Colleges, and remaining with them, would be liable to this Relief.

CC. BY this Act no benefic'd Perſon under a Prelate, may ſet longer Tacks than for Three Years, and a Biſhop is allow'd to ſet Tacks of his Teinds for Nineteen Years, and an inferiour Prelate for his Life-time, and Five Years thereafter, *Act*, 4. *Parl.* 22. Ja. VI.

ACT CC. But becauſe ſome Thought, that that Act did abrogate this Act, as if Prelats needed not the Conſent of the Patron to ſuch Tacks for Nineteen Years, or Five Years reſpective; therefore it is expreſly declar'd by 15. *Act*, 23. *Parl.* Ja. VI. and even theſe and all other Tacks ſhall be null, if they be ſet for longer than Three Years, without Conſent of the Patron, and that the 4. *Act*, *Parl.* 22. did ſtill preſuppoſe the Conſent of the Patron, tho' it was not there expreſt, which was moſt juſt, for ſince it is the Patron's Intereſt, that the Cure be well adminiſtrate, and that he may get an able Man after the Incumbent's Death; it was juſt that nothing ſhould have been done without his Conſent, and for that Reaſon, *Clericus nec reſignare nec permutare nec penſione onerare poteſt invito Patrono*; as is by the Canon Law, for by that Law, the Adminiſtration belongs to the Patron, *nec ab ejus diſpoſitione auferri poſſunt, Can. Rationis,* 16. *q.* 7. and by that Law he was to be alimented out of the Rents of the Benefice, if he fell Poor, and the Perſon preſented was to give his Oath to the Patron, for Preſervation of the Temporals.

This Conſent may be adhibite by the Patron, either before, or after the ſetting of the Tacks, *C.* 20. *de jur. Patron. dubitatur*; whether a Patron may lawfully authoriſe a Tack ſet in his own favours, ſince his accepting is equivalent to a Conſent, and he cannot be Author *in rem ſuam*.

Tho' Tacks ſet for longer Space than Three Years, be null by this Act; yet if they be ſet for longer Time, they will be ſuſtained, if the Tackſmen reſtrict them to Three Years allanerly, *July* 18. 1668. *Johnſtoun* contra *Howdoun*, even as tho' a Bond wanting Witneſſes be null, if the ſame exceed an Hundred Pounds, yet it will be valid if reſtricted to an Hundred Pounds, and this ſeems to be received with us as a general Principle in the Interpretation of all Statutes, both as to Time and Sums; and therefore tho' by the 36. *Act*, *Parl.* 3. Ja. IV. Tacks of the Rents of Burghs be declar'd null, if ſet for longer Space than Three Years, yet by the ſame Reaſon, they ſhould be ſuſtained, if reſtricted to Three Years. This ſeems to be ſomewhat dubious, in reſpect of the 175. *Act*, *Parl.* 13. K. Ja. VI. and 5. *Act*, *Parl.* 3. Ch. II. which declare all Writs, without Exception, null, that are not ſubſcribed before Witneſſes.

THESE Acts are explain'd in the 36. *Act*, 2 *Parl.* Ja. VI. CCI, and CCII.

THE Deſign of this Act has been, as I conceive, to ſecure ſuch as had intrometted with the King's annex'd Property ſummarily, by vertue of the 41. *Act*, 11. *Parl.* Ja. II. Becauſe it is probable the Warrant granted by that Act; was thought dubious, and ſomewhat ſevere in the Analogy of Law, *Vid. Obſerv.* upon that Act. A Provoſt is in our Law no Prelat; and therefore Tacks ſet by him are null, without Conſent of the Patron, *Hope Tit.* Kirks. CCIII.

THIS Diſſolution of the King's annex'd Property has ſeveral Specialities in it, as that it ſhall not extend to the ſetting in Feu-ferm of Caſtles, Forreſts, Coal-heughs, and Offices, *&c.* But that theſe ſhall remain inſeparably annex'd to the Crown; and from this it may be obſerv'd, that to this Day, all Caſtles, Palaces, Woods, Parks, Forreſts, Paſtures, Coal-heughs, and Offices, are to remain inſeparably with the Crown; and therefore except they be expreſly diſſolved, they fall not under Diſſolution: This Part of the Act is renewed by the 235. *Act*, 15. *Parl.* Ja. VI. This Diſſolution is likewiſe only in favours of kindly Tenents, and ancient Poſſeſſors, and of ſuch as ſhould pay their Compoſition betwixt, and the Firſt of *Auguſt*, 1595. CCIV.

THIS Act is explain'd, *Crim. Pract. Tit.* Injuries, *Num.* 6. CCV.

BY this Act, the Duty granted by the States to the King upon Wines, is to be charg'd for, by Letters of Horning; and I find by Act of Council, *February* 21. 1581. That a Commiſſion is granted to the King's Maſter-houſholds, to break up the Doors of ſuch Merchants, as refuſ'd to let the King's Servants Taſte their Wines, to the end they might choſe the beſt for the King's own Uſe, but this certainly preſuppoſed that the King would pay for the Wines. CCVI.

FROM this and many other Acts, it is obſervable that the Parliament may, and does by a general Law, annul Rights granted to private Perſons, without calling them, and without the hazard of the Act *ſalvo*, tho' any one private Man's Right cannot be declar'd null by the Parliament, without citing him. CCVII.

CCIX. BY this excellent Act, a Horning or Eſcheat following thereupon, cannot be taken away, and declar'd null upon Acquittances and Diſcharges, which were alledg'd to be prior to the Horning, ſo that the Eſcheat could not fall, the Debt being pay'd, except the Pro-

ACT ducer of the Diſcharge make Faith that it is of a true Date, becauſe ſuch Diſcharges with *ante* Dates, uſe to be granted by the Creditor when himſelf is paid.

It has been doubted whether Aſſignies be bound to ſwear in this Caſe, but ſince this is *factum alienum*, which they are not oblig'd to know; and if this be neceſſary, the Cedent by refuſing to ſwear, may deſtroy the Aſſigney; but yet the Act of Parliament obliges indefinitly the Producer of the Diſcharge to ſwear, and ſo it ſeems whether he be Cedent or Aſſigney, he is ſtill bound, ſince his Oath is ſolemnly requir'd by Act of Parliament, *Quæritur*, whether it can be remitted to Quakers, Anabaptiſts, &c. who think ſwearing unlawful.

CCX. THIS Act giving many Privileges to the King's Forreſts, ſeems not communicable to all Forreſts, tho' it be pretended that all Forreſts are the King's Forreſts, it having been very ordinary to erect Forreſts in private Men's Lands, in Imitation of the King's Forreſts; but becauſe theſe Erections of Forreſts were very prejudicial to Neighbours, ſince they might fine their Neighbours, and poind their Beaſts; therefore the Lords of the Seſſion did in *July* 1680. give their Opinion to the Lords of Exchequer, that all ſuch new Erections ſhould be ſtopt; and it appears to me very clearly, that all Forreſts are not the King's Forreſts, by comparing *Cap.* 17. *leges Forreſtarum*, which Treats of Crimes committed in the King's Forreſt, with *Cap.* 21. which Treats of the Delicts committed in the Forreſts of Barons, and wherein they are Infeſt, *cum libera Forreſta*.

*Obſerv.* II. That that Part of the Act which ordains all that Hunt within ſix Miles to His Majeſty's Caſtles, Woods, Parks, or Palaces, to be fin'd in an Hundred Pounds, is in Deſuetude; and it ſeems then only to be obſerv'd, when the King Himſelf dwells in His Caſtles, and uſes actually to Hunt in His Woods or Forreſts; this Act bearing, *To be made for His own Royal Paſtime*, or at leaſt this Privilege ſhould not be continued to Caſtles, or Forreſts, which the King has diſpon'd to private Subjects.

CCXII. *VIDE Obſerv.* on the 13. *Act*, *Parl.* 3. Ch. II.

CCXIII. THO' this Act ſay, *That the Lords of Seſſion were not oblig'd to ſit down till Nine a Clock*; yet it appears clearly, that they were oblig'd to ſit down at Eight by the 49. *Act*, 5. *Parl.* Ja. V.

CCXIV. IT is obſervable from this excellent Act, that where evidents are not thought neceſſary to be kept, there is no Reaſon to grant Certification againſt them, after many Years; and therefore the Lords refuſe oft Times to grant Certification againſt the Grounds and Warrants of Appriſings, ſuch as Executions, tho' they cannot be produc'd after Twenty or Thirty Years, *ex paritate rationis*, tho' the Act ſecures only againſt the not producing of Procuratories, and Inſtruments of Reſignation, and Precepts of Seaſines; and *July* 1680. *Strowan* contra Earl of *Athol*: This Act was extended to ſecure againſt the Production of the Decreet of Compriſing, and Decreet whereupon it was led, albeit this Extenſion ſeems Dangerous, ſince thereby great Eſtates may be carried away by null Compriſings, and ſmall Debts, which might be ſatisfy'd by leſs than a Years Intromiſſion, whereas none or ſmall Prejudice can be infer'd from not producing Inſtruments of Reſignations, &c. It is obſervable that this Privilege of not being oblig'd to produce ſuch Papers, is only allow'd to ſuch as are, and were in Poſſeſſion for Fourty Years.

There is likewiſe in this Act a *præſumptio juris* founded, that theſe from whom Lands are appriſed, will induſtriouſly abſtract their Evidents; and therefore the Lords uſe to be very favourable in granting Certification againſt Compriſers.

CCXV. THE Act *ſalvo jure* is ſtill ſubjoin'd to Parliaments, except here where it is inſert in the midſt of the Acts of this Parliament.

CCXVI. BY this Act, Lords of the Seſſion, Advocates, Clerks, Writers, and their Servants, nor no other Member of the College of Juſtice, nor no Judges, Clerks, &c. of inferior Courts, may take Aſſignations to Pleas, which is conform to the Civil Law, *Lib.* 2. *Cod. Tit.* 14. *Ne liceat potentioribus patrocinium litigantibus præſtare, vel actiones in ſe transferre.*

*Nota*, The Right taken by them is not declar'd null, but themſelves only puniſhable; and the Reaſon ſeems to be, Becauſe when they are depriv'd from being Members, the Advantage they had over others is taken away, and which Advantage was the Reaſon inductive of this Act; nor ſhould the Puniſhment be extended beyond the Cauſe, which is alſo conform to the Opinion of the *Civilians. Vide Vin. ſelect. Quæſt. jur. Cap.* 1. But it may be doubted, if he who takes ſuch Aſſignations, ſhould not be liable to refound the Damages which are occaſion'd by taking ſuch an Aſſignation, ſince it is a Principle, that Damage is ſtill due where the Injury is done to any Man againſt a poſitive Law, tho' that Law ordain not Damage and

Intereſt to be repaid: And in this Caſe, the taking ſuch Aſſignations is declar'd unlawful; and ſo an Injury is done againſt a poſitive Law.

II. Without this the Party injur'd is not repair'd; for tho' the public Intereſt, *vel vindicta publica*, be repair'd by the Deprivation, yet the Intereſt of the Perſon leſ'd, which is chiefly to be conſider'd, is not.

III. Deprivation is oft-times no Puniſhment, and ſeldom a commenſurable Puniſhment; for many Members of the College of Juſtice loſe nothing by Deprivation; and a Plea may be worth a great Sum, and their Employment worth nothing; whereas Damage, as it is a natural, ſo it is a moſt commenſurable Puniſhment. Becauſe this Act diſcharges only Members of the College of Juſtice to buy Pleas, therefore it is ſtill lawful for them to take Aſſignations to Pleas *gratis*, as a Donation, *July* 30. 1678. For as this falls not under the expreſs Prohibition of the Act, ſo it is not preſumable that they will be as keen in purſuing ſuch Proceſſes, as theſe for which they have paid out Money: Nor were it juſt to make the Members of the College of Juſtice incapable of their Friends and Relations Liberality.

By this Act, Advocates Servants do pretend they are Members of the College of Juſtice, becauſe this Act ſays, *Their Servants, and other Members*.

Tho' this Act, and the Rubric, diſcharges only the buying debateable Lands, Teinds, or Poſſeſſions, and ſpeaks nothing of Moveables, nor even Heretable Bonds, *mobilia* being ordinarily accounted *vilioris naturæ*; yet the Lords do now *ob paritatem rationis*, extend this Act to ſuch as take Aſſignations to moveable Debts, or any other debateable Rights.

This Act uſes to be ſo interpreted, as to be extended only to the Members of the reſpective Courts, who take Aſſignation, to plead before the Court where they ſerve; and thus, if an Advocate ſhould take an Aſſignation to a Plea depending before an Inferior Court, it may be urg'd that this Act ſhould not reach them, becauſe he has not Influence before that Court; but if he ſhould go and plead before that Court, as an Advocate may before any Court, then the Act would reach him alſo.

*Item*, Tho' this Act does not ſpeak of Procurators before Inferior Courts, yet the Word *Advocates*, ſeems to comprehend them.

CCXVII. By this Act Caution is to be found in Actions of Ejections for the violent Profits; and tho' *cautio juratoria* be ordinarily ſuſtain'd where Perſons cannot find other Cautioners, yet it is not ſuſtain'd in this Caſe, *July* 17. 1630. becauſe this Act ſays, *That by the proponing of theſe Defences againſt Ejections, Delays are granted*; therefore the Defender, either in Removings or Ejections, is not obliged to find Caution where the Defence can be inſtantly verify'd. And altho' it has been doubted, whether this Caution is to be found at the proponing of the Defence, or at the firſt Term aſſign'd by the Act, yet it is clear that the Caution ſhould be found at the firſt Term aſſign'd by the Act, both becauſe this Act ſays, *That the Caution ſhall be found at the firſt Diet of Litiſconteſtation*; and becauſe there muſt be ſome Time given to find Caution.

*Nota*, That in the Brieves of Diſſaſine, which was the ſame Thing of old that Ejection is now, Caution was to be found, as here, by the Defender, *Quon. Attach. Cap.* 53. *Num.* 2.

For clearing ſome Miſtake in the printing of my Criminals, *Page* 294. my Meaning was, That there may be Perjury *in cautione juratoria*; as for Inſtance, if a Perſon ſhould depone that he could not find Caution for the violent Profits; and yet it could be prov'd, that ſuch a Perſon who was very reſponſal, offer'd to be Caution: This, I think, would infer Perjury.

CCXVIII. By this Act it is appointed, that Twenty Days after the Parliament is proclaim'd, and before it meet, Four of every Eſtate ſhould meet to receive Articles to be preſented to the Parliament, but this is now in Deſuetude; for no State can now meet, except the Burrows, and yet ſometimes the King writes down to call whom He pleaſes, to name to meet and conſult previouſly what Laws are fit to be made in the future Parliament.

By this Act alſo it ſeems that nothing can be preſented in plain Parliament, by any of the Members of Parliament, but that every Thing muſt be firſt preſented in the Articles for eviting Confuſion; and this Act was made uſe of to that Purpoſe in the Parliament 1674. againſt a Propoſal made then for having a Committee of Grievances. To which it was then anſwered, that the Articles being but a Committee of Parliament, they could not reſtrict their own Conſtituents, and this Act was rather directive than reſtrictive.

CCXIX. THIS Act is fully explain'd, *Crim. Pract. Tit.* Juriſdiction of the Lords, *Num.* 7.

CCXX. THIS Act is explain'd, *Crim. Pract. Tit.* Paricide.

ACT CCXXVI. THIS Act is formerly explain'd, 15. *Act*, 4. *Parl.* Ja. V. where Liferenters are to find Caution.

By this Act alſo, a Power is granted to the Magiſtrates of Burghs, to cauſe repair burnt and waſte Lands; but yet ordinarily the Magiſtrates of Burrows uſe to give in Petitions to the Council, craving Liberty to force the Heretors of ſuch burnt Lands to repair their burnt Lands themſelves, or elſe to ſell their Part; and when there are many ſmall Heretors concern'd, the Council grants Warrant to the Magiſtrates to regulate their Venditions, tho' I know it hath been alledg'd that the Council could not do this, becauſe it was an Inverſion of Property, and that this was only competent to the Parliament; and yet the Council have ſtill been in Uſe to do ſo for the common Good of the People; nor is any Man a Loſer, ſince he may repair by himſelf, and if he will not, he gets his juſt Price. This was granted to the Magiſtrates of *Edinburgh* in *Anno* 1676. *Publice enim intereſt ne civitatis aſpectus deformetur, & ideo conſtitutum eſt, L.* 4. *C. de Jur. Reipub. areum collapſam poſſe a fiſco diſtrahi ſi proprietarius monitus eam reficere non curaverit. Vide L.* 46. *ff. de dam. inſect.* I have ſeen a Decreet in *Anno* 1636. at the Town of *Edinburgh*'s Inſtance, againſt ſeveral Heretors, before the Lords of Seſſion, for ordaining the Heretors of theſe Houſes (upon which the *Trone-Church* now ſtands) to denude themſelves of their Right in favours of the Town, *ob utilitatem publicam*, and to appoint Four for them, and Four for the Town, for valuing the Lands, that the Price may be paid accordingly.

But to prevent all ſuch Debates, it is appointed by the 6. *Act*, 3. *Seſſ. Parl.* 1. Ch. II. *That the Magiſtrates of Burghs Royal ſhall cauſe cite all ſuch as pretend Right to any ſuch waſte or ruinous Lands, as have not been inhabited for Three Years; or ſhall be waſte and not inhabited for other Three Years, to repair the ſaids Lands, with Certification to them that if they do not, the Magiſtrates will cauſe value the ſame by certain Perſons to be choſen for that Effect, and to ſell the ſame: Which Sale ſhall never thereafter be quarrelled.* So that it appears that after this Act, the Privy-Council can grant no Warrant to ſell, except in the Terms of this Act; at the leaſt they cannot grant any ſuch Warrant to build or ſell upon any private Account, or even for beautifying the Town: But the Privy-Council has ſince this Act, granted a Warrant to force private Heretors to ſell and accept their Price for making the Entry to the *Parliament-Houſe* more large and convenient, tho' it was alledg'd that this could not otherwiſe be done than after Three Years, and in the Way preſcriv'd by the Act of Parliament, which has made no Exception of any ſuch Caſe as this. And if the Council could do this, they might as well have made the Act of Parliament itſelf; for the Power granted to Magiſtrates by Act of Parliament, proceeds upon the ſame Motive of public Good.

It might likewiſe have been alledged, That whatever the Council might have done in Caſes of abſolute Neceſſity, as if the *Parliament-Houſe* had wanted an Entry altogether; yet they could not invert Property merely for the Conveniency of enlarging the Entry, beyond what formerly ſerv'd in our Predeceſſor's Time.

CCXXVII. BY this Act, Chiefs of Clans are not made liable, but all Landlords and Bailies are oblig'd to make their Men-Tenents and Servants anſwerable to Juſtice, and to redreſs the Party ſkaithed: Which Obligation is not alternative; and therefore the Council in the Caſe of *Leith* and *Grant*, *Auguſt* 1680. did find that the Landlord was liable for the Skaith, tho' he ſhould preſent his Men.

# PARLIAMENT XV.

CCXXXI. BY this Act Biſhops are in Effect reſtored to ſit in Parliament, tho' the Act is cautiouſly conceived in favours of Miniſters, who ſhall be provided to Biſhoprics by the King; but yet the Biſhops themſelves were not reſtored to their Juriſdictions *in ſpiritualibus*, till the 2. *Act*, 18. *Parl.* Ja. VI. in *Anno* 1606. This Act gave Occaſion of calling a General Aſſembly at *Dundee*, to whom the King propoſed ſeveral Overtures, and it was condeſcended on, that Fifteen Miniſters ſhould ſit in Parliament, becauſe ſo many repreſented the Church in Time of Popery, but remitted to a Committee to conſider what Revenue each Churchman ſhould have for defraying that Expence, and who ſhould be elected.

In this Act likewiſe it is declared, *That this Reſtitution ſhall be without Prejudice to the General and Provincial Aſſemblies, and Preſbyteries*; and the Act of Parliament here related to eſtabliſhing theſe, is the 114. *Act*, 12. *Parl.* Ja. VI.

It is obſervable, that Kirk-yards have in many Things in our Law the ſame Privilege as Kirks; and therefore the killing or wounding of Men within Kirks and Kirk-yards, are puniſhable in the ſame Way, 118. *Act*, 12. *Parl.* Ja. VI. and the Raiſers of Frays in Kirks and Kirk-yards are puniſh'd in the ſame Way, 27. *Act*, 11. *Parl.* Ja. VI. And by the 83. *Act*, 6. *Parl.* Ja. IV. Fairs and Mercats are prohibited to be kept within Kirk-yards, as well as within the Kirk: As alſo by the 86. *Act*, *Quon. Attach.* Courts Civil or Criminal within Kirks, or Kirk-yards, are forbidden; all which is conform to the Canon Law, *Cap.* 5. *de immunitate Eccleſiarum, & Cap.* 2. *h. t. in ſexto Decretal.* By this Act, Letters of Horning are to be directed by the Lords of the Seſſion, for bigging of Kirk-yard Dikes, and for making Stiles and Entries to Kirks and Kirk-yards: By which laſt Clauſe, it would ſeem alſo that Heretors would get Letters of Horning againſt any Heretor who lies betwixt him and the Kirk, to give him a ſufficient Way to the Kirk through his Land, albeit the Words bear only, *That there ſhall be ſufficient Stiles and Entries in the ſaids Kirk-yard Dikes.* But when any Thing is allow'd in Law, all is underſtood to be allow'd, without which, that which is expreſly allow'd, cannot be uſeful; yet I find by a Deciſion, *June* 27. 1623. betwixt *Neilſon* of *Carcaſſie* and the Sheriff of *Galloway*, that the Lords refuſed to grant a Servitude thro' a private Man's Lands, even for a Way to the Church, except the Purſuer could prove immemorial Poſſeſſion: And to reconcile this Difference, it ſeems that every Man muſt have ſome Way to the Church, but that he will not have Right to any ſpecial Way, if he ſeek the ſame upon the Account of Nearneſs, except he can prove immemorial Poſſeſſion. *Mornatius ad L. penult. ff. de juſt. & jur.* ſhews, that this Law is obſerv'd in *France. Quæritur*, To whom a Coal found in a Church-yard, or Trees growing there, will belong, whether to the Heretor, the Poor, or the Patron? Or if the Trees will belong to the Miniſter? CCXXXII.

This Act declares all Alienations of the annex'd Property to be null, except where they are ſet with Augmentation of the Rental; and therefore to this Day, there is ſtill ſome ſmall Augmentation made: But it has been doubted, whether if the Charter bear an Augmentation: But yet it can be proven by the Exchequer Rolls, that the Lands paid more formerly than is expreſt in the new Charter. If in that Caſe the Alienation will be null, and I conceive it ſhould; for tho' the Feuar may alledge that he was *in bona fide*, becauſe of the former Charters, yet ſeeing the Hazard by this Act of Parliament, he ought to have looked to the Exchequer Rolls. CCXXXIII.

I find the 233. and the following Acts till 240. of this 15. Parliament of King *James* VI. were at firſt Statutes of Seſſion, inſerted in the Books of *Sederunt* upon the 14th of *March* 1594. and here in 1597. they are turn'd in Acts of Parliament, without mentioning that they had been Acts of *Sederunt* formerly, as uſes to be done when the Parliament ratifies ſuch Acts. It ſeems that it was rather the Exchequer's Part than the Seſſion's to have regulated the King's Revenue and Property, whereunto all the above-cited Acts relate: But about this Time I find in the *Sederunt* Book, ſeveral Acts ingroſſed, bearing to have *been made by the Lords of Secret Council, Seſſion, and Exchequer, met together*, which is like the ſeveral Chambers whereof the Parliaments of *France* conſiſt, who conveen all together, when any ſolemn Arreſt or Deciſion is to be pronounc'd *in purpuris*, as they call it: And theſe Acts being Declarations of what was Law, in Relation to the King's Property, it was more proper for the Seſſion to have made ſuch Acts, than for the Exchequer, who raiſe the King's Rents conform to Law, but declare not what is ſo.

This Act declares, that all Alienations of the annex'd Property are null, if they be ſet otherwiſe than in Feu-farm; and therefore if any Part of the annex'd Property be diſponed to be holden Blench or Ward, the Alienation is null: And I conceive the true Reaſon to be, Becauſe originally the annex'd Property was allow'd to be diſpon'd for improving His Majeſty's Rent, which cannot be, except where there is a yearly Rent paid. And albeit ſometimes the King and Parliament may diſſolve the annex'd Property, in Order to a Diſpoſition to be made to a Perſon who has deſerv'd well of the King and Eſtates, in which the improving His Majeſty's Revenue is not deſign'd; yet the general Nature of Annexations ought not to be alter'd upon ſuch accidental Accompts. CCXXXIV.

This Act annulling all Rights of the King's Caſtles, Parks, Coal-heughs, &c. being annex'd, was formerly ſtatuted, 204. *Act*, 14. *Parl.* Ja. VI. CCXXXV.

This Act is fully explain'd in the 41. *Act*, 11. *Parl.* Ja. II. CCXXXVI.

ACT CCXXXVII. THIS Act declares, that the *Aſſiſe Herring* is a Part of the annex'd Property, and ſo cannot be ſet in Tack, nor diſpon'd. *Aſſiſe Herring* is a certain Meaſure of Herring due to the King out of every Boat: And the Meaning of this Act is, that it cannot be ſet in Tack without a competent Duty; for it is ſet in Tack for a juſt Avail, and could not be well otherwiſe collected; but this being a Caſuality, it is *jactus retis*, and ſo except the Duty be almoſt eluſory, it is hard to quarrel it: *Ex hoc capite* they were formerly annex'd by the 176. *Act*, 13. *Parl.* Ja. VI.

CCXXXVIII. THIS Act diſcharges all Offices of heretable Chamberlainries, and all free Gifts and Diſcharges of the King's Property; but to cheat this Act, the Feuars ſuffer the Bygones to lie unpaid, and then obtain Diſcharges, or elſe they obtain Tacks of their own Feu-duties, for Payment of a ſmall and ſimulate Tack-duty, called by the *Romans*, *Aſ. Caſſianus*.

CCXXXIX. BECAUSE the annex'd Property could not be diſpon'd without Diſſolution; therefore ſome to cheat theſe excellent Laws, obtain'd Diſpoſitions of the Feu-farms payable to the King, for Payment of a Feu-duty: And therefore theſe *feudifirmæ feudifirmarum* are here diſcharged and annulled.

CCXL, CCXLI, and CCXLII. THESE Acts are formerly explain'd in the Act concerning the Thirds of Benefices, *viz.* Ja. VI. *Parl.* 1. *Act* 10. which are now obſolote, Miniſters being otherwiſe provided.

CCXLIII. O*BSERV*. That Acts of Parliament are to be obſerv'd by the Lords of the Seſſion, except they be particularly abrogated in expreſs Terms. *Vide Gen. Obſ.*

CCXLIV. THIS Act is now uſeleſs, Miniſters being otherwiſe provided.

CCXLV. ALL Vaſſals are oblig'd to exhibit their Evidents to their Superior, not only by Improbations, but in Exhibitions, tho' in Law *nemo tenetur edere inſtrumenta contra ſe*; and the Reaſon of this Speciality is, Becauſe the Superior is *Dominus directus*, and ſo has a true Intereſt in the Land: And if the Vaſſal pretend any Intereſt, he is oblig'd *docere de titulo*, to ſhew his Intereſt, and to inſtruct the Superior in what is due to him: And the King in our Law is preſum'd to be univerſal Superior of all Lands; and therefore may, by a Proclamation, or by Way of Action, or by a Statute, as here, ordain all Evidents to be produc'd betwixt and ſuch a Day; but nothing, ſave a Statute or Improbation, can declare the Evidents to be null, if not produced as here: And ſince an Improbation could not be univerſal, this Statute was neceſſary in theſe Times, when His Majeſty's Revenue was not eſtabliſhed nor known.

CCXLVI. FEUS are declar'd null for not Payment of the Feu-duty, either by the Clauſe irritant contain'd in the Infeftments, declaring, that if Two Terms run, the Feu ſhall be null; or by this Statute, declaring, that if the Feu-duty be unpaid for Two Years together, the Feu ſhall be null. But there is this Difference betwixt Irritancies upon this Act, and theſe contain'd in the Infeftment, That the Irritancy upon this Act may be purg'd at the Bar; but Irritancies upon Clauſes in Infeftments cannot be purg'd at the Bar, becauſe they are incurr'd by Paction betwixt Parties, which the Lords cannot alter; for the Superior having given out the Feu upon that expreſs Condition, it is not juſt to alter what was expreſly treated amongſt Parties, *December* 1. 1664. Laird of *Pourie* contra *Hunter*. But yet I ſee no Reaſon for this Diſtinction, ſince this Act appoints expreſly, that they ſhall be null in the ſame Manner as if there were a Clauſe irritant contain'd in the Infeftment; nor do I ſee how the Lords can alter what is ſo expreſly introduc'd by a clear Statute.

IF offer was made of the Feu-duty, but refus'd, yet this will not be ſuſtain'd when Reduction is purſu'd *ex hoc Capite*, except it be inſtantly offered of new at the Bar; nor will a Term be allowed for purging, as was found in the former Caſe, in which the Lords alſo inclin'd to think that Compenſation will not be ſuſtain'd to take off this Irritancy; for tho' Compenſation *tollit debitum*; yet there is a reverence due by the Vaſſal, and which is conſidered more than the Value of the Feu-duty it ſelf; but yet if the Vaſſal come and offer humbly to his Superior, before the Term of Payment, Compenſation of as much as is due to him in Payment of the Feu-duty, *Quæritnr*, if this will not be ſufficient, it may be doubted whether a Minor will be reſtored againſt the not Payment of his Feu-duty, ſince it is not juſt that the Superior ſhould be prejudged by the minority of his Vaſſal, or that the Nature of the Feu ſhould be thereby inverted; and it may be alſo doubted whether this Irritancy will be incurr'd by him who was hindred *vi majori* from Payment, as by being taken and detained Priſoner, or carried to remote Countrys, ſince by the Feudal Law in other Caſes, this does excuſe *a mora*, and from all the Inconveniencies that follow upon it.

IV. It may be doubted if this legal Irritancy will be incurr'd where the Charter bears another ſpecial Penalty and Certification, in Caſe of the Vaſſals Faillie in Payment of his Feu-duty, without ſubſtituting the ſame in the Room of the legal one, or expreſly renuncing it.

V. *Quid juris*, Where there are more Heirs-portioners, if the faillie of one of them will prejudge the reſt, ſeeing *quoad* the Superiority, he is oblig'd to own none but the eldeſt Daughter.

VI. If an offer made of the Feu-duty, not by the Vaſſal but by a Third Party, will ſtop this Caducity, ſeeing the Feudal Obligation on the Vaſſal's Part is a perſonal Recogniſance, and ought to be perform'd perſonally: And on the other Hand theſe Irritancies are unfavourable, and ought not to be extended.

VII. *Quæritur*, If the Vaſſals offering Feu-duties for Years yet to run, if that offer will hinder the incurring the Irritancy for theſe Years, ſeeing a Debitor may in Law pay before his Day come; and what if it be ſuch a Preſtation as muſt be performed yearly.

VIII. If the Vaſſal will amit his Feu, for not offering where he had a pretext to doubt who was his true Superior, and what he is to do in that Caſe.

So much uſe the Lords to favour the Vaſſal againſt ſuch ſevere Irritancies, that a Retour bearing in the Firſt Part of it, an Irritancy for not Payment of the Feu-duty *ſi petatur tantum*, they allowed the Vaſſal to purge, tho' in the poſterior Part of the Retour, theſe Words were omitted in the Clauſe irritant it ſelf, *February* 18. 1680. Earl of *Mar* contra his Vaſſals.

Like to this Irritancy was that of the Civil Law, whereby *non ſolutio penſionis per biennium in civili Emphiteuſi & per triennium in Emphiteuſi Eccleſiaſtica efficiebat ut Emphiteuta a jure ſuo caderet*; by the Civil Law the Irritancy & *mora* in not Payment, was not purgeable, but by the Canon Law it was.

In Tacks alſo with us, the not Payment of a Tack-duty for Two Years or Terms infers an Irritancy, *November* 23. 1609. *Murray* contra *Nisbit*. *March* 9. 1611. *Seton* of *Baro* contra *Seton* of *Pitmedden*, which is alſo conform to the Civil Law, *l. 56. ff. locati.*

THIS Act is explain'd *Crim. Pract*, *Tit*. Uſury. CCXLVII.

CCXLVIII. BY the 18. *Act*, 1. *Parl*. Ja. VI. *The bearing and ſhooting with Culverings or Daggs, without the King's Licence, is forbidden under the Pain of loſing the Right Hand*; and that Act is here ratify'd, and thereto is added Confiſcation of Moveables: And by the Act 6. *Parl*. 16. Ja. 6. It is appointed that the Contraveeners of theſe Acts, may be purſu'd, either before the Council or the Criminal Court, and when they are purſu'd before the Council, it is provided that they ſhall not loſe the Right Hand.

It may be argu'd from this Act, that where there are Two Puniſhments appointed by Two different Laws, the Laſt is not added to the Firſt; but either it antiquats the Firſt, or elſe either of the Two can be only regularly inflicted, for elſe this Act needed not ſay, *ſwa that the ane Pain ſhall not ſtop nor ſtay the other*.

From that 6. *Act*, 16. *Parl*. It may likewiſe be obſerv'd, that the Secret Council are not Judges competent to Life and Limb, ſuch as the Amputation of the Right Hand. By the *Lex Julia*, it was lawful to carry Arms without *Rome*, but not in the Town, but they were every where thereafter diſcharg'd, *Tit*. 46. *Lib*. 11. *C. ut armorum uſus inſcio principe interdictus ſit*.

CCXLIX. BY this Act is ratify'd an Act made at *Dundee*, *by the King*, *His Nobility*, *Council and Eſtates*, which was an Act of the Convention of Eſtates, for the Convention of Eſtates ordinarily conſidered the Matter of Coinage; nor needed that a Parliament, becauſe Coinage is a Part of the Prerogative; and by the Eſtates there were mean'd ſome of every Eſtate, taken by the King for Advice.

From this Act it was urg'd in the Lord *Hattons* Caſe, That I. By this Act it is clear that we had a different Standard from *England*, which is to be Eleven Peny fine.

II. That it was lawful to melt down current foreign Coin, becauſe this Act allows it to be uſ'd as Bullion.

*Nota*, This is the Firſt Act that mentions the general of the Mint's Office, as different from the reſt.

CCL. BY this Act it is clear that the Convention of Eſtates made Acts, alſo diſcharging the Tranſportation of Wool and the like; and this Act as to Wool is again ratify'd, but a Power is allow'd to the Echequer to tranſport Wool (contrary to this Act) *Act* 40. *Parl*. 1. *Seſſ*. 1. Ch. II. But even this Act diſcharges only by paſt Licences, but not Licence for the Future, for theſe are allow'd even for Wool by the 254. *Act*, of this ſame Parliament.

ACT CCLI. BY this Act Cuſtoms are declar'd to be due to His Majeſty of all that is brought in from foreign Nations; and by the 27. *Act, Seſſ.* 3. *Parl.* 1. Ch. II. The ordering and diſpoſal of Trade with Foreigners, is declared to be His Majeſty's ſole Prerogative; and therefore ſome think His Majeſty may impoſe upon foreign Commodities, what he thinks Convenient; for ſince he may diſcharge the Trade, if He pleaſes; it ſeems to follow, that He may burden it as He pleaſes.

By this Act an *a, b, c.* of the Cuſtoms is to be put upon all Commodities, that is to ſay, a particular index of the ſeveral Cuſtoms impoſed upon every ſeveral Commodity, is ordain'd to be made according to the Letters of the Alphabet, and this has varied in ſeveral Ages; the preſent *a, b, c.* being made by Order of the Parliament 1661. *Vid. Statut. David* II. *Cap.* 12. *Num.* 3. where this Privilege as to paying of Cuſtoms, is formerly declar'd; and by the Canon Law this was likewiſe declar'd lawful to Princes, *Vid.* Perez. *ad Lib.* 10. *C. Tit.* 18. *Num.* 13. & *L.* 5. *C. de Jure fiſci,* where it is ſaid, *Officialibus volentibus ea capere debet acquieſcere.*

From theſe Words of this Act, *Albeit it cannot be deny'd that His Majeſty is a free Prince of a Sovereign Power, havand als great Liberties and Prerogatives be the Laws of this Realm, and Privilege of His Crown and Diadem as any other King, Prince, or Potentate whatſoever:* It is obſervable, that our Kings are here acknowledged to be Abſolute and Sovereign Monarchs, as is likewiſe more fully declar'd by the 1. *Act, Parl.* 18. Ja. VI. In which it is ſaid, *Whom the hail Eſtates of their bounden Duty, with maiſt hearty and faithful affection, humbly and truly acknowledges to be Sovereign Monarch, Abſolute Prince, Judge and Governor over all Perſons, Eſtates and Cauſes, both Spiritual and Temporal within His ſaid Realm:* By neither of which Acts, I conceive our Kings are ſo Abſolute, as that they have a Tyrannic, or Deſpotic Power, but that they are ſo Abſolute, as that they have Power to do every Thing that is juſt and reaſonable, tho' they be not thereto empowered by particular Acts of Parliament, and therefore they are ill Subjects, and worſe Lawyers, who allow the King to do nothing but that for which He can ſhew an Act of Parliament; ſince His being an Abſolute Monarch implies this innate Power; and therefore it follows by a better Conſequence, when any Thing is controverted, that the King may do the Thing in Controverſie being reaſonable, if His Power be not as to that Point reſtrained by a particular Act of Parliament.

It is likewiſe very obſervable, that this Power of abſolute Monarchy does not flow from the People, but is His own Right; for no Act of Parliament grants the King any Prerogative, but only declares by way of humble Acknowledgment what His Prerogatives were, *Principibus,* ſays *Tacitus, ſummum rerum judicium dii dederunt, ſubditis obſequii gloria relicta eſt, L.* 4. *Armal. Vide Obſervations* on the 15. *Act, Parl.* 1. Ch. II, where our Parliament acknowledges that our Kings hold their Crowns from God immediately. *Vide Act* 31. *Parl.* 5. Ja. III.

I know ſome pretend that the King's Power is here declar'd to be abſolute only in Oppoſition to the Pope, and implies no more but that He did not depend upon the Pope: But this is very groundleſs, for He is here declar'd abſolute in relation to His laying on of Cuſtoms, in which the Pope is no Way concern'd; and generally the King's Power in relation to Eccleſiaſtic Rights, is ſaid to be ſupreme, not abſolute; and in Civil Rights, is ſaid to be abſolute, and not ſupreme.

CCLII. BY this Act, *Engliſh* Cloth, and all other *Engliſh* Commodities made of Wool, are forbidden, for the Encouragement of our own Manufactures; but ſince the Union this Prohibition is taken off, and a great Cuſtom is only impos'd, by the 13. *Act, Parl.* 1. *Seſſ.* 3. Ch. II. but are thereafter, upon the erecting of our Manufactures, abſolutely diſcharg'd by the 12. *Act, Parl.* 3. Ch. II.

CCLV, CCLVI, and CCLVII. THESE Acts, ordaining all Ships to have ſpecial Cocquets, containing an Inventar of the Goods which they bear, and the Names of the Merchants and Owners, are yet in Obſervance; but the Merchants do not ſtill make Faith upon theſe Points, as is appointed by this 257. *Act*: And if the Keepers of the Cocquet abſent themſelves to the Prejudice of the Merchant, or take more for the Cocquet than the Sum of Forty Shilling, they are to loſe their Place, and repair the Merchant's Damage, by the 55. *Act, Parl.* 1. Ch. II.

CCLIII. THIS Act, and the Seven following Acts, till the 61. are very clear and need no Obſervation; only by loſing of Goods in theſe Acts is meant breaking of Bulk.

CCLXII. THIS Act is but a Branch of the 245. *Act*.

ACT CCLXIII. THIS Act, appointing Three Burghs-Royal to be made, One in *Kintire*, One in *Lochabar*, and One in the *Lewis*, is not only not put in Practice, but the Erection of a Burgh-Royal in the *Lewis* was unjuſtly oppos'd by the Burrows in *Anno* 1636. upon Pretext that it would communicate their Privileges to Foreigners and Strangers, *viz. Hollanders*, who offer'd to come and ſettle there: Whereas it would only have dilated and improv'd our Trade, and theſe Foreigners had preſently become *Scotiſhmen*.

CCLXIV. BY the 119. *Act, Parl.* 7. Ja. VI. Inhibitions and Interdictions are to be regiſtrated in the Sheriff-Clerk's Regiſters: But by this Act all Letters of Horning, Inhibitions, Interdictions, and their Executions are to be regiſtrated in the Regiſters of the reſpective Bailiaries, Stewartries, or Regalities, within which the Perſons dwell, againſt whom theſe Executions are; but if theſe Perſons be out of the Country, they muſt be denounc'd at the Mercat Croſs of *Edinburgh*, and Pier and Shore of *Leith*, and not at the Head Burgh of the Stewartry, Bailiary, or Regality, *July* 4. 1666. *Cuninghame* contra *Cuninghame*; and that becauſe this Act of Parliament ſpeaks only of *Perſons dwelland within the Kingdom*: But it may be yet doubted, whether the ſingle Eſcheats of Perſons out of the Country may fall upon Denunciations at the Mercat Croſs of *Edinburgh*, and Pier and Shore of *Leith*? Or, Whether Liferent-Eſcheats will fall, except the Rebel be denounced at the Head Burgh of the Shire, Regality, or Stewartry wherein his Lands lies? Since if he had been within the Country, he ought to have been denounced in the reſpective Juriſdictions, within which the Lands ly.

ALBEIT this Act appoints all Letters to be executed within Regalities and Stewartries; yet if theſe Juriſdictions have no known Head Burgh, the Eſcheat will be ſuſtain'd upon a Denunciation at the Head Burgh of the Shire, *January* 7. 1677. *Scot* contra *Dalmahoy*.

CCLXV. BY this Act, all Hornings, Relaxations, Inhibitions, and Interdictions that were to be regiſtrated in Inferior Regiſters, are ordain'd to be preſented judicially before a Notar and Four Witneſſes; which Formality is thereafter found not to be neceſſary, and is abrogated by the 13. *Act, Parl.* 16. Ja. VI.

CCLXVI. *VIDE Crim. Pract. Tit.* Theft.

CCLXVII. BECAUSE the Money had riſen at this Time to a great Value, ſo that the ſame Piece of Money which paſſed formerly for one Penny, was worth Ten the Time of this Act; therefore it is juſtly appointed by this Act, that all the Unlaws ſhall be raiſed, ſo that the ſame Delict which was fined only in Twelve Pennies before the Firſt of *March* 1542. (that is to ſay, before the Firſt Parliament of Queen *Mary*) ſhould be fineable in Ten Shilling of the Money current the Time of this Act. *Gel. L.* 20. *C.* 1. tells us, *That the* Romans *were in this ſame Manner forc'd to augment the Penalties of the Twelve Tables, becauſe* Lucius Veracius *took pleaſure to beat all that paſt him, becauſe he was only to pay* 25 *Aſſes for every Blow*, according to that Law.

CCLXVIII. THIS Act is explain'd, *Crim. Pract. Tit.* Beggars.

CCLXIX. FROM this Act it is obſervable, that he that is charg'd with Lawburrows, ſhall be as liable in the Contravention as if he had found Caution, tho he has not found Caution; it being unjuſt that by his Contempt he ſhould put himſelf in a better Condition. And it is by the ſame Reaſon that an appearand Heir's Liferent-Eſcheat falls to his Superior in the ſame Way as if he had entered, ſince it is unjuſt that the Superior ſhould be prejudg'd by the appearand Heir's lying out.

*Obſerv.* II. THAT by this Act, when any Man finds Caution, being charg'd with Lawburrows, he who raiſes Lawburrows has Action againſt either Principal or Cautioner at his Option, as in other pecunial Obligations. Which Words, *viz. As in all other pecunial Obligations*, are added, becauſe by our Law, he who is a Cautioner *ad factum præſtandum* (ſuch as they are who become Cautioners for Executors, Meſſengers or Tutors, *&c.*) is only liable after the Principal is diſcuſs'd, becauſe they being only Cautioners for the Principal's Performance, it muſt be firſt known whether the Principal has performed: And thus the *beneficium diſcuſſionis*, that was of old competent by the Civil Law to all Cautioners, is only competent by our Law to ſuch Cautioners only as become Cautioners *ad factum præſtandum*.

CCLXX. THIS Act, appointing that the Pains of the general Bond ſhall be divided betwixt the King and the Party, is to be underſtood of the general Bond of Lawburrows, which is appointed by the 3. *Act, Parl.* 2. and 12. *Act, Parl.* 6. Ja. II. even as the Pain of ſpecial Lawburrows is to be divided betwixt the King and the Party, by the 77. *Act, Parl.* 6.

Ja. VI. for that Act 77. related only to private Lawburrows at the Inſtance of private Parties; and therefore this Act was neceſſary in the Caſe of general Lawburrows, exacted at the King's Inſtance, for the Security of all His Subjects, from ſuch as He thinks liable to Suſpicion.

It was and is ordinary for the King and Council, to charge Heretors who are at Feud to give Bonds of Aſſurance to one another, and that upon Six Hours Advertiſement, under the Pain of Rebellion, *Vide* the Council Regiſters, *July* 26. 1582. and which is a great Inſtance of the King's Power allow'd him by Law, againſt thoſe whom He has Reaſon to ſuſpect.

CCLXXI. THE Rubric of this Act is wrong, for Sheriff-Clerks bring not their Books to the Exchequer, but to the Lord Regiſter.

CCLXXII. BY this Act, it is appointed that all ſuch as are Commiſſioners for Parliament ſhall be authoriſed by the Subſcription of a great Number of the Barons then preſent, and the Subſcription of the Clerk of the Convention elſe to be null; which Act was found not to be in Deſuetude, by a Deciſion in the Convention, *July* 1678. where it was found likewiſe that this Act extended to Commiſſions for Conventions, as well as to Parliaments; for tho' this Act ſpeaks only of Parliaments, yet Parliaments and Conventions being called the ſame Way, the Commiſſions ſhould have the ſame Solemnities. And the Reaſon why the Sheriff-Clerk's Subſcription is requiſite, is, becauſe he is the public Servant of the Shire, and ſo it is preſumeable that he will mark exactly all that was done, and will not ſuffer counterfited Subſcriptions to be put to Commiſſions, being to be liable himſelf; whereas otherwiſe Commiſſions may be obtruded upon the Convention with falſe Subſcriptions, as was done in that ſame Meeting. And which dangerous Falſhood cannot otherwiſe be well faſtened upon any other, ſince the Commiſſioner may juſtly alledge that the Commiſſion was ſo granted to him, and one may be choſen a Commiſſioner who is abſent; in which Caſe he cannot know who ſign'd.

CCLXXIII. BURROWS having great Freedoms and Privileges from the King, are therefore oblig'd to have ſufficient Priſons, for receiving ſuch as are attach'd for Crimes and Debts; which Act was found to oblige Baillies of Burghs of Regality, as well as Burghs-Royal, *July* 7. 1668. and Stewarts of Stewartries, *June* 18. 1670. And theſe Words of this Act, *By the Sheriffs to Stewarts and Baillies of Regality*, are wrong printed; for the Word *To* ſhould be *Or*: But this Act was not found to oblige Baillies of a Burgh of Barony, *March* 13. 1623. nor Biſhops Baillies, *March* 21. 1627. but the Baillies of the Head-Burghs of Stewartries were thought to be oblig'd by this Act of Parliament to receive Priſoners, albeit the Act of Parliament appoints them to be preſented only *to Stewarts and Baillies of Regality*, but ſpeaks not of Baillies of the Head-Burgh of the Stewartry, *June* 18. 1670. *Cheap contra* the Baillies of *Falkland*; where it was likewiſe found, that the Baillies keeping a Rebel Eight or Ten Days in a private Houſe, and thereafter impriſoning him, were not liable *ſuper hoc medio*, except he eſcaped by their Negligence, or the Inſufficiency of the Priſon. And it ſeems by the Act of Parliament, that theſe Burghs are only oblig'd to have Priſons, which have Provoſts and Baillies; for the Act appoints the Priſon to be upholden by the Provoſt, Baillies, *&c.* tho' the Rubric ſays, *That Priſons ſhould be bigged within all Burghs.* And it may be doubted from the Words of the Act, whether Burghs, which have no Common-Good, ſhould be liable, eſpecially ſeeing Magiſtrates are oblig'd to keep Priſons for the King's Uſe, becauſe they have a Common-Good from Him.

If the Magiſtrates do not receive Rebels, or have not ſufficient Priſons, they are liable for the Debt, and that without calling the principal Debitor, ſince the Magiſtrates are liable *ex ſuo delicto*: And theſe Goals are found not to be ſufficient which want Cat-bands, and outward Chains, becauſe the Priſoner cannot force thoſe from within; but the Priſon being ſufficient, and ſufficiently guarded, *vis major* is a ſufficient Defence. And tho' this Act ſays only, *That they ſhall ſecure Perſons preſented to them*, yet they are found to be oblig'd to ſearch any Houſe where the Rebel is ſaid to be, *July* 2. 1669. *Farquhar contra* Magiſtrates of *Elgin*: And tho' this Act bears, *That they ſhall detain all ſuch Priſoners upon their own Expence*, yet this is only extended to Priſoners taken *ob vindictam publicam.* But it is indulg'd to the Tolbooth of *Edinburgh*, *That they ſhall not be oblig'd to receive any who are offered to Priſon by private Parties, till the Preſenters find Caution to aliment them.*

This Act appoints thoſe Priſons to be made for ſure impriſoning, keeping, and detaining of ſuch Priſoners as are preſented; and therefore the Magiſtrates cannot let them out, either to Church, or to go about any of their Affairs, how important ſoever, tho' with a Keeper, ſince *ſqualor carceris* is thus eluded: And therefore in ſuch Caſes the Magiſtrates muſt be authoris'd by a Warrant from the Secret Council, or Lords of the Seſſion, and that by an Act of *Sederunt in Anno* 1671. And if the Rebel be ſuffered to eſcape, or go abroad, the Magiſtrates will not only be liable, but they will get no Relief from the Cautioner, tho' they take

Aſſignation to the Debt, ſince *tenentur ex proprio delicto*, and the Cautioner is prejudg'd of his Relief by that their Delict, *January* 24. 1668.

CCLXXIV. THIS Act is formerly explain'd in the 1. *Act*, *Parl.* 9. Ja. VI.

CCLXXV. THIS Act is formerly explain'd in the 153. *Act*, *Parl.* 12. Ja. VI.

CCLXXVI. SINCE by this Act, all Burgeſſes are to be ſtented according to their Rents and Holding within Burgh, it may be doubted, if a Burgeſs have no actual Trade, but only Money owing him by Perſons without the Burgh, if he may be ſtented according to that Eſtate, ſince it is no Rent nor Holding in Burgh: But the Anſwer is, That *mobilia ſemper ſequuntur perſonam*; and therefore he may be ſtented according to that Money. It may be doubted if Gentlemen who never had any Trade, but dwell in the Town very long, may be ſtented, tho' they be honorary Burgeſſes only. *Item*, If they can ſtent for Miniſters Stipends, Strangers within Burgh, who are not at all Burgeſſes. And this Act ſeems to imply, that Inhabitants as well as Burgeſſes, may be ſtented according to their Eſtates within Burgh, and that all who have Advantage by the Miniſtry ſhould pay Miniſters.

CCLXXVII. THERE are Two Ways of levying Subſidies in *Scotland*: The one is by Taxation, which was the old Way, and which Taxation was upliſted according to the Retour; the other is by Way of Ceſs, in which the Subſidy is upliſted according to the late Valuations, wherein every Man's Land-Rent was given up, as preſently poſſeſs'd.

THE Subſidy granted by this Act is by Way of Taxation, and the old Way of upliſting Subſidies by Taxations may be fully herein ſeen, and which is very fit to be read upon that Account; and in which it is evident, that the Clergy paid the one Half, including the Erections: But *in Anno* 1666. a Propoſal being made, That the Subſidy then offered ſhould be upliſted by Way of Ceſs, and not by Way of Taxation.

THESE enſuing Reaſons were repreſented againſt that Propoſal, and which I have here inſert, becauſe they tend very much to the clearing many of our old Laws and Cuſtoms.

THE Reaſons were, 1. That the Rule and Way for upliſting Taxations; has in all Ages been according to Retours, and the taxed Rolls until theſe late unhappy and irregular Times; from which it is humbly conceiv'd, a Rule and Precedent ought not to be taken. It is beyond all Queſtion, this being the good old Way, tho' it were upon no other Account, ought not to be chang'd, the Danger and Inconveniency of the Alteration of ancient Laws and Cuſtoms being ſo great and obvious from the late Experience of theſe Kingdoms, that this Age needeth not to be put in Mind of the ſame, but may be a ſad Remembrance to Poſterity.

II. THE foreſaid Way is only now the legal Way, wherein Taxations can be upliſted at this Time, ſeeing the ſame is determin'd and authoris'd by ancient and uncontroverted Cuſtoms in all Ages, and beyond Memory, and by the Law of Nations, and the Fundamental Law of this Kingdom. Ancient national Cuſtom is Law, and of as great Force as Statute, and is the great *Baſis* and Foundation of the Power, and Rights and Property of the Prince and People, which for the moſt Part are warranted and ſecur'd by the Common Law and Cuſtom, and not by expreſs Act of Parliament and Statute.

III. THIS Way of upliſting Taxations, and the Proportions of the ſame, payable by the reſpective Eſtates, is deſign'd and eſtabliſh'd by expreſs Laws and Acts of Parliament; ſo that the ſame cannot be alter'd but by a Parliament, which only has Power to repeal, as appears by the 56. *Act*, Ja. III. *Parl.* 7. intituled, *Theſe Retours ſhould contain the old and new Extent*, and the Act 229. Ja. VI. *Parl.* 14. ordaining all Feu-lands annex'd, and other Feulands whatſomever to be retour'd, and when any Taxation or Impoſt is to be rais'd, that the Feuars ſhall be charged according to the Retour; and by the 229. *Act*, Ja. VI. *Parl.* 14. ordaining His Majeſty's Property to be retour'd, and ſuch Lands as are diſſolv'd and diſmembred from Baronies, to be retour'd, and charg'd according to the Retours, in Order to the Payment of Taxation, and divers others, and in ſpecial all the Acts of Parliament concerning the granting and upliſting Taxations.

IV. WHEREAS it is pretended by the Heretors of the Weſtern Shires, that their Retours are higher than in other Shires, and that it ſhould be a more equal Way that the Taxation ſhould be upliſted as Ceſſes, according to the Valuation, without reſpect to Retours; theſe Gentlemen have no Reaſon to complain, being their own Deeds, procured by them, upon the Verdict of their own Friends and Neighbours *per fideles homines patriæ*, and according to which, they payed not only Taxations according to the old Extent; but His Majeſty's Caſualities of Non-entry, Relief, and ſiklike, according to the new Extent contain'd in the ſaid Retours, and has been alſo in Uſe to upliſt the like Caſualities from their own Vaſſals, according to the ſaid Retour; That the Retours ſhould be altogether taken away, both as to old and new Extent, it is conceiv'd that they will not deſire, ſeeing if their Retour ſhould be leſſened, as to the new Extent, it would be an irrepairable prejudice to His Majeſty, as to his ordinary Benefit and Caſualities of Non-entry, Relief, and ſiklike a prejudice to themſelves; as to the ſame Caſualities due, and payable to themſelves by their Vaſſals: And what Incongruity ſhould it be, that the ſame Retour ſhould be altered as to the old Extent, and ſhould be ſtated as to the new, and that it ſhould be ſtill a Rule, as to their own Intereſt and Benefit, and not as to the Payment of the Taxation to His Majeſty, as it has been in all Ages, it being alſo conſidered, that they cannot ſay that the Lands are valued unjuſtly by their Retours, and extend to more than the true Value, the Time of the retouring of the ſame, and ſince that Time they cannot deny that they are improven for the moſt Part above any Proportion.

V. THE Intereſt, and conſequently the Way of proceeding of lawful Princes; and Uſurpers being ſo different and oppoſite, that as Princes are *patres patriæ*, and do cheriſh and intend the flouriſhing of their Subjects; ſo by the contrary, it is the Intereſt and Practice of Uſurpers *deglubere*, to ſqueeze and oppreſs the People, that they ſhould not be in a Capacity to ſhake off the Yoke: It is neither the Honour nor Intereſt of the Country to take a Pattern, and riſe from the Uſurpers to overturn the ancient Law of the Kingdom, eſpecially in the Matter of Taxations, ſeeing the Neceſſity and fatal Courſe of theſe Times, in order to maintaining of War againſt His Gracious Majeſty, and His bleſſed Father did not only require a Taxation, which was an eaſie Burden to the People, and were chearfully granted, and ofttimes offered to His Majeſty's Royal Predeceſſors as an Aid and Subſidie, when their Occaſions did call for the ſame; but the Uſurpers were driven to exact a conſiderable Part of every Perſon's Eſtate, as a conſtant Tribute, under the Notion of taxt and Loan-maintenance, Ceſs and ſuch like Burdens, which cannot be remembred without Horrour; and in order to the ſame, to introduce a new Way by Valuation, whereas His Majeſty is to have an ordinary Taxation; and therefore there is no Reaſon but that the ſame ſhould be rais'd in that good old and ordinary Way, that has ever been uſed in the Time of His Majeſty's Father, and His Royal Predeceſſor.

VI. THE Way of Ceſs, both as to the Manner and Thing, is ſo hateful to the Body of the People of this Kingdom, that tho' exhauſted in a low Condition, they did offer, and chearfully grant to His Majeſty a conſtant yearly Taxation and Annuity, during his Majeſty's Life, of 40000 Pound *Sterling*, upon Conſideration expreſly mentioned in the ſaid Act, That His Majeſty had ſignified His Royal Reſolution not to raiſe any more Ceſs; it cannot be expreſſed how great Diſſatisfaction and Apprehenſion it would beget in the Hearts of the People, if that unhappy Way of Ceſs ſhould be reviv'd, under what Name or Notion ſoever, now after His Majeſty's Reſtitution; and that the People had juſt Reaſon to think themſelves ſecur'd by the ancient Laws and Cuſtom of the Kingdom, and His Majeſty's gracious Reſolution ſo recently and ſolemnly expreſſed by His Majeſty's late Commiſſioner in Parliament, and recorded in a printed Act, being the Fourteenth of His Majeſty's late Parliament, and Firſt Seſſion thereof.

VII. THE Weſtern Shires, being only Five, and the remnant Shires who plead for the good old Way, according to the ancient Laws of the Kingdom, being Five Times more, it is humbly repreſented, that the Intereſt and Number of ſo many other Shires ſhould weigh down the Pretences and Deſires of ſo few Shires, for a Novation contrary to the Law and Liberty of the Kingdom; it being alſo conſidered, that tho' the Loyalty of ſome Noblemen and Gentlemen within the ſaid Weſtern Shires, be above all Exception, and be more eminent, that there are ſo few of ſound Principles there; yet to ſpeak modeſtly, the Generality of the Inhabitants of theſe Shires has not been ſo forward to deſire or promote His Majeſty's Reſtitution and Intereſt, that now after His Majeſty's happy Re-eſtabliſhment, they ſhould obtain what they could never effectuate in any Time, and ſhould be gratifi'd to the Prejudice of other Shires of undoubted and conſtant Loyalty, and the overturning the ancient Law, and Way of the Kingdom.

VIII. AS to the Pretence of inequality in the old Way, it is to be conſidered, that tho' an Arithmetical Proportion and Exactneſs is not to be expected in any Way; yet there is more Reaſon to preſume for the Juſtice and Equity of a legal Way, venerable for Antiquity, warranted by expreſs Laws and immemorial Cuſtom, which for any thing known, had it's Beginning in the Time of Freedom, and has been continued in the beſt, moſt peaceable and pureſt Times, notwithſtanding any Endeavours to the contrary, than for a Way contriv'd and hatch'd in the Heart and fury of Trouble and Diſtempers, and brought forth and obtruded upon the Country with ſo much Partiality and Factiouſneſs, that it is well known that the Shires, and Perſons who were in Oppoſition to His Majeſty, had ſo great and prevalent Intereſt for the Time, that the Valuations, both as to the Quota of Shires, and Proportions and Rents of private Perſons were carry'd on by the Inſtruments and Commiſſioners, moſt inequally to the Advantage of their Party, and the Evident Prejudice and Preſſure of whole Shires, and all Perſons who were ſincere, or had the leaſt Affection for the Royal Intereſt.

IX. BY the Common and Feudal Law and Law of the Kingdom, where the Heir of the Vaſſal dieth not entered, the Superior during the Non-entry, has Right to the Duties of the Land holden of him; and when the Heir of Ward-lands doth enter, the Superior hath Right to the Duties for a Year, under the Notion of Relief, which in both theſe Caſes of Relief and Non-entry, are payable according to Retours and the new Extent; if the old

Way of Retours ſhould be alter'd, in relation to the Payment of Taxations, why not in Order to Non-entries and Relief, ſo that they ſhould be paid, not according to Retour, but Valuations, there being no Reaſon that the ſaids Caſualities are not exacted in Rigour, but the ancient Law and Cuſtom for Retours. How dangerous the Preparative may be, if the Way of Retours ſhould be altered, even to thoſe who are for Novations; and what Combuſtion and Diſorder it may occaſion in the contrary, it is ſo apparent, that it needs not to be repreſented.

X. Whereas it is pretended that Lords and others of the Clergy, will have Prejudice by the Old Way, both as to their own Proportion, and the Proportion of the Vaſſals; and that they are in another Condition than formerly, by Reaſon that their Rents are impaired by Valuations and Miniſters Stipends; it is humbly conceived with all Tenderneſs and Reſpect to the Reverend Clergy, that whatever others for their own Intereſt, do ſuggeſt under Pretence of theirs, the Lords of the Clergy and others, will not decline to contribute, and be taxt for His Majeſty's Service, as the other Eſtates. And as to the pretended Way of paying Taxation according to the Valuations in theſe late Times, they cannot be taxed in that Way; becauſe the Rents of the Biſhops being for the moſt Part in theſe Times of Uſurpation, mortified to Univerſities, and other pious Uſes; they were not valued, nor liable to Ceſs, and ſuch like Burdens: It muſt then follow, That either they muſt be taxed in the old Way, or elſe not at all as to the Proportion of the Clergy; it is deſigned by all the Laws concerning Taxations, and it is not higher than it was at any Time, ſince Taxations were granted to His Majeſty's Predeceſſors: And it is to be obſerv'd in all Acts of Parliament concerning Taxations, the Lords of the Clergy do in the firſt Place, before the reſt of the Eſtates, make a chearful Offer of the ſame Proportion without any grudging: And tho' there needs no Reaſon to be given for clear Law and Practice; yet that the ſaid Proportion is defin'd, and ſettled upon good Reaſon, it is obvious, ſeeing the ſame is impos'd in Order, both to their Spirituality, conſiſting in Tithes, and their Temporality conſiſting in Lands and others; and it is known that the Tithes are more than the Fourth-Part of the Rent of *Scotland:* And Temporalities and Church-lands will extend to a conſiderable Part of *Scotland*, at leaſt to a Fourth-Part.

The Clergy having their Benefices and Living, not Property, as the other Eſtates, but of His Majeſty's immediate Favour and Grant, and for their Life-time; ſo that it is not ſtrange, that upon the Conſiderations foreſaid they paid ſuch a Proportion of the Taxation; the Caſe is not altered upon the Account of Valuations and Miniſters Stipends, that Courſe for Valuation of Teinds, and Augmentation of Stipends being procured, and taken at the earneſt Deſire of the Reverend Biſhops and Clergy; ſo that it ought not to be repreſented, as being to their Prejudice; and *de facto*, the Reverend Biſhops and Miniſters, have no Prejudice by that Courſe, by reaſon the Biſhops and Miniſters, and benefic'd Perſons (who ought only to be looked upon as Clergy) are ſecur'd by divers Proviſions contained in the Acts of Parliament anent the Valuation of Tithes; and in ſpecial, that what they were in Poſſeſſion of actually and really the Time of the Submiſſion, made by them, ſhould remain with them *in quantitate & qualitate*, unprejudged by any Valuation. So that the Valuation and Augmentation of Stipends being only in relation to, and affecting the Spirituality and Teinds; the Caſe neither is, nor can be altered as to the Clergy, they being ſecured by the ſaids Proviſions, and the Burden of Augmentation of Stipends, and Prejudice by Valuations, doth only ly upon the Lords; and Titulars of Erection, and Tackſmen of Tithes, as the Caſe is not alter'd in relation to Benefic'd Perſons, ſo ſtipendiary Miniſters cannot be prejudg'd by the good old Way, ſeeing by an Act of Parliament 162. Ja. VI. *Parl.* 13. they are freed and exempted of all Taxations and Impoſitions, the Burden of the Proportion of the Clergy doth not ly upon them, but for the moſt Part upon the Vaſſals and Tackſmen, againſt which they have by the Law a preſent and ſummar Way of Relief. As to the Lands and Temporality of the Clergy, they are the ſame, and in the ſame Caſe as in Time of former Taxations; and that the Vaſſals of Erection, or of Churchmen, ſhould be in better Caſe than formerly as to the Payment of Taxation, it is contrary to Law and Reaſon, ſeeing *res tranſit cum onere & cauſa*; and that Laymen acquiring Lands from Churchmen, ſhould have more Eaſe of Taxation, as to ſuch Lands, than other Churchmen had when they poſſeſſed the ſame, is inconſiſtent with Law, and with the Reſpect and Privileges belonging to that Sacred Order.

XI. Whereas it is pretended, That ſince His Majeſty's Reſtitution, and the ſaid Act of Parliament containing His Promiſe and Reſolution not to raiſe any more Ceſs, a Taxation hath been paid to the Lords of Seſſion in the Way of Ceſs; that Pretence is of no Weight, it being conſidered that the ſaid Taxation is granted not to His Majeſty, but for an honorary Allowance to the Lords of Seſſion; and by an Act of the ſame Parliament, wherein His Majeſty declar'd that no more Ceſs ſhould be rais'd: So that the ſaid Act being in the ſame Parliament, and it being an Exception from the ſaid Act, *firmat regulam in non exceptis*, and ſhuts the Door as to the Future, upon that Manner of raiſing of Impoſitions.

ACT

XII. Whatever a Parliament may do as to the repelling of former Laws and Cuſtoms, a Convention of Eſtates (tho' a Meeting moſt eminent) has not that Legiſlative Power: And albeit the Commiſſioners from Shires has Power, by their Commiſſion, to offer and condeſcend to a Taxation; yet they have not Power to alter and take away the Fundamental Laws and Cuſtoms of the Kingdom, as to the Manner of uplifting of Taxations, being the Birth-right of the People, and which cannot be taken away but by a Law made in Parliament.

# PARLIAMENT XVI.

I. THE Earl of *Gowrie* having endeavoured treaſonably to murder King *James* VI. he was forfeited in the Beginning of this Parliament; and after his Death, his Brother and Poſterity were diſabled to ſucceed, and the Name of *Ruthven* aboliſhed; as is to be ſeen in the firſt Three unprinted Acts of this Parliament, and a public Day of Thankſgiving is appointed by this Act, which is yet conſtantly celebrated upon the 5. of *Auguſt*, which was the Day upon which the Murder was to be committed.

The Malice of the Fanatics in thoſe Times is moſt remarkable, who pretend that he was unjuſtly forfeited, albeit the Depoſitions of the Witneſſes are yet extant, whereby the traiterous Deſign of having contriv'd, and accordingly attempted to kill that excellent King, is prov'd by his own Relations, and many eminent Witneſſes of entire Reputation.

It is alſo obſervable, That Witneſſes of old, in Proceſſes before the Parliament, were only led before the Articles, and repeted in Parliament.

*Item*, That the Summons was ſtill in *Latin*, & *ſub teſtimonio magni ſigilli*, they were at the Inſtance of the Juſtices, and of the King's Advocate; and the Summons in all ſuch Caſes were ſtill rais'd before the Parliament did ſit; for our Parliaments ſat very ſhort Time, and ſo they err who think that ſuch Proceſſes can only be rais'd by a Warrant from the Articles, tho' that be ordinary now. And now likewiſe the Summons is in *Scots*, and under the Signet only.

II. THE Earl of *Gowrie* being forfeited, his Lands are by this Act annex'd to the Crown; and tho' by the former Acts of Annexation, Lordſhips and Baronies were only in general annexed, yet here all the particular Baronies of the Lordſhip, and all Tenements of the Lordſhip are expreſſed, with all the Pertinents thereto belonging, which are here ſpecially enumerated; and amongſt the Pertinents, Patronages are enumerated, which ſhews that Patronages in our Law, are comprehended under the Word *Pertinents*; which is alſo clear by the Author of the Book, call'd, *The Parſon's Law*, See more of this in the Notes on *Act* 29. *Parl.* 11. Ja. VI.

The Regalities and heretable Offices belonging to *Gowrie* are likewiſe ſuppreſt expreſly, and the ſaids Lands erected in a Stewartry; for a Regality is properly the Erection of Lands holding of Subjects; and a Stewartry is only in Lands which are the King's Property.

III. THIS Act is explain'd in the 37. *Act*, *Parl.* 2. Ja. VI. and that is the Act related to in this Statute.

IV. BY this Act, *invading or purſuing any of His Highneſs's Seſſion, Secret Council, or Officers, it being verify'd that they were purſu'd or invaded for doing His Highneſs Service*, is declared puniſhable by Death, and upon this Act Mr. *James Mitchel* was hang'd for invading the Biſhop of St. *Andrew*'s; in which Proceſs it was upon Debate found, that the purſuing and invading for doing His Highneſs Service, was ſufficiently proven by Preſumptions, except the Pannel could have condeſcended upon another Reaſon which provok'd him to the Attempt, ariſing from private Quarrel or Grudge, and that becauſe it is impoſſible to imagine that the Deſign of the Invader can be otherwiſe proven, that being an occult and latent Act of the Mind.

By the Civil Law, the invading a Counſellor was Treaſon; for, ſays the Emperor, *ſunt pars corporis noſtri*, *L.* 5. *C. ad L. Jul. Maj.*

ACT

It may be queſtioned from this Act, 1. Who are to be call'd the King's Officers? 2. If the invading them when they are out of the Kingdom, or ſuſpended, or when they are only nam'd, and not yet admitted to their Place, will infer the Puniſhment of this Act. 3. If theſe Words in the Narrative of this Statute, that they are oft quarrelled without any juſt Cauſe, will excuſe the Invader, if he can ſhow that he was truly wrong'd by that Party, either in voting, or deciding againſt him, or otherwiſe. *Scipio Gentilis* in his Books, *De conjurationibus adverſus Principes*, explains the *L.* 5. *Cod. ad L. Jul. Majeſt.* and ſhews how far invading of the King's Counſellors is Treaſon.

Sir *Francis Bacon* obſerves, That an Act of this Tenor was made at the Suggeſtion of the Chancellor, in the Reign of *Henry* VII. becauſe of the Danger the Chancellor was then in from the Courtiers, drowning the Envy of it in a general Law. And I am ſure that was alſo our Caſe; for our Chancellor was in ill Terms then with our Nobility, but their Conſpiring was made a Crime; whereas with us Invading is neceſſary.

V. THIS Act is explained in the 80. *Act, Parl.* 10. Ja. III.

VI. THIS Act is formerly explain'd in the 248. *Act, Parl.* 15. Ja. VI.

X. THIS Act diſcharging Herring to be carried abroad before *Michaelmas*, under the Pain of Confiſcation, is now innovated by the Privileges granted to the Fiſhing Company, and that very juſtly, for the ſooner Herring be carried abroad, they give the better Price: And tho' there were not Herring enough taken to ſerve the Country the Time of this Act, which was the Reaſon of the Prohibition; yet now there are, ſufficiently for ſerving both the Country and Strangers.

XI. THO' the ſlaying Salmon in forbidden Times, be Theft by this Act, yet none has ever been purſu'd capitally therefore, but the ſame is only puniſh'd as a penal Statute by an arbitrary Puniſhment.

The Reaſon why the Rivers of *Tweed* and *Annand* are excepted from this Act, is, becauſe the killing Fiſh upon them prejudges only the *Engliſh* Fiſhing: But after the Union of the Two Kingdoms, this Exception as to theſe Two Rivers, is alſo taken away by the 5. *Act, Parl.* 18. Ja. VI.

XII. THIS Act declaring the Provoker and Provoked in Duels to be puniſhable by Death, is explain'd, *Crim. Pract. Tit.* Duels: And ſince fighting Duels is only declared Death by this Act, it appears that naked Provocation is not Capital; but yet even the ſending of Cartals may be arbitrarily puniſhed by the Privy Council: But Fighting is Capital, tho' no killing follow: And Fighting by Rencounter may be puniſhed as a Duel, tho' there was no formal Cartal; for by this Law all ſingle Combats are declared puniſhable by Death, *Vid. Crim. Pract. Tit.* Duels: This Act was renewed by a ſtrict Act of Secret Council, in *Anno* 1674.

XIII. THIS Act is explain'd in the *Act*, 265. *Parl.* 15. Ja. VI.

XIV. BY this Act it is declared that the Negligence of the King's Officers, in purſuing or defending a Cauſe, ſhall not prejudge the King: And therefore Competent and Omitted, is never received againſt the King, tho' it be againſt private Parties; and by this Act it would appear that the King may propone a Nullity of a Decreet obtained againſt him, even *in foro* before the Lords of Seſſion, by Way of Exception or Suſpenſion, without a formal Reduction; but yet Preſcription runs againſt the King, notwithſtanding that it may be alledged, that by this Act he cannot be prejudged by the Negligence of His Officers, in not purſuing, ſince Preſcription is a general Remedy introduced for the final quiet, both of King and People; and as to Heretage it is introduced by an Act poſterior to this Act, wherein there is no Exception made in favours of the King; but the Act introducing Preſcription of Moveables is prior to this Act, and ſo it may be the more doubted, whether Preſcription of Moveables runs againſt the King, ſince by this poſterior Act it is declared, that the Negligence of His Officers in not purſuing, ſhall not prejudge him, nor is there ſo great Hazard to the Lieges in their Moveables, as in their Heretage.

XV. THE tranſporting or inbringing of forbidden or uncuſtomed Goods, that is to ſay, Goods that ſhould pay Cuſtom, without paying Cuſtom is puniſhable, not only by Forefeiture of the Goods, but by Confiſcation of the In-bringers whole Goods moveable; albeit by the Civil Law, *ea res tantum in commiſſum cadit quam quis non eſt profeſſus*; by which Law the naked Entry, or *ſola poſſeſſio*, was ſufficient to defend againſt the Forefeiture & *imputandum eſt publicano qui non exegerit*, Perez. *Tit. C. de Vect. Num.* 10. both by that Law and ours, the Cuſtomers may recover the Goods unentered, even from ſingular Suc-

ACT ceſſors who have bought the ſame, *bona fide*, for a competent Price; and in that Law, Error excus'd from Confiſcation: But in that Caſe it exacted double Cuſtom, *Perez. ibid.*

I have not obſerved any Man's Moveables eſcheated upon this Act.

XVII. THIS Act, fining ſuch as will not Communicate once a Year, when he is thereto deſired by his Paſtor, is ill obſerved, but not in Deſuetude, and therefore was renewed by Proclamation in *January* 1679.

*Obſerv.* THAT the having Rancour againſt their Neighbour is declar'd no relevant Excuſe; and juſtly, becauſe it is a Fault, and ſo ſhould be no Defence; *& argumento hujus legis*, a Fanatic having Prejudice at his Miniſter, even tho' reaſonable, is no legal Defence, for he ſhould ſtill hear.

*Obſerv.* II. THO' this Act ſay, *That no other Excuſe whatſoever ſhall defend*, yet certainly Inability to Travel, Madneſs, *&c.* will defend, and general Words are ſtill to be underſtood *in ſubjecto capaci.*

XVIII. THIS Act is explain'd, *Crim. Pract. Tit.* Hereſie.

XIX. This Act is explain'd, *Crim. Pract. Tit.* Beggars and Vagabonds.

XX. THIS Act is explain'd, *Crim. Pract. Tit.* Adultery.

XXII. THIS Act is but a Temporary Commiſſion.

XXIII. THIS Act againſt Slaughter of Wild-fowl, is renew'd by an Act of Privy-Council, *June* 9. 1682 Years, whereby Maſters of the Game are appointed for putting theſe Acts in Execution; tho' by this Act the Sheriffs, Stewarts, and the King's ordinary Magiſtrates, have a particular Commiſſion of Juſticiary for this Effect; and it was queſtioned in the Time, how the Council could take away a Right eſtabliſh'd in them by the Parliament?

BY this Act, the killing of Muir-Pouts is diſcharg'd before the 3. of *July*, and Partridge-Pouts before the 8. of *September*; and by that Proclamation, Muir-Pouts are allow'd to be kill'd after the 1. of *July*, and Heath-Pouts after the 1. of *Auguſt*, and Partridge and Quail after the 1. of *September*. And whereas, by the 109. *Act*, *Parl.* 7. Ja I. *No Partridges, Plovers, Black-Cocks,* &c. *are to be kill'd till* Auguſt; this Proclamation allows them to be kill'd from the 1. of *July*.

XXIV. THIS Act, ordaining all *Engliſh* Cloth to be ſeal'd by a Seal, the Form whereof is here condeſcended on, was thought to have been in Deſuetude; but now found not to be ſo in *Anno* 1666: At which Time it was found, that the Cuſtomers might enter the Shops, and ſeal or confiſcate what was not ſo ſeal'd. This Sealing was formerly appointed by the 129. *Act*, *Parl.* 12. Ja. VI.

XXV. THIS Act appoints, that no Letters of Horning ſhall be direct againſt Perſons dwelling on the other Side of *Dee*, upon ſhorter Space than 15 Days; which Act was found only to be extended to Actions before the Privy-Council, but not to Charges before any other Court; becauſe the Narrative of this Act ſays, *That ſeverals of the Lieges were drawn in Inconveniencies by Charges before His Majeſty and His Council*; tho' the Rubric and ſtatutory Part be general, and tho' the Reaſon whereupon this is inferred extends to all Charges, as well as Charges before the Council.

XXVI. SUCH as invade any of His Majeſty's Subjects within a Mile to the Place of His Highneſs's Reſidence, or whoever reſort thereto armed with Jacks, or Corſlets under their Coats, are to be impriſoned for a Year, and puniſhable by an arbitrary Fine.

*Obſerv.* THAT the Attrocity of the Crime is much heightned from the Circumſtance of Place, as well as Time; as is likewiſe clear by the 173. *Act*, *Parl.* 13. Ja. VI.

IT may be doubted, whether this Act can be extended againſt ſuch as invade Strangers? ſince the Act ſays only, *ſuch as invade Subjects*; ſince the invading of Strangers is more atrocious in itſelf, than the invading of Subjects, the Crime being there aggreged by the Breach of Hoſpitality.

IT may be likewiſe doubted, how long a Time of Reſidence by the King, makes the Invaders puniſhable? and it would appear that if the Invaſion be not within a Mile of that which is known to be the Place of the King's ordinary Reſidence, that then it muſt be proven, that the Invader did reſide there for the Time.

XXVII. BY this Act Sheriff-Courts ſhould be kept in the Middle of the Shire, for the Eaſe of the People; but this is not obſerv'd.

ACT XXVIII.

OF old Pledges were taken in the Borders, that is to ſay, one Man entred himſelf Priſoner for another, and bound himſelf for his Appearance, Perſon for Perſon; but now the Peace is ſecured by Sureties or Cautioners, who if they preſent not the Perſon for whom they are bound, that very Hour they forefeit their Bonds; nor is the preſenting the Priſoner afterwards ſufficient: Which Speciality has been found neceſſary in Border Sureties.

THESE Pledges were diſtributed of old amongſt the Nobility and Gentry, who were to be anſwerable for them, becauſe we wanted then many and ſure Priſons; and becauſe they were unwilling to receive theſe Pledges, therefore this Act obliges them to receive and keep ſuch Pledges, under the Pain of Two Thouſand Merks.

IT may be doubted, if Pledges may not be taken in other Crimes, as well as theſe relating to the Borders and Highlands, *argumento hujus legis*, ſince this may tend much to the quieting of the Country; and if the Nobility may not be forc'd to keep theſe; for Priſons may be often ſo full, that Priſoners cannot otherwiſe be kept; and by many Acts of Secret-Council, the Nobility was before this Statute oblig'd to keep Pledges.

BY the Common Law, *Obſides* or Pledges could only be granted, *ex cauſa publica, ſed non ex privata*, Bald. *in L. ob æs, C. de obl. & act.* But it ſeems that Pledges, tho' for Criminal Cauſes, could not bind themſelves to corporal Puniſhment, *quia nemo eſt dominus ſuorum membrorum licet aliter obtineat de conſuetudine, ob bonum publicum*, Bald. *in Tit. de pace Conſtant.* § *damna in fine.*

# PARLIAMENT XVII.

THERE have been Two Commiſſions granted for conſidering of an Union betwixt this Kingdom and *England*, One in this Year 1604, and another in *Anno* 1670. Betwixt which there are only theſe Two Differences, That in this Act, the Names of the Commiſſioners are ſet down, and they had no other Commiſſion but the Act of Parliament; but in the other Commiſſion 1670. the Perſons were nominated by His Majeſty, under His Great-Seal; the Nomination being referr'd to the King by that Act of Parliament.

The ſecond Difference is, That in this Commiſſion 1604. their Power is limited with this Proviſion, *viz.* not derogating any Ways from any fundamental Laws, ancient Privileges, Offices, Rights, Dignities, and Liberties of this Kingdom. But the other has no ſuch Exception; and yet it may be doubted, whether by virtue of the laſt Commiſſion, thoſe who were commiſſionated could have derogated by their Treaty from any of our fundamental Laws, ancient Privileges, Offices and Dignities.

THAT the Parliament of *Scotland* could not conſent to an Union of Parliaments, tho' all its Members were admitted, without at leaſt conſulting the Shires and Burghs, which the reſpective Members of Parliament repreſent, may be thus urg'd: All Nations conſidering the Frailty of their Repreſentatives, and that ſome Ages and Generations do too eaſily quite, what is fit and neceſſary for ſecuring their Liberty; have therefore thought fit to declare ſome Fundamentals to be above the Reach of their Power. And that Parliaments cannot overturn Fundamentals, ſeems clear, not only becauſe theſe were not Fundamentals if they could be overturn'd, that being the true Difference betwixt Fundamental and other Laws: But if a Parliament ſhould enſlave their Kingdom to a Foreigner, the People might, by a ſubſequent Election, diſown the Perfidy; Or if Two of Three Eſtates, ſhould by Plurality, exclude the Third, ſurely their Excluſion would be null. And that the Conſtitution of a Parliament is a Fundamental, appears not only from the Nature and Weight of that Privilege, but likewiſe from this Commiſſion, *Anno* 1604, wherein it is call'd Fundamental, and looked upon as unalterable. Nor is it imaginable, how the Parliament cannot invert the Conſtitution of one Eſtate, and yet can invert and alter the Conſtitution of the Whole. And by our Statutes, it is declared *Treaſon to endeavour to leſſen the Power of the Three Eſtates of Parliament*. And it cannot be ſaid, that their Power is not leſſened when they cannot make one Act or Statute by their own Authority, or when others have more Intereſt in, and Influence upon their Determinations, than they themſelves have; and when, from being abſolute, they become ſubject to another; and a Parliament has but ſome ſuch Power over the People, as the Magiſtrates and Council have over a Burgh: For the Parliament is but the great Council of the People and Kingdom. And it is moſt certain, that the Magiſtrates and Council of a

City or Town, could not conſent to incorporate with another Town, and conſent to the Everſion of their own, without the full Conſent of their People whom they govern.

COMMISSIONERS for Shires and Burghs are the ſame with us that *Procuratores univerſitatis* are in the Civil Law; and Procurators *etiam cum libera*, could not alienate the Rights of their Conſtituents without a ſpecial Mandate for that Effect, *L. Procuratori ff. de Procurat.* nor can they exchange nor tranſact upon what belongs to their Conſtituents, (which is our Caſe exactly) *L. mandato generali ff. de Procurat.* and if we conſider the Commiſſion whereby they ſit in Parliament, we will find it does only impower them to repreſent in Parliament their Conſtituents in every Thing which ſhall be advantagious for them. From which Commiſſions I argue, *Firſt*, That this is but *mandatum generale*; for it impowers them only in general Terms, and bears no Warrant to treat with *England* of an Union of Monarchies or Parliaments, & *generali mandato etiam cum libera ea veniunt quæ ſunt de conſuetudine, L. quod ſino L. § qui aſſidua ff. de ædidit. edict.* & *non comprehendit ea quæ ſunt uſui regionis repugnantia*: It impowers not ſuch as have it to do Things extraordinary, and which, it is probable, the Conſtituents would not allow, *L. ut ſi filius ff. de donationibus, L. indebitum ff. de condict. indebit* & *Cap. generali de reg. jur. in ſexto.* But in ſuch Caſes, as Lawyers obſerve, and Reaſon teaches, the Conſtituent is to be conſulted, and a ſpecial Mandate is required, as is clear by the Laws above-cited. Our Commiſſioners for Shires and Burghs ſit by virtue of Commiſſions, and as they need a Warrant to ſit, ſo cannot they exceed it when they ſit, and are not arbitrary: Nor could the Parliament of *Scotland*, as now conſtituted, reſign their Parliamentary Power over to the Council: Nor does their Commiſſion impower them to ordain that there ſhall be no future Parliaments; and when they exceed their Commiſſions they are no more Members of Parliament, and therefore what they do is null.

III. BY theſe Commiſſions, the Commiſſioners for Shires and Burghs are only impowered to repreſent them in the Parliament of *Scotland*; which preſuppoſeth that there muſt be a Parliament, and conſequently that they cannot extinguiſh or innovate the Conſtitution of the Parliament of *Scotland*; for how can they repreſent the Shires and Burghs in a Parliament which is not? And certainly the Parliament of *Scotland* can be ſaid to be no more, when they make but a Part of the Parliament of *Great-Britain*; for *Scotland* cannot be called *Britain*, nor a Part of a Parliament cannot be called a Parliament, no more than the Commiſſioners for the North of *Scotland* can be called the Parliament of *Scotland*; but how our Commiſſioners could ſit in the Parliament of *Great-Britain*, by virtue of their former Commiſſions, I ſee not. And therefore it ſeems to be both fit and juſt, that the Commiſſioners of Shires and Burrows ſhould be ſent home to their reſpective Conſtituents, to crave their Advice and Conſent in ſo weighty and comprehenſive an Affair, *nam quod omnes tangit, ab omnibus debet approbari.*

IT may be likewiſe contended, that this great Determination of uniting both Parliaments, requires at leaſt the full Aſſent of the Members of both Parliaments; and that tho' the Parliament had Power to alter its own Fundamentals, yet if any one diſſent, the Union of both Parliaments muſt ſtop; for both in Law and Reaſon, the Power of making Laws, and the Right to retain or reſign Privileges are Two different Things, the One is a Legiſlative Power, which is regulated by Plurality of Voices; the Other is founded upon Dominion or Property, and is not ſubject to Suffrage, no more than other Properties are; for as every Member has Right, ſo his Right cannot be taken away from him without his own Conſent, tho' all theſe who are in the Society with him ſhould renounce what is their's, *in re pari, melior eſt conditio prohibentis*, & *in re communi, nemo dominorum jure quicquam facere poteſt invito altero, L.* Sabinus, *ait* 28. *ff. com. divid.* Thus if the Members of a Society were, by Law, free from Impoſitions, tho' all the Society, ſave One, ſhould ſubmit to pay, yet Plurality would not in that Caſe oblige the Refuſer; and if all who had Intereſt in a Commonty, ſhould condeſcend to reſign their Right therein in favours of another, yet if One were refractory, that One would not be prejudged by the Conſent of all the remanent Partners. Whence it ſeems conſequential, That as the Parliament cannot debar any Member from ſitting in Parliament, ſo that if one Member, by Advice from his Conſtituents, oppoſe the Union of Parliaments, it could not be carry'd by Plurality; for whatever Reaſon militates why Plurality ſhould not overſway in the One, does likewiſe militate in the Other: And if the Right of every Member is given as the Cauſe why he cannot be debarr'd from ſitting, why ſhould not the ſame Right impower him much more to ſtop the total Alteration of the Parliament? Even as a Man cannot be debarr'd from uſing a Commonty. It will likewiſe operate, that the Commonty cannot be alter'd in its Nature without his Conſent; and the Right of theſe who ſit in Parliament, is as much prejudg'd by extinguiſhing the Being of a Parliament, as by debarring them from ſitting, or voicing in it. Our Shires and Burghs have Right to be repreſented in no Parliament ſave that of *Scotland*; and therefore, if the Commiſſioners had Power to overturn the Being of the Parliament of *Scotland*, they could have debarr'd our Shires and Burghs from being repreſented in the Parliament of *Great-Britain*, ſeeing they could pretend no Right to ſit there; ſo that it ſeems, either Plurality of Voices may exclude any particular Member, and may retrench that Member; or elſe by the ſame Reaſon, no Plurality can eſtabliſh an Union of both Parliaments. And if our Parliament could, by Plurality of Voices, overturn the Fundamentals, and deſtroy the very Being of our Parliament, how ſhall it be poſſible to ſecure our Parliament, when it is join'd in with the Parliament of *England*, into one Parliament of *Great-Britain*, ſo as that the Parliament of *Great-Britain* may not, by the Plurality of Voices, likewiſe overturn any Fundamentals that ſhall be condeſcended on? But that the Fundamental Conſtitution, and Privileges of Parliament, are not ſubject to Suffrage, and cannot be abrogated nor innovated, without the univerſal Conſent of all its Members and Commiſſioners, may be clear likewiſe from many Inſtances; for it is moſt certain that the Parliament, as now conſtitute, could not, by any Statute, ordain that there ſhould be no more Parliaments, or reſign over their parliamentary Power in the Hands of the Council; nor could they tranſmit the Power they poſſeſs in favours of their own Heirs, or exclude any of the Three Eſtates. And ſure, if Fundamentals be not ſubject to Plurality of Voices, the Power of uniting of Parliaments, and ſuppreſſing of Monarchies is not; for theſe comprehend all other Privileges and Fundamentals; and if the Privileges of One of the Three Eſtates cannot be alter'd by Plurality, I ſee not how the Privileges of all the Three can be; and we have ſeen Parliaments in the laſt Age do ſuch irregular Things, that the ſucceeding Parliaments have been forc'd not only to abrogate their Laws, but even to find that they had exceeded their Power, which implies that it was not arbitrary.

# PARLIAMENT XVIII.

I. THIS Act declares His Majeſty's Royal Prerogative by way of Acknowledgment, without any new Conceſſion, in theſe Words, *They all, in a voluntar, humble, faithful, and united Heart, acknowledge His Majeſty's Sovereign Authority, Princely Power, Royal Prerogative, and Privilege of His Crown, over all Eſtates, Perſons and Cauſes; and confirms to His Majeſty His Imperial Power, and whatever Sovereign Authority any of His Predeceſſors had, and caſſes, annuls, and abrogates all, any Way done to the Prejudice of His Authority any Manner of Way.* So that it ſeems that all former Acts of Parliament, leſſening any Way the Royal Power, are hereby abrogated.

By this Act likewiſe, the Eſtates of Parliament promiſe, *To maintain, defend, and advance the Life, Honour, Sovereign Authority, Prerogative Royal, and Privilege of His Crown, with their Lives, Lands and Goods, to the outmoſt of their Power.* But becauſe this Act was too general, therefore by the 2, 3, 4, and 5. Acts of the firſt Parliament, *Charles* II. His Majeſty's Royal Prerogatives in the *Choice of the Officers of State, Counſellors and Judges, in calling and diſſolving of Parliaments, and making of Laws, in making Peace and War, and ordering the Militia, &c.* are expreſly acknowledged and ratify'd. And by the 2. *Act* of the 2. *Seſſ.* of the 1. *Parl.* *All Endeavours to reſtrain His Royal Perſon, to depoſe or ſuſpend Him,* and *all Endeavours tending thereto, are declared treaſonable*; and *all ſtirring up of the People to the Hatred or Diſlike of His Royal Prerogative,* are puniſhable in Manner therein-mentioned. And by the 27. *Act* of the 3. *Seſſ.* of the 1. *Parl.* Ch. II. His Majeſty is declared, by His Prerogative Royal, *To have the only Power of ordering all Trade with Foreigners.*

*Nota,* This is the firſt Act that mentions the Word *Prerogative*, which was formerly call'd the *Privilege of the Crown*; and therefore this Act mentions both the old and the new Words, by aſſerting His Majeſty's Prerogative and Privilege of the Crown.

II. BY this Act Biſhops are not ſo much reſtored to their Offices, as it is declar'd, that it was never meant by His Majeſty, that the Eſtate of Biſhops was to be ſuppreſſed: Their ſitting in Parliament, being by this Act declar'd, to be One of the Fundamentals of the Nation: But by this Act, their Benefices are only reſtored to them, which were much impaired. And tho' by the 114. *Act, Parl.* 12. Ja. VI. General and Synodal Aſſemblies, and Presbytries, are thereby ratify'd; yet Epiſcopacy is not thereby abrogated expreſly.

By this Act the King is declar'd *to be Sovereign Monarch, abſolute Prince, Judge, and Governor over all Perſons, Eſtates, and Cauſes, both Spiritual and Temporal, within this Realm:* And by 1 *Act, Parl.* 2. Ch. II. it is aſſerted and declared, *That His Majeſty hath the ſupreme Authority, and Supremacy over all Perſons, and in all Cauſes Eccleſiaſtical within this His Kingdom; and that by Vertue thereof, the Ordering and Diſpoſal of the external*

ACT III.

*Government and Policy of the Church, doth properly belong to His Majeſty, and His Succeſſors, as an inherent Right to the Crown:* And that *His Majeſty and His Succeſſors, may Settle, Enact, and Emit ſuch Conſtitutions, Acts, and Orders, concerning the Adminiſtration of the external Government of the Church, and the Perſons employ'd in the ſame, and concerning all Eccleſiaſtical Meetings therein, as they in their Royal Wiſdoms ſhall think fit.*

There having been great Debates about the Wording this Part of the Act; ſome Members of Parliament, preſſing to have it without any Reſtriction, and others, tho' very Loyal, preſſing it might be reſtricted to the Calling and Diſſolving of Eccleſiaſtic Meetings, and external Government only. *Lightoun* Biſhop of *Dumblane*, was at laſt, truſted by the Commiſſioner, who has drawn it very cautiouſly for the Church; tho' our blinded Fanatics think otherwiſe: For, Firſt, It is founded upon the former old Statute; and after repeting that Statute, it is ſaid, *It is therefore Enacted*, to ſhew that it was not deſign'd, that this Act ſhould exceed the former and old Supremacy.

II. The Prerogative is reſtricted *to Government*; and not only ſo, but to the *external Government*; and even as to this external Government, the King has only the Ordering, and Diſpoſal of it; and *the Adminiſtration of it* by the next Clauſe: So that the Doctrine of the Church, nor the internal Part of the Government falls not at all under the King's Power, by Virtue of His Supremacy; that is to ſay, He can neither *Admit, nor Depoſe, nor Adminiſtrate Sacraments*; tho' He may diſcharge a Biſhop, or Miniſter to preach: And this is that which was allow'd by the Primitive Church to their Emperors. Thus *Conſtantine*, that Great and Firſt Chriſtian Emperor, is approv'd by all the Fathers, for ſetling thus the Marches, betwixt the Eccleſiaſtic and Civil Juriſdiction, *Euſeb. Lib.* 4. *de vit. Conſtant. vos quidem* των ἔσω της εκκλησιας *eorum quæ intus in eccleſia ſunt agenda ego vero* των ἔξω *eorum quæ extra ſunt epiſcopus ſum a Deo conſtitutus*; and that the Adminiſtration of the Sacraments, and theſe other Things *quæ intus ſunt*, belong not to the Civil Magiſtrate, is acknowledg'd by the 69 *Act*, *Parl.* 6. Ja. VI. Wherein it is acknowledg'd, that the Juriſdiction of the Kirk conſiſts *in the Preaching of the Word, the Correction of Manners, and the Adminiſtration of the Sacraments:* In which *Act*, Three Things are obſerveable. *Firſt*, That the Act tells they derive their Juriſdiction from the King, which is as to the external Part; for no Man can think they derive their Power of adminiſtrating the Sacraments from the King; tho' from Him they derive the Faculty of having the external Face of a Church; without which, that could not be enjoy'd.

II. Tho' the Church has the Correction of Manners, yet the King may regulate theſe, as we ſee in the very next Act, for keeping the Sabbath, and which ſeems to have been made the next Act to this, for to clear the Meaning of that Part of this Act.

III. Tho' the Preaching of the Word is declar'd to be a Part of the Eccleſiaſtic Juriſdiction; yet that relates only to the Matters of Faith, to be Preach'd; as to which, Miniſters are to be judg'd by Church-Judicatures: But if they Preach what encroaches on the ſecular Power, they are to be judg'd by the King, and thoſe deriving Power from Him, conform to the 129 *Act*, *Parl.* 8. Ja. VI.

This Supremacy in Caſes Eccleſiaſtic ſeems to have been ever the proper Right of ſecular Princes; and *Hædeus*, the Great *Canoniſt*, *repet. in Cap. novit. de jud. num* 145. tho' a *Roman* Catholic does acknowledge, *That nemini dubium eſt, quin, in primitiva Eccleſia de rebus, & perſonis eccleſiaſticis jus dixerint*; which will very clearly appear to any who will read the Firſt Thirteen Titles of the Firſt Book of *Juſtinian*'s *Codex*; in which he ordains amongſt other Things, *vim legum obtinere Eccleſiaſticos canones a quatuor ſynodis, Nicena, Conſtantinopolitana, prima Epheſina, prima & Chalcedonenſi expoſitos & confirmatos*; and I find that the Supremacy is in *England* thus eſtabliſhed, under the Reign of *Henry* VIII. That *the King and His Heirs and Succeſſors, ſhould be taken and accepted as the only ſupreme Head on Earth, of the Church of* England, *and ſhould have and enjoy, annexed to the Imperial Crown of that Realm, as well the Title and Stile thereof, as all Honours, Dignities, Preheminencies, Juriſdictions*, &c. *to the ſaid Dignity of ſupreme Head belonging.*

In this Act the Biſhops are not reſtored to Benefices, that are not of Cure, but to theſe which have a particular Cure; and therefore His Majeſty confirms all Diſpoſitions, or other Rights made of Abbacies, Priories, or other Benefices, not being Biſhoprics made or confirmed at, or before *July* 1587. they paying the Greſſum appointed by that Act, to the Biſhop within Year and Day.

There is likewiſe reſerved by this Act, all Feus lawfully ſet and confirmed before the Act of Annexation, which was in the Year foreſaid; and all Patronages of Kirks (pertaining formerly to them) diſponed by the lawful Titular and the King's Majeſty, and ratify'd in Parliament, which extends, as well to the Patronages of menſal Kirks, as of Kirks which are of the Biſhops Preſentation, *March* 25. 1631. And albeit, *regulariter confirmatio nihil novi juris tribuit*; yet *hoc caſu ſupplet omnes alios defectus*; for by the former Practique it is found, that Alienations of Patronages, even of menſal Kirks, are valid, if made, as ſaid is, by the lawful Titular; though not made by him, with the Conſent of the moſt Part of the Chapter; for this Act requires that it be made by the lawful Titular, but there is no Mention therein of the Conſent of the Chapter. It may be contended, that Menſal Kirks are not contained in the ſaid Exception, and that becauſe that Exception mentions only Patronage of Kirks pertaining to Biſhoprics; whereas a Menſal Kirk is not patronate, being a Part of the Benefice, and the diſponing a Menſal Kirk is a formal Dilapidation of the Benefice, and ſo contrary to other Acts of Parliament.

By the Act of Annexation in *Anno* 1587. the whole Superiorities of all Kirk-lands being annexed to the Crown, it was therefore neceſſary, that by this Act they ſhould have been reſtored, but they are not reſtored expreſly to theſe; but it is alledged, that they have Right to them by the 14. *Act, Parl.* 1. Ch. I. But yet in that Act it is only ſaid, that what is ſtatute anent the King's being Superior to Vaſſals of Erections, ſhall be but Prejudice to Biſhops and their Chapters of their Rights to their Superiorities, which is only a Reſervation, but is no expreſs Reſtitution of them to theſe Superiorities.

THIS Act anent the Dilapidation of Biſhoprics, is formerly explained in the general Nature of Dilapidations, in the *Act* 101. *Parl.* 7. Ja. VI. and *Act* 11. *Parl.* 10. Ja. VI. and as to what concerns Chapters, it ſhall be explain'd in the *Act* 2. *Parl.* 22. Ja. VI. III.

WHEN a Perſon is forfeited, he may be in Law reſtored Two Ways, *viz.* either *by way of Juſtice*, when the Sentence of Forfeiture is found to be unjuſt; or *by way of Grace*, when the Sentence is juſt, but the Perſon forfeited, or his Poſterity, is reſtored. Which Diſtinction we have from the Civil Law, that allows a Diſtinction *inter reſtitutionem per modum juſtitiæ, & per modum gratiæ.* IV.

The Difference betwixt theſe Reſtitutions by this Act of Parliament is, That the Perſon that is reſtored by way of Grace, has not, by his Reſtitution, Right to any Part of the forfeited Lands, and others diſponed in favours of Third Parties. But ſuch as are reſtored by way of Juſtice, will thereby have Right to their own Lands, tho' diſpon'd to Third Parties for onerous Cauſes; as was found in the Diſpoſition of the Lands of *Mugdock*, formerly belonging to the Marquis of *Montroſe*, and diſponed by the Parliament for onerous Cauſes to *Argyle*. As alſo, theſe who are reſtored by way of Juſtice, will have Right even to repete the Sums of Money which formerly belonged to them, tho' aſſigned to Third Parties for onerous Cauſes. And albeit thoſe Sums were firſt ordained to be paid in to the Treaſury, and Precepts only drawn upon the Treaſury in favours of theſe Third Parties, as was found in the Earl of *Brandford*'s Caſe againſt the Earl of *Callender* and others; tho' this Reſtitution of Money ſeems much harder than that of Lands, ſince Money is *res fungibilis*, and ſingular Succeſſors are not obliged to know to whom the ſame belonged.

A Proceſs having alſo been intented againſt the Earl of *Argyle* in the Parliament 1681. for reducing his heretable Offices, as granted ſince the 44. *Act, Parl.* 11. Ja. II. it was anſwered, That theſe heretable Offices were diſpon'd to the Family before that Act. And it being reply'd, That the firſt Right was extinguiſhed by the Forfeiture, and the Reſtitution being only by way of Grace, was to take Effect only from the Date: Nor was it more ſufficient againſt the King, than if the King had granted them originally at that Time; in which Caſe they would have been quarrellable on that Act; and yet *de praxi*, the King reſtores to Titles of Honour, as of the firſt Date. By the 2. *Act, Parl.* 9. Ja. VI. the King ſucceeding to Lands by Forfeiture, has Right to whatever the forfeited Perſon was Five Years in Poſſeſſion of before the Forfeiture; becauſe it is preſumed, that the forfeited Perſon will abſtract the Evidents. And therefore upon the ſame Preſumption it is likewiſe appointed by this Act, that the Production of Extracts out of the Regiſter ſhall ſatisfy the Production in Improbations againſt the King in forfeited Lands; whereas, other ſingular Succeſſors Rights will be improven, if the Originals be not produced, *Vide Notata* upon the ſaid Act 2. The excellent Narrative of this Act, is copied out of *L.* 1. § 1. *ff. de juſtitia & jure.*

THIS Act is explain'd in the 11. *Act, Parl.* 16. Ja. VI. which is that Act that is here reſcinded, tho' it be not here cited. V.

BY this Act it is appointed, *That where there is no arable Ground in the Paroch, the Miniſter ſhall have Sixteen Soums Graſs in place of the Four Acres*, which are allow'd to him for his Gleib. And by the 21. *Act, Parl.* 1. *Seſſ.* 3. Ch. II. it is ordain'd, *That the Miniſter ſhall have Graſs for One Horſe and Two Kine, over and above his Gleib*; and therefore it was doubted, if, where the former Gleib did extend to more than would be Graſs for Two Kine and One Horſe, above the Four Acres, the Miniſters might ſeek that Graſs: And the Lords found they might; albeit it ſeems that if this were juſt, the Miniſter might alſo ſeek Graſs for One Horſe and Two Kine, even where he had Sixteen Soums Graſs, by this Act, *February* 16. 1675. Parochioners of *Banchry contra* their Miniſter. VII.

THIS Act is but Temporary. IX.

ACT X. THIS Act, appointing Letters of Horning to paſs upon Sheriff, Stewart, and Bailies Decreet, without a Decreet conform, before the Lords, is explain'd in the 177. *Act, Parl.* 13. Ja. VI. and becauſe theſe Acts gave only Warrant for raiſing Letters of Horning upon ſuch Decreets; therefore Warrant is likewiſe given for raiſing Letters of Poinding upon all ſuch Decreets, by the 29. *Act, Parl.* 1. Ch. II. which ſhews that expreſs Acts are uſed even where there is *paritas rationis*; and they are uſeful *ob majorem evidentiam.*

XI. BY this Act, all Perſons are diſcharg'd from receiving any Coalliers, Salters, or Coal-bearers, without ſufficient Teſtimonials from their Maſters: But tho' this Act appoints the Coalliers, Coal-bearers, and Salters, to be puniſhed as Thieves; yet none ever died upon this Act. But the ordinary Action, both againſt them and their Reſetters, is before the Privy-Council; and the Act only ſays, *They ſhall be repute as Thieves, and puniſhed in their Bodies.* This Act is extended to Drawers of Water in Coal-heughs: And the Fees of Coalliers are diſcharged to exceed 20 Merks, by the 56. *Act,* 1. *Seſſ. Parl.* 1. Ch. II. Tho' this Act only diſcharges all Perſons within the Kingdom to hire other Men's Coalliers, *&c.* yet it was juſtly thought, that the Prohibition of it extended to all ſuch as had Right to Coal or Salt here by Tack or otherwiſe, tho' themſelves dwell not within the Kingdom; and it ſeems that the Council might hinder Foreigners to carry away our Coalliers and Salters, tho' they cannot puniſh them for ſo doing.

BY this Act likewiſe, a Power and Commiſſion is given to all Maſters and Owners of Coal-heughs and Pans, to apprehend all Vagabonds and ſturdy Beggars, and put them to Labour; and it has been reſolved, That Tackſmen of Coal-heughs and Pans has the ſame Privilege, tho' they cannot properly be called Maſters and Owners, except the Words be allowed to be extended to Temporary Rights: But ſince this Privilege is chiefly real, and not perſonal, *& in rem ſcriptum*; therefore it ſeems reaſonable, that whoever have the Power of the Coal-heughs, ſhould likewiſe have this Privilege, which is granted upon their Account.

THE Council thought *argumento hujus legis*, that Maſters of one Manufactory could not have Action againſt others of the ſame Manufactory, for reſetting their Servant who had run away from them, and to whom they had learn'd their Trade; and yet I have ſeen Action granted in the Council againſt Heretors, who had enticed away other Men's Fiſhers; and the Parity of Reaſon ſeems to reach to ſuch as work in Lead-mines. This Condition of Coalliers and Salters by our Law, makes them to be like to the *addicti glebæ & adſcriptitii*, mentioned in the Common Law.

XII. THIS Act is explain'd formerly in the 72. *Act, Parl.* 14. Ja. II.

XIII. BY this Act Men are diſcharg'd to lay Lint in their own Lochs, ſince thereby Fiſh is deſtroy'd, and the Water becomes noxious to Neighbours; and thus Property is in many Things reſtricted for the Good of the Commonwealth; there being nothing more conſequential to Property, than that *quilibet poteſt jure ſuo uti modo principaliter hoc non faciat in æmulationem alterius*: But it ſeems that only the Parliament can reſtrain this Exerciſe of Property, elſe this Act had been needleſs: And therefore when the Laird of *Haining* offered to drain his own Loch, it was juſtly debated whether the Fiſhers upon *Tweed* could hinder him, becauſe the Water that run in from the Loch to *Tweed*, prejudged their Fiſhings. But that which made the Caſe there more debateable was, that public Rivers and Salmon-fiſhings, are of their own Nature privileg'd. It may be likewiſe debated, whether *paritas rationis* ſhould extend this Act againſt ſuch as lay ſtinking Hides, or other ſuch noyſome Things in their Lochs or Burns; and the laying any ſuch Things in the Loch of *Lochlevin*, is ſpecially declar'd puniſhable by the 29. *Act, Parl.* 1. Ch. I. *vide quæſtiones medico legales* Pauli Zaccheii, *Lib.* 3. *Tit.* 3. where he condemns what is here diſcharg'd as noxious both to Man and Beaſt.

XIV. BY this Act, the Vaſſals who hold Blench of His Majeſty, are only liable in their Blench-duties, if they be required allanerly; and theſe Blench-duties cannot be converted into Money by the Exchequer.

*Obſerv.* I. IT is declared by this Act, That Blench-duties are not to be any Burden or yearly Duty by their own Nature, but only an Acknowledgment or Recognizance, if they be requir'd allanerly: And yet by our Law, in Lands holding blench of a Subject, we thus diſtinguiſh, *viz.* either the Charter bears, *ſi petatur tantum*, and then the Blench-duty cannot be required beyond the Year in which it was due; or elſe the Blench-charter bears not this Clauſe: And then either the Blench-duties are ſuch as are of an yearly Growth, as Wax, Pepper, *&c.* and theſe can only be crav'd within the Year; or elſe they are Things of ſome intrinſic Value, and not of an annual Growth; ſuch as Silver, Spurs, *&c.* and they may be

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purſued for at any Time within 40 Years. Nor can any annual Preſtations, ſuch as Carriages, be acclaimed, after elapſing of the reſpective Years, wherein they were due by the Tack, or otherwiſe, *January penult*, 1624. But tho' a Vaſſal's Charter, who holds of the King, bear, *ſi petatur tantum*, yet the Exchequer, by an Act, does tax the Price, and purſue for theſe and for annual Growths, albeit they have not been crav'd within the Year; for which I can give no other Reaſon, but that the Negligence of the King's Officers cannot prejudge the King. But how can the Act of Exchequer alter the Nature of the Holding, which is an expreſs Contract betwixt the King and His Vaſſals. And it may be alledged, that by Act of Exchequer it may be as well declar'd that Preſcription ſhall not run againſt the King, for this is a *Species* of Preſcription; but eſpecially ſince it is declar'd by this Act that they ſhall not pay, notwithſtanding of any Act of Exchequer paſt or to come. Nor does the Act anent the Negligence of the King's Officers abrogate this Act as it ought to have done. The Advocate's Proteſtation in the End of this Act ſeems to be unintelligible; for how can Blench-duties be conform to the King's Eſtate and Dignity? Some interpret this Act, as if it only prohibited the Converſion of the Blench-duty into Money in the Body of the Charter; but does not hinder the Exchequer's valuing of it. Others, to reconcile the preſent Practice with this Act, make a Diſtinction betwixt Holdings in *blanco*, and in *alba firma*; as if the Firſt being an inconſiderable Duty, as a Roſe, or a Peny, may not be converted to Money; but the other affording ſome Profit, ſuch as Gilt-ſpurs, Gloves, a Pound of Pepper, &c. may be valued by the Exchequer.

THIS Act quadrates with *Tit.* 2. *Lib.* 11. *Cod.* Theodoſ.

XV. THIS Act is formerly explain'd in the 77. *Act*, *Parl.* 6. Ja. V.

XVII. BY this Act, all ſuch as convocate or aſſemble themſelves within Burgh, without Licence of the Provoſt and Bailies, are declar'd to be guilty of Faction and Sedition; and it has been doubted, whether Keepers of Conventicles within Burgh may be puniſhable by this Act; for tho' there be a ſpecific Puniſhment appointed for Conventicles, yet ſince this and other Laws, by which Conventicles may be puniſhed in ſpecific and particular Caſes, are not abrogated expreſly; it is therefore alledged that they are not abrogated, conform to the general Rule ſet down in the 243. *Act*, *Parl.* 15. Ja. VI.

*Obſerv.* II. IT may be doubted whether, ſince this Act runs in the General againſt Convocations within Burgh, if this Act ſhould not as well extend to Burghs of Barony, and Burghs of Regality, as to Burghs-Royal, ſince the Word *Burgh* comprehends all. And the Reaſon inductive of this Act, *viz.* the quenching Convocations, extends likewiſe to all; and when the Parliament deſigned to extend their Acts only to Burghs-Royal, they were particularly expreſt, as is to be ſeen in the immediate foregoing Act. And albeit it may be urg'd that this Act ſpeaks of Provoſt and Bailies, yet this muſt be interpreted *applicando ſingula ſingulis*; for there are many Burghs-Royal, as well as Burghs of Regality and Barony, that want Provoſts.

*Obſerv.* III. THAT tho' this Act ordains only ſuch as obey not their Magiſtrates and Officers, to be fined; yet if the Inhabitants of any Town refuſe to obey any Officers in the King's Name, ſuch as Captains, &c. they may be fined.

*Obſerv.* IV. THIS Act appoints, that it ſhall be proclaimed at all the Mercat-croſſes of the ſaids Burghs; albeit by the 128. *Act*, *Parl.* 7. Ja. VI. all Acts of Parliament are only to be publiſh'd at the Mercat-croſs of *Edinburgh*; but this Act being poſterior and ſpecial, derogates from that general Law; and this was ſpecially appointed, becauſe of the ſpecial Intereſt of the Burrows.

*Obſerv.* V. IT is obſervable, that this Act propoſes no Puniſhment for Towns where the Magiſtrates do not their Duty to oppoſe Tumults againſt the Government; yet the Town of *Lanerk* was fin'd for not purſuing thoſe who burnt the *Teſt* at their Croſs, *Anno* 1681, and private Burgeſſes pay a Proportion of ſuch Fines, tho' they were not required by their Magiſtrates, becauſe it is their Duty to concur when they ſee ſuch Tumults; and Magiſtrates are oft-times unable to require Concurrence.

XVIII. THE Lands of *Huntington* and *Strabrand*, are diſſolved to be ſet in Blench-farm in favours of the Earl of *Montroſe*; and it was neceſſary that there ſhould be a particular Warrant for ſetting the Lands in Blench-farms; becauſe by the 234. *Act*, *Parl.* 15. Ja. VI. the annex'd Property can only be diſſolv'd for ſetting Lands in Feu-farm. *Vide Obſerv.* on that Act.

IT is likewiſe obſervable by this Act, that becauſe this Diſſolution was to be made in favours of the Earl of *Montroſe*, then Commiſſioner, it is mentioned that there is a particular Warrant for diſſolving the ſame.

# PARLIAMENT XIX.

I. THIS Act againſt *Sayers and wilful Hearers of Maſs*, is explain'd, *Crim. Pract. Tit.* Hereſie.

*Nota*, By this Act the Reſetters of ſuch are fineable as *Non-communicants*; and the Act by which theſe are fined, is not here cited, but it is the 17. *Act, Parl.* 16. Ja. VI.

II. THIS Act againſt the Uſers of falſe Weights and Meaſures, whoſe whole Goods are to be confiſcated, is explain'd, *Crim. Pract. Tit.* Falſhood.

III. THIS Act is explain'd, *Crim. Pract. Tit.* Theft.

VIII. THIS Act impowers the Biſhop of St. *Andrew's* to chooſe Seven within his Diocy to be his conſtant Chapter; which was formerly reſolved upon by the 3. *Act*, *Parl.* 18. Ja. VI. tho' the Power of chooſing them was not given to that Biſhop expreſly: But thereafter by the 2. *Act*, *Parl.* 22. Ja. VI. the Benefices, whoſe Incumbents are to make up that Chapter, are particularly condeſcended on in that Act.

# PARLIAMENT XX.

I. SUCH as ſent Pedagogues abroad with their Children, without a Teſtificate from the Biſhop of the Diocy where the Pedagogue lately made his Reſidence, are fineable by this Act: And tho' this Act is thought only to ſtrike againſt Children of Popiſh Parents; yet it is general, and ſtrikes againſt all His Majeſty's Subjects, of what Religion or Opinion ſoever; and tho' they uſe to call theſe Governors, and not Pedagogues, yet that will not defend againſt this Act, for Pedagogue was the only Term then in uſe.

II. THIS Act ſtrikes only againſt the Children of Popiſh Parents, who are hereby ordain'd to find Caution to the Lords of Privy-Council, that they ſhall not entertain their Children abroad, when they know them to be Popiſhly inclin'd; and by virtue of this Act, the Lord *Semple* and others, were obliged, in *Anno* 1667, to recal their Children out of *Doway*; and this Act was renewed by Proclamation of Council, *January* 1679.

III. BY this Act it is ordain'd, that ſuch as are excommunicated for not profeſſing the true Religion, ſhall neither directly nor indirectly poſſeſs their Eſtates; and by virtue of this Act it was found, upon the 16. of *June* 1629, that thoſe excommunicated Perſons are not ſo much as *bona fide poſſeſſores*; but that by virtue of this Act, they are oblig'd to refound all their own bygone Rents poſſeſs'd by them before Citation or Sentence, they only getting Defalcation of Seed, Teinds, and Servants Fees; which are ordinarily defalked in the Computation of Multures, and all other Intromiſſions.

VI. IN Time of Popery, every Biſhop had his own Official or Commiſſar; but in the Year 1563. Queen *Mary*, by a Signature ſuperſcribed with Her own Hand, did inſtitute this Court at *Edinburgh*, appointing Four Commiſſars to ſit there, and to judge in Divorces, and to reduce the Decreets of Inferior Commiſſars, which is ratified in Parliament 1567; by which alſo they are appointed to judge in all Actions concerning Benefices granted by the Queen. They were at firſt nominated by the Queen, and were called *Judices Regii*; but after Her Demiſſion they were nominated by the Lords of Seſſion, as is clear by the Books

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of Sederunt. And even in this Act, the preſent Commiſſars were to continue, they getting Teſtimonials of their Sufficiency from the Lords of the Seſſion, and ſeverals of them were at once Lords of the Seſſion and Commiſſars, as appears by the Books of Sederunt. Upon the Reſtitution of Biſhops, the Commiſſars who then were did ſubmit. And this Act ſeems to have proceeded upon a Submiſſion betwixt the Biſhops and Commiſſars the 23. of *June*, the Day before the Parliament ſat down; whereupon Decreet was pronounced the 29. of *June*, containing the foreſaid Reſervation of the Commiſſars Offices. And in the Caſe of the new Proviſions, the Commiſſars are the only Submitters, and yet there are Annuities decerned to the Clerk, to the Former of Teſtaments, Quot-maſters and others. And there is a Form preſcribed anent the Procedure in Divorcements, betwixt the Parties in other Commiſſariots, who are not worth a certain Sum, which hath no Foundation in the Act, nor ſeems to be ſeconded by Practice: The Decreet is regiſtrated *January* 19. 1610. relative to the Decreet, wherein the Archbiſhops and Biſhops of *Galloway* and *Orkney* are Subſcribers for themſelves, and taking Burden for the remanent Biſhops and their Succeſſors, there is a Contract the 15. of *November* 1609, and *March* 5. 1610, entred into amongſt the Biſhops, for the Relief of the Archbiſhops, or either of them, for Payment of their reſpective Proportions to the Archbiſhop, who ſhall happen to be diſtreſſed for the Salary, the Archbiſhops by the Contract being bound conjunctly and ſeverally to the Commiſſars, the whole Proportion of Relief due by *Glaſgow* to St. *Andrew*'s, is the Double of the Contribution to the Lords, and Salary due to the two youngeſt Commiſſars, and the Relief due by St. *Andrew*'s to *Glaſgow*, is the Double of his Contribution, and the Salary due by him to the Two eldeſt Commiſſars. By which it appears, that before this Decreet the Commiſſars had Salaries: The Obligement in favours of the Members of Court of the Commiſſariot of *Edinburgh*, whereby the Biſhops are obliged to compel the Members of their Court to pay certain Sums to the Members of the Court of *Edinburgh* during their Lifetime, is not renewed in the Contract. In this Contract the Obligements upon the Part of the Commiſſars are general, relative to their Duty to their Superiors, and Fidelity in Adminiſtration of Juſtice, according to the Practique and Injunctions, the Obſervation of the Decreet-arbitral, and Articles, by which it is ruled, ſubſcribed by Arbiters and Overſmen, which is not extant; there is no Penalty adjected, neither are the Commiſſars ſubſcribing.

The Commiſſars and many of the Biſhops being dead who were alive the Time of the Decreet-arbitral, the Biſhops eſpecially; the ſucceeding Biſhops refuſed to pay the Salary to the ſucceeding Commiſſars; whereupon they purſued *John*, then Archbiſhop of St. *Andrew*'s, who, the Time of the Decreet and Contract, was Archbiſhop of *Glaſgow*, and *James* Archbiſhop of *Glaſgow*, who then was Biſhop of *Orkney*, as the only Two alive who were Burden-takers by the Submiſſion for the reſt, and Decreet followed, *February* 12. 1630. againſt the Archbiſhop of St. *Andrew*'s, who, the Time of the Contract, was Archbiſhop of *Glaſgow*, and was bound conjunctly and ſeverally with St. *Andrew*'s: The Archbiſhop, for his Relief upon the Contract, being diſtreſſed upon the Decreet, purſued *Adam* Biſhop of *Dumblain*, who was created Biſhop ſince the Contract, and thereupon defended himſelf as free of the Obligement of Relief: As likewiſe, that the Salary was not due to the then Commiſſars, it being due to their Predeceſſors, the Submitters allanerly, which was repell'd, and the Biſhop decerned, *February* 18. *eodem*, in reſpect the Charge and Pains was perpetual upon the Commiſſars Part, and the Benefit perpetual to the Biſhops, and they having the Confirmation of the great Teſtaments; and the Word *Allanerly* was found only to exclude the Heirs of the then Commiſſars, but not their Succeſſors in Office. The Point being clear'd as ſaid is, the Commiſſars thought it more juſt that every Biſhop ſhould be liable for his own Part; and therefore all the Biſhops are purſued, wherein the ſame Defences are again repell'd, and they decerned, *March* 27. *eodem*, and the 24. of *July* 1634. there is a new Decreet obtained in favours of the Commiſſars and their Succeſſors againſt the Biſhops and their Succeſſors, containing a Declarator, that it was a conſtant Fee payable in all Time coming: This was in Abſence. The Decreet againſt St. *Andrew*'s, dated the 12. of *February* 1630. is not extant, unleſs in the Regiſter; but it is narrated and founded upon, in the Decreet at the Inſtance of St. *Andrew*'s againſt *Dumblain*. Upon the Decreet in *March* againſt the Biſhops, there are Letters rais'd, dated the laſt of *March*, *Givand Warrand to charge the Biſhops to pay their Proportion of the Salary, and to find Burgeſſes of* Edinburgh *Cautioners within Fifteen Days*; That in all Time coming they ſhall pay their Proportions, conform to a Deliverance of the Lords ſhown to them, founded upon the Damage that the Commiſſars would ſuſtain in evacuating their Salaries, by charging and denouncing the Biſhops yearly in the ſeveral remoteſt Corners in the Kingdom: The Deliverance is not extant. There are other Letters directed againſt them the 1. of *April* 1630. for Payment only; ſo that both the Remedies are uſed. There are likewiſe Letters directed for finding a ſufficient Burgeſs Cautioner, dated the 16. of *February* 1637.

The 9. of *July* 1661, there is a Ratification in Parliament in favours of the Commiſſars, declaring the Rent, Patrimony, and Eſtates of the Biſhops to be liable to them for their Salaries; and there is a Reſervation in favours of the Commiſſars. In the Reſtitution of the

ACT Biſhops, there is a Decreet againſt the Repreſentatives of Archbiſhop *Fairfowl*, wherein the whole Defences againſt the Commiſſars Right are repell'd: But by the ſaid Decreet, the Diſparity betwixt the Proviſion of a Salary in Favours of the Commiſſars, and in Favours of the other Members of Court by the Decreet-arbitral, is not ſufficiently clear'd; for the Decreet, as to the Members of Court, was null, it being beyond the Terms of the Submiſſion, which was only in Favours of the Commiſſars. And as to the Members of Court, the Decreet infers no ſpecial direct Obligement upon the Biſhops, but only that they are oblig'd to compel their Members of Court to pay theſe certain Sums to the Members of *Edinburgh*, without any Penalty, and which hath never taken Effect by the Decreet or Contract, the Commiſſars had no Action againſt the whole Biſhops, but only againſt the whole Burden-takers, and the Archbiſhop; but by the ſubſequent Decreets and Acts of Parliament, the whole Biſhops, and the Intrometters with their Rents, are directly liable unto them, and ſo their Executors intrometting with the Ann, or the ſubſequent Biſhops are liable; and that is but Prejudice of the Obligement *in ſolidum* againſt the Archbiſhop, contain'd in the Contract; by virtue whereof, St. *Andrew*'s was decern'd; and by virtue of a Submiſſion betwixt St. *Andrew*'s and *Edinburgh*, *Edinburgh* is decerned to relieve St. *Andrew*'s in the Half; and St. *Andrew*'s hath ratify'd to him in Parliament the Nomination of the whole Commiſſars: Againſt which *Edinburgh* did proteſt. It doth not appear how *Glaſgow* loſt his Right to the Nomination of Two eſtabliſhed to him by the Act of Parliament. There was an Act for Regulation of the Commiſſariots, which took no Effect; neither is there any Thing done by the Lords, by virtue of the Act of Parliament 1661, as to the Regulation of the Commiſſariot of *Edinburgh*, or ſettling a Courſe for the punctual and ſecure Payment of the Commiſſars Salary. The whole Inſtructions above-mentioned related to, are to be found with the Commiſſars of *Edinburgh*.

It is obſervable by this Act, That the Commiſſars of *Edinburgh* have a Two-fold Power; a Dioceſian, whereby they confirm the Teſtaments within the Diocy of *Edinburgh*, and exerce all Power that is competent to other Commiſſars; and another, univerſal and tranſcendent; whereby they may reduce the Decreets of all the other Commiſſars in *Scotland*. And this Act founds them ſo abſolutely in this Juriſdiction, that it is excluſive of the Lords of the Seſſion's Power ſo far, that the Lords cannot reduce *in prima inſtantia* a Decreet paſt by any inferior Commiſſar; and the Lords themſelves did ſo decide after full Debate, *Dury*, *July* 23. 1624. tho' it was there alledged, That the Parliament could not diminiſh the Power of the Seſſion without calling them thereto; and yet now the Lords does ordinarily reduce *in prima inſtantia* the Decreets of the inferior Commiſſars, which proceeds rather from the Inadvertancy of the Advocates who are careleſs to plead it, to withdraw Actions from the Judicature whereof they are Members, than that the Lords do concern themſelves to claim it: But both then and now, the Lords may reduce the Decreets of the Commiſſars of *Edinburgh*, if they decide not rightly in theſe Reductions.

In this Act alſo, Biſhops are impower'd to create Clerks and Procurator-fiſcals; and tho' in the Commiſſion, which the Biſhops give to Commiſſars, they give them Power to admit Procurators; yet cannot the Commiſſars, by that Power, create Procurator-fiſcals, but only ordinary Procurators; the Fiſcal remaining ſtill at the Biſhop's Nomination, *July* 12. 1627.

The Commiſſars Books bear *Sedebant*, where the Lords Books bear *Sederunt*.

VIII. King *James* finding that the Nobility did ordinarily get their Children, Friends, or Servants, to be elected Magiſtrates of Burghs, whereby they carry'd all Nominations in Parliament at their Pleaſure; did therefore in this Act, which is entitled, *Act for the Apparel of Judges, Magiſtrates, and Kirk-men*, ordain, *That no Man ſhould in Time coming be capable of Provoſtry, or other Magiſtracy, but Merchants and actual Traffiquers, and Habiters within the ſaid Burgh allanerly, and no others*. By virtue of which Act, Chancellor *Seton* was oblig'd to demit his Provoſtry of *Edinburgh*: And this Act is renew'd by Proclamation in *Anno* 1626, how ſoon King *Charles* came to the Crown. Some think, that tho' Noblemen cannot be elected ſince this Act, yet the Privy-Council may name them; and ſome think that this Act is in Deſuetude: But I believe neither; for where the Council names *jure devoluto*, becauſe Magiſtrates accept not, they come only in Place of the old Magiſtrates and Council; and therefore they can only do what theſe could have done, *ex regula ſurrogatorum*. And this Act having been made in Favours of the King and Monarchy, it cannot run in Deſuetude without their Conſent; and it is thought, that by virtue of it, none who are Lords of the Seſſion can be Provoſts, theſe being incompatible Employments, and inconſiſtent with the Deſign of this Act, which bears to be made *to hinder the Diſſipation of their common Good, and perverting of their Privileges*, which is much more eaſy for Lords of the Seſſion, and Perſons in public Employment, than for others: Beſide, that public Traffique and Merchandizing is inconſiſtent with that exact Diſtribution of Juſtice, which is neceſſary in His Majeſty's Judges. *Vide* Lampridium *in vita* Severi, as to the Diſtinction of Habits amongſt Magiſtrates.

ACT IX. THIS Act is explain'd, *Crim. Pract. Tit.* Injuries. To which I ſhall only now add, that not only what is deſtructive to the Government, but what may tend to the Prejudice of the Government, is here puniſhed; and this I have thought fit to obſerve, becauſe *Tending* has been oft-times debated not to be relevant. It may be alſo doubted, whether ſpeaking againſt the Houſe of Commons, or their Reſolutions, is puniſhable by this Act, ſince it puniſhes all reproachful Speeches of the People or Country of *England*; and they are the Repreſentatives of the People: And ſince theſe are puniſhable who ſpeak againſt a Counſellor of *England*, much more ought they to be puniſh'd who ſpeak againſt the Houſe of Commons. But in my Opinion, this Act reaches only ſuch as ſpeak reproachfully of their Nation, Country, and Counſellors; but the whole Act ought to be abrogated by our Parliament, as being paſt by us, in Expectation that *England* would make ſuch an Act in their Parliament, which they never did; and upon which Account it was never in Obſervance with us. It is likewiſe obſervable, that tho' in our Law, Concealing and not Revealing, is only puniſhable in Treaſon; yet by this Statute, the hearing any Thing ſpoke againſt the People of *England*, or any Privy Counſellor in that Nation, and the not revealing, is declared to be equally puniſhable with inventing ſuch Calumnies.

X. THIS Act is Temporary as to many Things; but it is obſervable from it, that the uſing falſe Teſtimonials is puniſhable by Death as Falſhood. And the Power given to the Commiſſioners of the Borders to apprehend Fugitives, and to ſend them, or their Marks and Tokens to the King's Commiſſioner, is founded on *L.* 4. *ff. de Fugitivis*; where *Limenarcha*, which is our Commiſſioners of the Borders, *debent inquirere in fugitivos*; and to ſend them with their *Notæ* (which is our Tokens) to the next Magiſtrates.

XI. THE Cuſtoms being annex'd to the Crown by the 8. *Act*, *Parl.* 1. Ja. I. they are by this Act diſſolved from the Crown, in ſo far as concerns 10000 Pounds yearly to be paid to the Lords of Seſſion, in place of *Quotes* of Teſtaments; and therefore the Lords of the Seſſion do, conform to this Act, decern ſummarly the Tackſmen and Collectors to pay this 10000 Pounds, and ordains them to be charged with Horning.

XII. BY the 4. *Act*, *Parl.* 18. Ja. VI. it is declared, That Reſtitutions by way of Grace ſhall not prejudge thoſe who acquired the forfeited Perſons Lands, either by a lucrative, or an onerous Cauſe; but becauſe, both by an Inference from that, and by the Principles of the Common Law, theſe who are reſtored by way of Juſtice, might pretend to quarrel thoſe, who, during their Forfeiture, were preſented to Benefices to which they were Patrons, upon Pretext that they were to be reſtor'd intirely. Therefore it ſeems that this Act has been made, whereby it is declar'd, that ſuch as are preſented to Benefices, which were at the Preſentation of forfeited Perſons, ſhall not be prejudg'd by their Reſtitution; and which was very juſt, ſince Patrons are not prejudg'd; becauſe it is preſum'd, that the Ordinary would not collate Perſons that were inſufficient, nor were Patrons allow'd to make any Advantage by the Preſentations; and upon the ſame Principle it ſeems reaſonable to conclude, that a Minor cannot revoke a Preſentation granted by him, with the Conſent of his Curators during his Minority.

XIII. THIS Act ratifies an Act of Privy-Council, whereby *Egyptians* were commanded to depart the Kingdom betwixt and the Firſt of *Auguſt* thereafter, under the Pain of Death: But it may be juſtly doubted, how the Council had Power to make Acts inferring the Pain of Death; ſince it is a receiv'd Principle in our Law, as is clear by *Craig* and others, that the Secret Council can make no Act which may infer Forfeiture of Life or Eſtate. And tho' by the *Acts* 124, and 147. *Parl.* 12. Ja. VI. Judges be ordain'd to puniſh *Egyptians*; and that by the 268. *Act*, *Parl.* 15. Ja. VI. Vagabonds and *Egyptians* are to be employ'd in common Works; yet by neither of theſe Acts is the Pain of Death to be inflicted: and therefore it was lately debated, that this Act was but at beſt a temporary Act, and ſo *Egyptians* could not be impannell'd for their Life. But yet this Act has been ſtill repute a ſufficient Warrant for puniſhing by Death ſuch as were known, holden and repute to be *Egyptians*. And I find, that upon the laſt of *July* 1611. *Moſes Schaw* and others were hang'd as *Egyptians*; and it is notour, that immediately after this Act, Sheriffs and others did hang very many by Warrant thereof. And the Act is not temporary, for it appoints them to be executed in Time coming after the Firſt of *Auguſt*. And the Act has ordain'd *Egyptians* to be proceeded againſt as Sorners and common Thieves, who are by our Law to be puniſh'd with Death, as is clear by the Narrative of this Act, which bears that the Council had commanded, *That the Sorners and common Thieves, commonly called* Egyptians, &c. *ſhould depart forth of the Kingdom*; ſo that the Council has not inflicted the Pain of Death upon a new Crime, but has only declared, *That* Egyptians *fell under the old Crime, that was puniſhable by Death*. Nor can it be deny'd, but that from this and many other Acts it is clear, that the Council has a Power to extend and

ACT interpret Statutes, even relating to Life and Forfeiture ; ſince the Act appoints only ſuch to be puniſhable by Death, *as are known, holden and repute to be* Egyptians. It may be doubted what can prove that the *Egyptians* pannell'd, *are known, holden and repute to be ſuch.* For which, beſide the common Inferences of Notoriety adduc'd by *Maſcardus* and others, *inprobatione notorii*, our Law allows that ſuch as call themſelves *Egyptians*, or go up and down the Country, bleaking their Faces, telling Fortunes, and ſpeaking the Gebriſh peculiar to thoſe People, ſhall be puniſhed as *Egyptians*: And ordinarily His Majeſty's Advocate chooſes ſuch Aſſiſers as know the Perſons impannell'd to be commonly repute to be *Egyptians*.

These who are call'd *Egyptians* in *Scotland*, are call'd *Zigeni*, *Tartari*, *Bohemii* ; all which are remarked as idle Beggars, going about oppreſſing the People, and cheating them by vain Superſtitions, and Fortune-tellings: Of which ſort of People *Fritſchius* has written a Treatiſe, call'd, *De origine* Zygenorum, & *eorum Coercitione* ; where are to be found upon what Pretext they were firſt ſuffered in ſeveral Nations, which was, becauſe they did aſſiſt ſeveral Princes in their great Difficulties, having, from being Vagabonds, gathered themſelves under Captains for that Effect ; but continuing, after Peace made, to grow inſolent, they were ordained to be baniſh'd in *Germany*, by an Imperial Conſtitution, *Anno* 1500 ; and in *France*, by the Act of *Orleance*, *Anno* 1561, and thereafter *Anno* 1612. which is about the Time of this Act ; and in *Spain*, 1492.

XIV. THE Time of this Act, the Secret Council had a Commiſſion from the King to receive Reſignations, and all Procuratories of Reſignations then, did ſtill bear a Power to reſign in the Hands of the Secret Council: But now Reſignations can only be made in His Majeſty's own Hands, or in the Hands of His Exchequer.

XV. THIS Act extends to the Decreets of the Admiral and his Deputes, the Privilege of having Letters of Horning granted upon them, without the Neceſſity of a Decreet conform, as was the old Cuſtom ; and in this it equals the Decreets of that Court with the Decreets of Sheriffs and Bailies of Burghs: But by the 29. *Act*, *Parl.* 1. Ch. II. whereby Poinding is ordain'd to be granted upon their Decreets, the Parliament has forgot to extend that Privilege to the Decreets of the Admiral.

*Obſerv.* I. That this Act declares the Admiral to be a Supreme Judge ; and therefore it has been decided, that he may reduce the Decreets of inferior or Admiral-deputes, and that he may reduce his own Decreets upon juſt Reaſons, ſuch as *noviter provenientes ad notitiam*, &c. and which Kind of Juriſdiction is competent to no inferior Judge ; and yet the Lords of Seſſion do ſuſpend and reduce his Decreets alſo, and Advocate Cauſes from that Court.

*Obſerv.* II. That by this Act the Admiral is declar'd to have Power of ſummar Execution ; becauſe Strangers and Sea-faring Men cannot attend as others may ; and therefore it is, that ſuch as obtain Decreets before that Court, may uſe Execution thereupon within Three Tides.

*VIDE Obſerv.* on the 16. *Act*, *Parl.* 3. Ch. II.

# *PARLIAMENT* XXI.

I. HIS Majeſty held a General Aſſembly at *Glaſgow*, and in *Anno* 1610. drew up ſome Articles to be preſented to the Parliament, which are ſet down by *Spotiſwood*, and many whereof are here confirm'd.

By this Act His Majeſty's Power to call Aſſemblies, is declar'd a Part of His Royal Prerogative. *Vide* 114. *Act*, *Parl.* 12. Ja. VI.

The Biſhop is to be Moderator, and in his Abſence any whom he ſhall Name.

The Biſhop only can excommunicate, and with ſuch Miniſters as he aſſociates to himſelf, he only can depoſe.

In this Act likewiſe is ſet down a *Formula* of the Oath of Supremacy.

As to the Manner of preſenting Miniſters, it is formerly fully treated in the Obſervations upon the 7. *Act*, of the 1. *Parl.* Ja. VI.

ACT II.

AFTER King *James* VI. came to the Crown of *England*, it was neceſſary that the Laws concerning the Borders ſhould have been alter'd by both Kingdoms; and by this Act, there is a Power granted to His Majeſty's Officers in *England*, to remand from the Courts of *Scotland*, that is to ſay, to require His Majeſty's Officers in *Scotland* to deliver up *Engliſh* Malefactors who had fled into *Scotland*; and another Act of the ſame Tenor *verbatim*, was paſt in *England* about the ſame Time.

In Place of the old Wardens of the Borders, there is now a Commiſſion granted under the Great-Seals of both Kingdoms, to an equal Number of *Scots* and *Engliſh*, who have in Effect a Commiſſion of Juſticiary; and it was found by the Council of *Scotland*, that they could not quarrel the Decreets of the Borders, becauſe they proceeded by a Warrant under the Seals of both Kingdoms. But the Laird of *Haining* having charged *Elliot* for Payment of a Sum for not preſenting of a Thief to the Commiſſioners of the Borders, conform to a Decreet of the Commiſſioners, finding that he had forfeited the Bond, there was a Bill given in to the Council, craving that this Caſe might be remitted to the Commiſſioners of the Borders, and not ſuſpended by the Seſſion; becauſe, *Firſt*, Theſe Decreets being pronounced by the *Engliſh*, as well as the *Scots* Commiſſioners, the Seſſion could not be Judges to what was done by virtue of an *Engliſh* Commiſſion, and becauſe they could not cite the *Engliſh* Commiſſioners, therefore they could not reduce their Sentences.

II. The Commiſſion of the Border is a Criminal Court, and the Lords of the Seſſion are only Supreme Judges in Civils.

III. The Border is judg'd by a Law unknown to us; and therefore, ſince the Lords of the Seſſion behov'd to conſult them, tho' they were Judges, it but multiplies Proceſſes and Expences to allow the Lords to be Judges *in prima inſtantia*.

IV. If the Lords were Judges, all Thieves, or their Cautioners, would offer to ſuſpend or reduce, which would much hinder that Expediteneſs of Trial, which is requiſite to ſtop Thieving in the Borders.

V. If the Lords here review'd ſuch Decreets, the Judges at *Weſtminſter* would do the like, which would be very troubleſome and expenſive to us. The Council upon this Debate recommended to the Lords to remit the Trial, in ſo far as it was Criminal, to the ſaids Commiſſioners.

By this Act, Remanding is only to be granted after full Probation of the Offences of the Perſons remanded in open Court; but this is now antiquated and in Deſuetude; becauſe it was found by the Commiſſioners of both Kingdoms to be unpracticable, if either the Names or Proofs were publiſhed in open Court, the Perſons to be remanded would flee, and the Witneſſes might be corrupted; therefore it was order'd by common Conſent, that the Commiſſioners of either Kingdom, might remand privately from the Commiſſioners of the other Kingdom, and that the Perſon ſo dilated, might be immediately ſeiz'd upon.

THIS Act is fully explain'd, *Crim. Pract. Tit.* Rapt. IV.

THIS Act is explain'd in the Obſervations upon the 73. *Act*, *Parl.* 6. Ja. VI. V.

THIS Act, diſcharging all Actions of Spuillie committed upon the Borders, prior to His Majeſty's coming to the Crown of *England*, is but temporary: But from it, it may be obſerved, I. That the King and Parliament may diſpenſe with the private Intereſt of Parties upon a public Account: Nor does the Act *Salvo jure*, ſubjoin'd to the ſeveral Parliaments, prejudge or derogate from this Act, upon Pretext that the Parties, whoſe Intereſt was remitted and diſcharg'd, were not call'd. VI.

II. In all ſuch Diſcharges of private Intereſt, and Acts of Grace, diſcharging Penal Statutes, Exception is ſtill made of Decreets already obtained; for by the obtaining of the Decreet before that Diſcharge, the Debt becomes innovated, and a private Debt of the Nature of other private Rights.

By this and many other the like Obſervations we may ſee, that the reading temporary, and even abrogated Acts, is not uſeleſs, ſince material Obſervations may be made thereupon.

THIS Act is explain'd in the 177. *Act*, *Parl.* 13. Ja. VI. VII.

THIS Act ordains Arch-biſhops and Biſhops to build and repair their Houſes and Manſes, and that the Succeſſor ſhall have Action againſt the Predeceſſor's Executors who ſuffered them to decay; which was very juſt, upon the ſame Reaſon, that all Liferenters are oblig'd *præſtare hanc cautionem uſufructuariam*. And where the Houſes are in Decay, and repair'd by the Predeceſſor, the next Succeſſor is to ſatisfy therefore, at the Sight of Two or Three of the Biſhops within the Province; providing that the Satisfaction exceed not 1000 Pound, if they be Prelates; and 500 Merks if they be other inferior Miniſters. VIII.

And by the 21. *Act*, *Seſſ.* 3. *Parl.* 1. Ch. II. this is renewed as to the maintaining of the Manſe; but the Heretors of the Paroch, where there are no Manſe, are oblig'd to build Manſes for Miniſters at the ſight of the Biſhop, or ſuch Miniſters as he ſhall appoint, not exceeding 1000 Pounds, and not under 500 Merks; ſo that in effect, a Miniſter's Manſe may be as dear by that Act, as a Biſhop's Manſe is by this, which ſeems unreaſonable; but their interveening more than 50 Years betwixt the Two Acts, the Price of Things, and Fees of Work-men, was much increaſed the Time of the laſt Act.

*Vide Papon Arreſt. lib.* 1. *num.* 15. & *additiones num.* 6.

# PARLIAMENT XXII.

1. THE Preſentation of Biſhops by Kings, begun in the Reign of *Lewis* King of *France*, about the Year 821. and was reſign'd to the Popes by *Philip* the Firſt; and thereafter, by the Canon Law, the Nomination of Arch-biſhops and Biſhops, did belong to the Pope only, as the Canoniſts affirm; but he transfer'd this Power to the Chapters of Cathedral Churches, *C. omnes* 22. *diſt.* &*c. fin. quæſt.* 7. and at laſt in *France* by Agreement betwixt Pope *Leo* the Tenth, and *Francis* the Firſt of *France*; the Nomination of Prelacies was after much Debate, granted to the Kings of *France*; tho' it be pretended to be a Privilege belonging to Kings, *in Synodo Aurel. Quinta*, as the learned *Pitheus* has proven; and after that *Concordat* made in favours of *Francis* the Firſt. It appears that King *James* the Fifth, who lived in the ſame Age, and Married *Francis* the Firſt's Daughter, did with His Parliament declare, that the Nomination of Biſhops did belong to the King of *Scotland*, and the Proviſion only to the Pope, *Act*, 125. *Parl.* 7. Ja. V. but by this Act it is declar'd, That Arch-biſhops and Biſhops ſhall be by His Majeſty's Licence elected by the Dean and Chapter of their own Cathedral-kirk, to which they are to be preferr'd, who being aſſembled by His Majeſty's Warrand, ſhall proceed to the Election of the Perſon named by His Majeſty; and the Election being teſtified under their Seals and Subſcriptions, he is to get a Right to his Benefice under the King's Great Seal, and to be conſecrated.

It is fit to know, that this Warrant for meeting, is call'd with us, *a conge d'eſlire*, which is a *French* Word, ſignifying *a Liberty to Elect*.

It is fit to know likewiſe, that with the *conge d'eſlire*, there comes a Letter from His Majeſty, recommending ſuch a Perſon, whom the Dean and Chapter are oblig'd to Elect, by the Words of this Act; and being elected, the Election is recorded in the Regiſter of the Chapter: In which Regiſter, all Deeds done by the Biſhop, either for entering Vaſſals, or granting Tacks of Teinds, are inſerted. An Extract of this Election is returned to the Arch-biſhop of the Province, and inſerted in his Regiſter; and by him tranſmitted to the King, who thereupon grants a Patent to the Perſon ſo elected, who after this is call'd Biſhop Elect of ſuch a See, which paſſes through all the Seals, and by which he has Right both to Spirituality and Temporality; tho' this Act ſays, *It ſhall only give Right to the Spirituality.* This being ſignify'd to His Majeſty by the ſaid Arch-biſhop; the King grants His Royal Mandate to a competent Number of Biſhops within the Province, (which cannot be under Three, by the 3. *Canon.* 1. *Concil. Nicen.*) after which there is no new Gift to the Temporality, as this Act provides: Only before his actual Poſſeſſion, he makes his Homage either to the King Perſonally, or to one commiſſionated to receive it; of which Oath and Homage, no Mention is made in Eccleſiaſtic Story, till the Fourth Council of *Toledo*, *Anno* 633.

*Nota*, THE Mandate for Conſecration, paſſes only the Great Seal, *per ſaltum*.

It is natural to all Benefices that they ſhould be vacant before they be fill'd; and the Right ſhould expreſs *a modus vacandi*; and therefore His Majeſty having ſent down Two *conge d'eſlires* in *January* 1679. one in favours of the Biſhop of *Edinburgh* to be Biſhop of *Roſs*; and another in favours of the Biſhop of *Galloway*, to be Biſhop of *Edinburgh*: It was adviſ'd, that the *conge d'eſlire*, in favours of *Edinburgh*, ſhould not be preſented till *Edinburgh* was vacant, by his being elected by the Chapter of *Roſs*.

It is obſervable likewiſe from this Act, that a Biſhop has not Right to the Temporalities till after Conſecration: For the Act ſays, *That after the Conſecration, His Majeſty is to diſpone to the Perſon elected the Temporality*; and the ſame being paſt under the Great Seal, the Biſhop ſhall do Homage, and ſwear Obedience; neither ſhall it be lawful for him who is admitted to intromet with any of the Benefices, or Rents of the Biſhopric, until he have taken the ſaid Oath, and done the ſaid Homage. And thus the *Engliſh* Lawyers, following,

ACT

as I conceive, that Notion of the Common Law, that *Epiſcopus eſt maritus Eccleſiæ*: They ſay, that Election is as the Sollicitation; the Confirmation is the Contract; and the Conſecration is the Conſummation of the Marriage: But where a Biſhop is tranſlated, there needs no Conſecration, either by the Canon Law, or ours.

The old Forms of Election was, that the King ſent a Viſitor to overſee the Election, and he return'd to the King the Decree of the Election, who confirm'd it by giving Inveſtiture; and the Metrapolitan was oblig'd to ordain the Perſon elected; the Inveſtiture of the Spirituality, was by giving a Bible; and the Temporality by a Ring and Baton, *Vid.* Sirmund. *form. lib.* 2. *formul.* 6. and the *conge d'eſlire* ſucceeded in place of theſe Viſitors.

II. By this Act, the Dean and Members of the Chapters of the Cathedral-kirks within this Kingdom, are reſtor'd to their Manſes, Gleibs, and other Patrimonies belonging to them.

The Chapter is to the Biſhop, what Convents were to other Prelates; that is to ſay, their Council, of which the Dean, or *Decanus* was the Head, under the Biſhop. By the Civil Law, *Decanus erat ille qui defunctorum lectos ſeu feretrum geſtabat, vid. Tit. de Decanis, lib.* 12. *Cod. Tit.* 17. But by the Canon Law, *Decanus* comes from the Greek Word δεκας becauſe the Dean proceeded over Ten Canons or Prebends; and their *decani*, eſpecially in the Cathedral Churches, ſucceeded in place of the *Archipresbyter*; and therefore, theſe Two are taken in the ſame Senſe, *Cap. ad hæc* 7. *de off. Archid. vid.* Bengeum *de beneficiis, pag.* 29. And with us, Deans are created by the King, He being only Patron of that Benefice.

The Chapter is call'd *Capitulum* by the Canon Law; becauſe it is the little, or inferiour Head of the Diocy, and is defined to be *Clericorum congregatio ſub uno Decano in Eccleſia Cathedrali.*

A Biſhop in our Law, nor no other dignify'd Perſon, who hath a Convent, can alienate without the Conſent of their Convent, or the greateſt Part of them, beſide himſelf, who is the Diſponer, in which Number, Minors nor Abſents, are not counted; *March* 14. 1622.

If one of the Chapter have Two Benefices, he will have Two Votes; and albeit the Law Ordains them to be *capitulariter congregati*; yet now *ſufficiunt eorum ſuffragia licet emendicata vel ſeparatim impetrata*, which is not only by mere Cuſtom, as *Craig* obſerves; but by Law likewiſe, *Act*, 3. *Parl.* 18. Ja. VI. and thus an Inſtrument of Reſignation of a Benefice, was found ſufficient, tho' ſome of the Convent ſubſcrib'd not before the Date of the Inſtrument, *November* 16. 1624. Providing always that none of their Subſcriptions be obtained after the Death of the Granter; for then they cannot be ſaid to Conſent, ſeeing they are not all alive together: From which it follows likewiſe, that the Alienation is not valid, if any of the Convent, or Subſcribers be Dead before the reſt ſubſcribe; where many ſubſcribe ſeparatly, the Conſent of the Laſt, is drawn back to the Conſent of the Firſt, *Craig pag.* 91. And albeit *Craig* be clear, that the Conſent of the Chapter is requiſite, *tam in renovatione quam in alienatione feudi*; yet by this Act it is for the Vaſſal's Eaſe ordain'd, that the Biſhop's or Chapter's Conſent is not neceſſary to the receiving of Vaſſals upon Compoſition, or otherwiſe; but that the direct Superiour may receive them by himſelf.

*Nota*, By that Part of the Act, it ſeems, that tho' *regulariter* Superiors are not bound to receive ſingular Succeſſors; yet Kirkmen being Superiors are. If there be no Chapter or Convent, the appending of the Seal of the Convent, with the King's Confirmation, is ſufficient, *Craig. Ibid.*

The Arch-biſhop of St. *Andrew*'s, had of old, the Conventual Brethren of the Priory of St. *Andrew*'s to be his Chapter: But by the 8. *Act, Parl.* 19. Ja. VI. Power is given him (that Priory being ſuppreſt) to chooſe Seven to be his Convent; and ordains that the appending of the common Seal of the Convent ſhall be ſufficient to declare their Conſent, without their Subſcription. Which Act is innovate by this ſecond Act, wherein a Convent is particularly ſet down to him, but nothing ſpoke of the Seal; and therefore the appending of the Seal is yet ſufficient: For this Chapter comes only in Place of the Seven preſcribed by the firſt Act, and the Subſcriptions of theſe Seven were not neceſſary; *ergo*, neither is the Subſcription of this Chapter.

As the Conſent of the Chapter, or moſt Part thereof, is requiſite to an Alienation made by the Titular, as the Biſhop, Abbot, *&c.* ſo reciprocally the Conſent of the Titular, and moſt Part of the Chapter, is requiſite to the perfecting of all Rights made by any Member of the ſaid Chapter, of his particular Benefices, or of any Benefice belonging to them *in communi*; which Rule holds in all Conventual Benefices, except that of the Arch-biſhop of St. *Andrew*'s: For it has been decided, that by this Act, any Member of that Chapter therein entred, may ſet Tacks, *&c.* without Conſent of the Arch-biſhop of St. *Andrew*'s, *November* 19. 1624. where theſe Conventual Benefices have Patrons, the Conſent of the Patron is likewiſe required, *Craig.*

*Nota*, That the Biſhop of *Edenburgh* is, by the Erection of that See in *Anno* 1633, made Chancellor and Vicar to the Arch-biſhop of St. *Andrew*'s, and ſo is the firſt Ordinary, or ſingle Biſhop; which Privileges, belong'd to the See of *Dunkeld*; and ſo the Biſhop of *Cathneſs*, has not now any Suffrage in that Election, becauſe they muſt be but Eight in this Act.

ACT III. AFTER the Arch-biſhops and Biſhops were reſtor'd, the Thirds of Benefices, out of which Miniſters were provided formerly, came to be an unfit and unproportional Stock for providing the whole Miniſtry of the Kingdom; and therefore by this Act, there is a Commiſſion granted for planting and providing of Churches; and this is the Firſt of the many Commiſſions which were granted by Parliaments afterwards to this Effect, and their Decreets are to this Day call'd *Decreets of Plat*, in our Practice.

*Obſerv.* I. THE loweſt Stipend allow'd by the Parliament here, is Five Chalders of Victual, or 500 Merks; but by the 19. *Act*, *Parl.* 1. Ch. I. the loweſt Stipend is appointed to be 800 Merks, or 8 Chalders of Victual; and the Decreet whereby this is appointed, is call'd, *The Decreet of Modification*; whereas if the Stipend be divided, and proportioned as well as modified, the Decreet is call'd, *a Decreet of Locality*: And this Proportion is ſo far obſerv'd, that the Victual ſo modify'd was found by the Lords to be payable, according to the Meaſure of the Shire where the Paroch was, and not according to the Meaſure of *Linlithgow*, where the modify'd Stipend would not have come the Length of the Quantity allow'd by the Act of Parliament, according to the Meaſure of *Linlithgow*, *June* 27. 1667. Miniſter of *Dalrymple contra* the Earl of *Caſſils*.

*Obſerv.* II. BY this Act, Power is granted by the Parliament, to the Commiſſioners, to unite or diſunite Kirks: Which Union, was likewiſe allow'd by the Canon Law, and is defin'd to be *duorum vel plurium Beneficiorum, cùm cauſæ cognitione a ſuperiore & ordinario, in perpetuum Canonice facta connexio, Cap. expoſuiſti de Præb.* So that of old, the Ordinary only could unite Benefices; but now the King, as having come in Place of the Pope, grants this Commiſſion to unite, with the Conſent of Parliament; but the Biſhop who is Ordinary, and the Patrons, if any be intereſted, muſt be likewiſe call'd; and the 5. *Act*, *Parl.* 23. Ja. VI. ordains, that all Perſons intereſted in the Union be conſenting: By which I underſtand the Ordinary, the Patron, the Incumbent, and the Parochioners. And this Act appoints, that if there be more Patrons, they ſhall preſent *alternis vicibus*; and becauſe it may be doubted who ſhould be the firſt Preſenter, in that Caſe it is fit to know, that the leſſer Benefice is alwiſe to be united to the Greater; and ſo the Greater remains ſtill the Mother Superior and principal Church, *Cap. recolentes de ſtat. Monach.* and therefore it would ſeem that the Patron of the Superior Benefice is to be the firſt Preſenter.

THE Reaſons given by the Canon Law, for uniting of Benefices are, That the Rector, or Parſon, may be the better enabled to relieve the Poor, and maintain Hoſpitality, the Churches being ſo near other, that one Perſon may conveniently ſerve the Cure in both; the great Poverty of the Benefices united, and the Fewneſs of the Parochioners. But with us, Benefices are never united, but where the Stipends are ſmall, the Paroches near, and the Charge little, or no Waters interjected: Which Qualifications are left by our Law to the Arbitriment of the Commiſſioners for Plantation of Kirks; for none elſe can unite with us. But by the Law of *England*, 17. *Car.* 2. *Cap.* 3. it is lawful for the Biſhop of the Dioceſs, Major of any Town, and the Patron to unite Churches, provided the Churches ſo united, exceed not the Value of 100 Pound *Sterling*. *Vide* Petrum *de peruſio in tractatu unionum*.

*Obſerv.* III. THAT there is Power granted by this Commiſſion, to prorogate the Tacks of Teinds, when the Tackſmen are burdened with Augmentations.

*Obſerv.* IV. THAT the Sentences of their Commiſſioners, are to have by this Act, the Authority and Force of a Decreet and Sentence of Parliament; and therefore it is, that in our Practice, the Decreets of this Commiſſion, can neither be reduced nor ſuſpended by the Lords of the Seſſion, and that becauſe of the 39. *Act*, *Parl.* 11. Ja. VI.

IV. BY this Act, no Arch-biſhop, Biſhop, or other Prelate, can ſet any Tacks of their Patrimony for longer Space than Nineteen Years; nor no inferior benefic'd Perſon for longer Space than their own Lifetime, and Five Years thereafter; but the Tacks otherwiſe ſet, are not declar'd null, the Act itſelf not being conceiv'd *irritanter*, but only the benefic'd Perſons who ſet the Tack for longer Time than is expreſs'd in this Statute, are thereupon deprivable, for having contraveen'd the ſame; for the Parliament having declar'd, that the Contraveeners are deprivable, but not the Tacks null, the Lords conceiv'd that the Puniſhment being under the Conſideration of the Parliament at the Time of the making of this Act, and they having determined the Puniſhment to be Deprivation, but not having annull'd the Tacks; they thereupon concluded, that the Tack could not be declared null, tho' ſet for longer Time than is declared by this Act, *November* 9. 1624. *Hope* contra *Kinnaird*.

*Obſerv.* II. THAT by this Act it is declared, That all Tacks ſet for longer Space than the Time foreſaid, ſhall be regiſtrated in a Book to be kept by the Clerk-regiſter for that Effect, elſe to be null; and therefore Tacks, tho' for longer Years, if they be regiſtrated, are ſufficient, *Hop. Tit.* Teinds. Likeas, it has been found that Regiſtration in the Books of Council and Seſſion, is ſufficient, tho' it be preſcribed here, that they be regiſtrated in a Regiſter to be made for that peculiar Uſe, ſince the Clerk-regiſter had not made ſuch a ſpecific Regiſter: All which was found in the foreſaid Deciſion, *November* 9. 1624. ACT

*Obſerv.* III. The Perſons allow'd to ſet Tacks for Nineteen Years, are Arch-biſhops, Biſhops, and Prelates: And though by the Canon Law, *Omnis honor, qui alicui tribuitur propter adminiſtrationem, eſt prelatura*: Yet by our Law, he is only a Prelate who has a Chapter; and therefore a Tack ſet by a Provoſt, is null, if it want the Conſent of the Patron, ſince Prelates can only ſet without the Conſent of the Patron, *July* 12. 1616. *Hop. Tit.* Kirk-men.

*Obſerv.* IV. That Exception is juſtly made in this Act of Tacks, ſet by Order from the Commiſſion of the Kirk; for in Effect theſe are not ſet voluntarily, but by Order from a Committee of Parliament, who when they grant Augmentations, which burden the Tackſmen, or Titulars of Teinds, do in Recompence of that Burden, prorogate their Tacks, for as many Years as they think fit.

*Obſerv.* V. That even Tacks for theſe Years, are null, if they have not the Conſent of the Patron, by the 15. *Act Parl.* 23. *Ja.* VI.

*Obſerv.* VI. That though Prelates may ſet Tacks of their Patrimony for Nineteen Years; yet they cannot ſet Tacks of their Caſualities for longer than their Life; ſuch as Quots of Teſtaments, *&c.* as is provided by the immediate ſubſequent Act, *viz. Act* 5.

*Obſerv.* VII. That a Biſhop cannot ſet a new Tack before the old Tack be expir'd, as was decided in Favours of the Biſhop of the *Iſles* againſt *Aſcog*; for elſe the preſent Incumbent might make the Benefice uſeleſs to the Succeſſor; and it being againſt the Nature of Benefices, that they ſhould be ſet for longer Time than the Incumbent has Right, it were moſt unjuſt to extend this.

*Obſerv.* VIII. It may be doubted, if a Biſhop may ſet a Tack, after he knows he is recommended to another See; for that ſeems fraudulent, though it be ordinary; and if it were allow'd, the Intrant Biſhop would certainly find all his Patrimony exhauſted by ſuch Tacks; and Laics would get very eaſy Tacks; for the Setter knowing that he were to be remov'd, would ſet Tacks for any Duty.

*Obſerv.* IX. It may be doubted, if a Biſhop who conſented to ſuch a Tack, when himſelf was a Member of the Chapter, can quarrel ſuch when he comes to be Biſhop of that ſame See; for though he may pretend that he is only to conſent, and not debate, or enquire; yet this ſeems inconſiſtent with Reaſon; for the Chapter is appointed to be *quaſi* Tutor; and ſo every Member is obliged to enquire; and therefore as he ſhould not have conſented, if he had not conceiv'd the Deed to be legal in it ſelf, and fit for the See; ſo ought he not to quarrel what he has already acknowledged to be fit.

THIS Act is formerly Explain'd, *Act* 11. *Parl.* 10. *Ja.* VI. V.

THIS Act empowers the Lords of the Seſſion to grant Letters for charging the Parochioners to meet and ſtent themſelves, for furniſhing Baſons and Lavers for Adminiſtration of the Sacrament of Baptiſm; and Cups, Tables, and Table-Cloths, for Adminiſtration of the Communion, and which is accordingly obſerv'd; but though the Rubric does generally bear, *Furniſhing of Neceſſaries for Adminiſtration of the Sacraments*; yet the Communion Elements fall not under this Act; but when Stipends are modify'd by the Commiſſion for Plantation of Kirks, there is likewiſe a particular Sum modify'd for the Communion Elements, which the Miniſter was once found to have Right to, though he do not adminiſtrate the Sacrament yearly, but now it is deſign'd that this ſhould be altered, and that that Money ſhould be ordain'd to be put in the Poor's Box. VI.

BY this Act, the Nobility, or Prelates, are allow'd to Vote by Proxies, if they be lawfully excuſed. VII.

*Obſerv.* I. This is not allow'd to Barons, nor Burgeſſes; becauſe the Allowance is only ſpecifickly given to Dukes, Marquiſes, Earls, Viſcounts, Lords, or Prelates; and yet I ſee no Reaſon for the Diſtinction, but on the contrary, it ſeems more reaſonable, that to the End a whole Shire may be repreſented; that therefore they may be allow'd to depute ſome to Vote, in Caſe others be abſent; for though it may be anſwer'd, that the Power of Proxies is unneceſſary in Shires, becauſe if their Members be neceſſarily abſent, they may chooſe others: For to this it may be reply'd, that they cannot chooſe new Commiſſioners, except in Caſe of Death; whereas the Shire may be much concern'd to have their Proxies at any one Dyet. Likeas, by the 52. *Act. Parl.* 3. Ja. I. All Free-holders are allow'd to have Proxies in Caſe of lawful Abſence from Parliaments. It is ordinary alſo for the chief Burrows to chooſe, and ſend an Aſſiſtant to attend their Commiſſioner.

*Obſerv.* II. By the ſaid 52. *Act. Parl.* 3. Ja. I. Abſents ſeem only to be allow'd to ſend their Procurators for excuſing their Abſence; but by this *Act*, they are allow'd to Reaſon and Vote; and therefore it may be doubted, whether a Brother who cannot vote in his own Brother's Cauſe, may notwithſtanding be admitted to vote for his Brother as Proxy for another, ACT ther, to whom his Brother is a Stranger; ſince here *ſuſtinent perſonam extranei*; but ſeeing the Affection is the ſame, I think they would not be allow'd; nor does the Parliament now allow Proxies in any Caſe.

It may be likewiſe doubted, if this *Act* may be extended to Conventions, ſince the *Act* ſpeaks only of Parliaments; and does not add, or other General Councils, as the *Act* 113, *Parl.* 11. Ja. VI. and other *Acts* do; but yet the *Act* 52. *Parl.* 3. Ja. I. allowing Proxies in Abſence, ſpeaks of Parliaments and General Councils.

*Obſerv.* III. It is the King's Advantage and Intereſt that Proxies ſhould be allow'd; for they are only to be allow'd by this *Act*, where the Reaſon of Abſence is warranted by the King, His Commiſſioner, or Council; and ſo the King may allow Proxies, or not, as He pleaſes; and needs never allow any to thoſe whom He ſuſpects; which is alſo the preſent Cuſtom of *England*, as to the Peers.

*Obſerv.* IV. That though Letters of Attorney out of the Chancery, be ſufficient for Abſence in other Courts; yet by this *Act*, the Abſents muſt give a written Warrant under their own Hand.

VIII. This Act gives Inſtructions to Juſtices of Peace and Conſtables, which is renew'd, and ſomewhat altered by the 38. *Act*, *Parl.* 1. Ch. II. But by this Act, their Decreets are ordain'd to receive Execution by Letters of Horning and Poinding; and that no Suſpenſion ſhall be granted, but on Conſignation; which Conſignation, is neither appointed by the foreſaid *Act* 38. nor is it now *in viridi obſervantia:* And tho' by both the Acts, they are ordain'd to proceed againſt Cutters of Green Wood, Slayers of Red and Black Fiſh, &c. yet they are not in Uſe to proceed in ſuch Caſes; becauſe the Act appoints, that Commiſſions ſhall be granted to them for that Effect; but theſe Commiſſions have never as yet been granted: Tho' by our Cuſtoms, no Perſon can be holden as confeſt, except they be perſonally cited; becauſe elſe Men might be drawn in Snares, by Citations at Dwelling-houſes; yet here they are allow'd to be holden as confeſt upon the ſecond Citation at their Dwelling-houſes, becauſe the Subject is ſmall in Juſtice of Peace Courts.

This Act is likewiſe explain'd, *Crim. Pract. Tit.* Juſtices of Peace; and is ratify'd by the 38. *Act*, *Parl.* 1. Ch. II. Where the Council is allow'd to grant them, what further Inſtructions they ſhall think fit.

The Council uſes to name Juſtices of Peace, in Place of ſuch as die; and it being alledg'd that all Commiſſions for Juſtices of Peace ſhould flow from the King immediately, this was refuſed by the King, as being contrary to the conſtant Cuſtom of Council, whom the King allows to name Juſtices of Peace.

XII. By this excellent Act, ſuch as have peaceably poſſeſſed their Lands for Forty Years, are ſecured by Preſcription.

As to this Act it is obſervable; *Firſt*, That Preſcription is only competent to ſuch as have bruiked by vertue of Heretable Infeftments; and therefore he who alledges Preſcription, muſt alledge an Heretable Title; but tho' the Poſſeſſor be not expreſly infeſt; yet if he has poſſeſſed the ſubject, as Part and pertinent, it will be ſufficient; and therefore a Salmond-fiſhing was found to be preſcriv'd, tho' it was alledg'd to be *inter regalia*, ſince the Preſcriver was infeſt *cum piſcationibus* in general, *February* 7. 1672. But if the Preſcriver be infeſt upon a bounded Evident, it will not furniſh him a valid Title for preſcriving, as Part and Pertinent, any Land that is without the bounding, *November* 14. 1671. This Act is alſo extended to Heretable Offices, as to Patronages, Penſions, and all Servitudes, tho' not expreſly mention'd; and tho' Heretors and Wadſetters are enumerated, ſometimes as different from one another, *Act*, 6. *Seſſ.* 2. *Parl.* 1. Ch. II. yet Heretage in this Act, comprehends Wadſets, and it is even extended to long Tacks; ſo that it was found, that after Forty Years, they could not be quarrel'd, as granted without Conſent of the Patron, *July* 7. 1677.

This want of a Title likewiſe, and of *bona fides*, hinders a Vaſſal to preſcrive againſt his Superiour, ſince the *reddendo* of that ſame Charter, whereupon he founds his Preſcription, obliges him ſtill to know his Superior's Right; and by this Act for the ſame Cauſe, a Wadſet cannot preſcrive, where the Reverſion was incorporate in the Body of his own Infeftment.

Since this Act appoints, that His Majeſty's Lieges bruiking for Forty Years, ſhall have Right by Preſcription; it may be doubted, whether Preſcription can run in Favours of Strangers, who have not been naturalized?

*Obſerv.* II. That theſe Forty Years, are only to run from the Date of their Infeftments by this Act; and yet in Warrandice, it is only to run from the Date of the Diſtreſs: But from both it is clear, that the Reaſon is, becauſe till then, they who have ſuch Rights, *non valent agere*; and therefore the Exception allow'd by the Civil Law of *non valens agere*, is allowable in ours, tho' it be not expreſſed in this Act, as Minority is, whereby it ſeems that *exceptio firmat regulam in non exceptis*. Likeas, it was found in the Earl of *Lauderdale*'s Caſe, againſt the Earl of *Tweddale*, that *Lauderdale* being forefeited by the Uſurpers, Preſcription

could

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could not run againſt him during that Forefeiture; but where there is a Title, Preſcription may run, albeit the Defender was *abſens reipublicæ cauſa*, at the leaſt, durſt not come home in the Uſurpers Time, for alledg'd Crimes committed againſt them, as was found in *Whiteſoord's* Caſe, the 24. of *July* 1678. he having kill'd in *Holland*, *Doriſlaus*, one of the King's Murderers; for the Lords thought that he might have transferr'd his Title to another: And if this Reaſon hold, it ſeems that *abſens reipublicæ cauſa* in general, is not ſuſtainable as Minority is, ſince theſe who are abſent may leave Procuratories to purſue their Rights.

It may be likewiſe debated, that ſuch as are *vi majore* hindred from coming to purſue, as being taken by Robbers, or Pirates, ſhould have the Privilege of *non valentes agere*, tho' no Exception be made of them here; for tho' the chief Deſign of the Act be, to eſtabliſh Heretable Rights in the Perſons of ſingular Succeſſors, who cannot know ſuch Accidents, and are ſecure if they find a Forty Years progreſs, yet Preſcription was at firſt introduced, for puniſhing the Slouth of the Proprietars, amongſt other Reaſons; and therefore *non valens agere*, was allow'd by the Civil Law and ours.

It may be alſo doubted, whether Preſcription ſhould run againſt a furious, or mad Man, ſince they are Minors in the Conſtruction of Law, and ſo are to have Curators, and are leſs judicious oft-times than Minors are; but yet ſince they are not expreſt here, when the Law ſecur'd privileg'd Minors, it is preſum'd they were deſignedly omitted; and it were hard to know who are furious, and Furioſity might continue Eighty or Ninety Years; or a Man might feign himſelf mad, *&c.*

*Obſerv.* III. That this Act, makes a Difference betwixt ſuch as are ſingular Succeſſors (who muſt produce for the Title of their Preſcription, not only a Saſine, but a Charter) and Heirs who need produce no Charter, but Saſines, one or more, proceeding upon Retours, or Precepts of *clare conſtat*; but becauſe the Act ſays, *That they ſhall produce Saſines, one or more continued, or ſtanding together for the ſpace of Forty Years*; therefore the Lords found, That Saſines muſt be produc'd by the Heir, by vertue whereof, he and his Predeceſſors have bruiked for Forty Years, during their being infeſt; and ſo where the Father was infeſt, and lived Thirty Nine Years, yet the Son not having been infeſt, tho' he and his Grand-child poſſeſſed for above one Hundred Years: This Saſine was not found a ſufficient Title for Preſcription, *February* 15. 1671. Earl of *Argyle* contra *Macnauchtan*, and the Reaſon is, becauſe a Saſine is but *aſſertio notarii*; and therefore it was too lax a Foundation for an Heretable Right; and one Saſine may be eaſilier forg'd than more Saſines can, and one Saſine being forg'd, may be laid up in the Charter-Chiſt, ſo that the true Proprietar could not, before the Regiſtration of Saſines, know how to improve the ſame: And ſince this Act requir'd no Charter from Heirs, it was juſt that it ſhould require more Saſines, to ſecure againſt Falſhood: But ſince the Act appointing Saſines to be regiſtrated, the Argument of eaſie Forging is much taken off; becauſe the Act of Parliament ſays, *That it is neceſſary to produce a Charter, granted to them by their Superiors and Authors*: It may be doubted whether the Superior is oblig'd to receive a Vaſſal, tho' Forty Years in Poſſeſſion, except he or his Predeceſſors can ſhew a Charter from him; and that becauſe, not only does the Act of Parliament ſay *Copulative Superiors and Authors*; but without this, there is no Title againſt the Superior: And ſome rather think, the Superior would be excluded by this Forty Years Poſſeſſion, from his Right of Superiority.

*Obſer.* IV. Tho' the Act require Charter and Saſines, yet a Diſpoſition, or Precept of Saſine, would be ſufficient; for many complete Rights have no Charter.

*Obſerv.* V. These Forty Years run, *de momento in momentum*; and therefore the Preſcription wanting a Day, was not ſuſtain'd, *July* 6. 1671. tho' it was alledged that *de minimis non curat prætor*: And it would be ſevere to take away the old Heretage of a Family for want of one Day or Hour.

These Forty Years are *tempus continuum*, and not *utile*; and therefore the Law ſubduces not from the Compt thoſe Years in which Judicatures were not patent; or in which War and Peſtilence hindred the Proprietar to purſue, the 30. of *June* 1671. But it may be here doubted, *quid juris*, if Judicatures were not open thro' War or Peſtilence for the greateſt Part of the whole Forty Years.

*Obſerv.* VI. This Preſcription runs againſt His Majeſty as well as Subjects; for the Act ſays expreſly, *That theſe who have poſſeſſed Forty Years, ſhall not be troubled by His Majeſty*, or any other; which was expreſs'd, leſt it might have been alledged that the Negligence of His Majeſty's Officers ſhould not prejudge him in not purſuing, *&c.* which are the expreſs Words of the 14. *Act*, 16. *Parl.* Ja. VI.

*Obſerv.* VII. That by this Act, the Preſcription was drawn back in favours of thoſe who had poſſeſſed Forty Years prior to the Act; for drawing back whereof nothing can be anſwered, but that this Remedy was previouſly allowed by the Civil Law: But leſt the Subjects might have been hereby prejudged, Thirteen Years are allow'd to run from the Date of this Act, ſo that tho' they had poſſeſſed Forty Years before the Act they could not preſcrive, except they had likewiſe poſſeſſed Thirteen Years after this Act. And tho' in this Clauſe the Privilege of Minority be not repeted, and that it ſeems that the Parliament deſign'd ſign'd not to deduce Minority out of ſo ſhort a Time as Thirteen Years, ſince having had it under Conſideration in the Act, they excepted it not in this Clauſe; yet it was found that Minority was to be diſcounted even in this Caſe, *July* 5. 1666.

*Obſerv.* VIII. THAT by this Act it is declar'd, That except the Summons be called and continued, it ſhall not interrupt Preſcription; and it is declared, *That the Raiſers of Summons ſhall not be oblig'd to inſiſt, except where the Summons is called and continued, and the Defenders of new ſummoned thereby*; and yet the 3. of *July* 1647. *Elleis* contra *Scot*, it was found, That upon a ſingle Summons one may be forc'd to inſiſt, which I cannot reconcile with this Clauſe, except by reſtricting this Clauſe merely to the Courſe of Thirteen Years here ſpecified, and generally a firſt Summons executed, interrupts Preſcription, *January* 26. 1622. And of old the Execution of a firſt Summons did interrupt, tho' they bare no expreſs Relation to the Summons upon which the Interruption was founded: But becauſe there were ſeveral Summons at the ſame Party's Inſtance, ſo that the Execution of one Summons might be obtruded for the Execution of another, it is appointed, That the Execution of Summons ſhall bear expreſs relation to the Names of the Purſuers and Defenders; and it ſhall not be ſufficient that the Execution does generally relate to the Summons by the 6. *Act, Seſſ.* 3. *Parl.* 2. Ch. II. and it had been fit that the Act had added, *That the Execution ſhould bear the Nature of the Action deduced in the Summons*; for elſe, where the Purſuers and Defenders are the ſame, one Execution may be ſtill obtruded for another.

*Obſerv.* IX. ALBEIT this Act appoints all Rights to preſcrive, yet it was found, that Heretors cannot preſcrive a Right of their Teinds againſt Titulars, except the Lands were feu'd *cum decimis incluſis*; but that they might preſcrive Liberation for Bygones, preceeding Forty Years, as in Cuſtoms and Feu-duties, which preſcrive not, *quoad* the Right, tho' neglected Forty Years, *February* 7. 1666. Earl *Panmure contra* the Parochioners of *Inverneſs*. *Vide* Obſervations upon *Act* 57. *Parl.* 5. Ja. IV.

*Obſerv.* X. THAT Falſhood never preſcrives by our Law; but whether this be in our Law peculiar to that Crime, I have debated *Crim. Pract. Tit.* Preſcription.

OBSERVE alſo from the Narrative of this Act, That the Regiſtration of a Paper in the public Regiſter, is a great Adminicle of Approbation, for the Paper muſt be left there. Tho' Falſhood preſcrives not when the Paper is produced, and the Purſuer offers to improve the ſame, yet it may be doubted, whether when Papers are only call'd for, in an Improbation, in order to a Certification, and for trying of the Defenders Rights, Preſcription may not be receiv'd againſt that preſumptive Falſhood, wherein the Writs are only declar'd to be falſe *fictione juris*. And the true Intent of ſuch Improbations is in Effect but to try the Rights civilly, and ſo it reſolves properly but in a Reduction, tho' that dangerous Certification of preſumptive Falſhood is adjected, *ob terrorem*.

XIII. BY the 57. *Act, Parl.* 5. Ja. IV. Summons of Error preſcrive within Three Years, in ſo far as concerns the Puniſhment againſt theſe who have committed the Error, who cannot be puniſhed after Three Years: But yet by this Act, the Retour itſelf may be reduced at any Time within Twenty Years. Which Preſcription of Twenty Years militates only in Caſes of Competition betwixt the ſeveral Kinds of Heirs amongſt themſelves; as, Whether the Heir of Line ſhould be preferr'd to the Heir of Tailie? but it does not exclude the clear Intereſt of Blood; for *jura ſanguinis nullo jure civili dirimi poſſunt*, *L.* 8. *ff. de Reg. Jur*, and therefore an elder Brother was found to have good Intereſt to reduce a ſecond Brother's Retour, *January* 11. 1673. By this Act, tho' ſuch Retours may be reduced in prejudice of Perſons ſo ſerved, yet if the Perſon ſo ſerved have diſpon'd their Right to ſingular Succeſſors, having *bona fide* acquired Rights, as ſaid is, they cannot be prejudged. And in our Law this is ſtill introduced, for the Good of Commerce, in Favours of ſingular Succeſſors; for how ſhould they know that the Retour was reducible? *Vide Act* 18. *Parl.* 23. Ja. VI. where the like Privilege is granted to ſingular Succeſſors of Bankrupts.

XIV. BY this Act we find, that Executors nominate had formerly, by virtue of their Office, the whole Defunct's Part of the Executry, that is to ſay, the whole Executry, if there was no Wife or Bairns, the Half, where there was only a Wife and no Bairns, or only Bairns and no Wife; and the Third, where there was a Wife and Bairns. But by this juſt Act, they are only ordain'd to have a Third of the Defunct's Part; and there was good Reaſon for abrogating the former Cuſtom, whereby the Executor was in Effect univerſal Legator where there was no other Legators; albeit in Reaſon the Executor ſhould only have had ſome ſmall Acknowledgment for executing the Defunct's Will.

*Obſerv.* I. THAT albeit the Narrative of this Act mention only the Caſe of Strangers who are Executors nominate, yet where a Wife is nominate, ſhe has the ſame Intereſt, *viz.* a Third of Deads Part, to which ſhe will have Right, beſide her own Half, or Third of the Moveables, as Relict; ſo that all are underſtood to be Strangers in this Act except the neareſt of Kin, who would fall to be Executors by Law: But if one of more neareſt of Kin were nominate, it might be doubted what Share of the Moveables ſuch an Executor would have, whether he might claim

ACT a Third of Deads Part, as Executors nominate, and a ſeparate Intereſt as one of the neareſt of Kin? It ſeems probable, that if there were only Two neareſt of Kin, whereby the Benefit as neareſt of Kin, would be greater than as Executors, he would only have the Half, and nothing as Executor; becauſe by this Act, if the Executors have a Third of Deads Part by any other Title, he is not allow'd another Third by Virtue of the Act. And albeit a Wife have both a Half or Third as Relict, and a ſeparate Third as Executor, yet the Relict's Part is not by Succeſſion, but is her own proper Intereſt, ariſing upon the Diſſolution of the Marriage; whereas the Queſtion is here only as to Deads Part: But if there were more in the ſame Degree to the Defunct than Three Perſons, whereby the Executor's Intereſt, as neareſt of Kin, would be leſs than a Third; in that Caſe, he might claim the Benefit of this Act, becauſe tho' the main and ordinary Caſe conſidered is of Executor-ſtrangers, yet the ſtatutory Part of the Act is general: And it were againſt Reaſon, that the neareſt of Kin ſhould be in a worſe Condition than a Stranger.

*Obſerv.* II. THAT this Act relates only to Executors nominate; and therefore Executors Dative have no more for executing the Office, than their Expences, which is very reaſonable: For otherwiſe Strangers would frequently ingire themſelves, to the Prejudice of the neareſt of Kin, *November* 28. 1676. *Ker*: contra *Ker*.

*Obſerv.* III. THAT notwithſtanding of this Act, where there is an univerſal Legator, the Executor gets no Part of the Defunct's Part, *January* 15. 1674. *Paton* contra *Leiſhman*, *November* 29. 1626. *Forſyth* contra *Forſyth*.

*Obſerv.* IV. THAT by the Confirmation of the Defunct's Teſtament, the Intereſt of the neareſt of Kin is *ipſo jure* eſtabliſhed; ſo that albeit the neareſt of Kin ſhould immediately deceaſe before executing of the Teſtament, the Intereſt that was competent to him, is tranſmitted to his Children, or neareſt of Kin, as was found, *February* 12. 1662. *Bells* contra *Wilkie*, where the Three Siſters of *Patrick Bell* being confirm'd as Executors, whereof one deceaſing before executing the Teſtament, her Son did confirm in his Mother's Teſtament, the Third Part that belonged to his deceaſed Mother, for which the Two ſurviving Executors were found countable to him: But where the neareſt of Kin died before the Teſtament of the Defunct was confirm'd; it was found that the Intereſt which would have been competent to that neareſt of Kin confirming, was not tranſmitted to his Executor; but that there was Place for the neareſt of Kin, of the Firſt Defunct, *February* 17. 1663. *Forſyths* contra *Paton*: Where it was alſo found, that a Child having ſurvived his Mother, did not tranſmit her Third to his Father as a *legittim*; but that the Father was liable for the Third of his Moveables to his Wife's Brother, who was her Executor, and neareſt of Kin.

XV. THERE are Two Caſes provided for in this Act; *Firſt*, That Liferent Tacks of Lands and Teinds, ſhall not fall under ſingle Eſcheat, but under the Liferent-eſcheat; and yet if the Superior, to whom that Liferent-eſcheat falls, go to the Horn, that ſame Liferent-eſcheat of the Vaſſal will fall under the Superior's ſingle Eſcheat; for it is no Liferent in the Superior's Perſon, for he has only Right to it during his Vaſſal's Lifetime, but not during his own: As alſo, for the ſame Reaſon, if the King gift the Liferent-eſcheat to a Donator, it will fall under the Donator's ſingle Eſcheat; and if the Donator aſſign the ſame, it will fall under the Aſſigney's ſingle Eſcheat, not becauſe Aſſignations makes that Moveable which was Heretable, for Aſſignations alter not the Nature of the Thing aſſign'd; but becauſe the Aſſigney has not theſe Rights for his Lifetime.

THE ſecond Part of this Statute provides, that in caſe any Tacks of Lands or Tiends, contain more Liferents; the firſt Liferent only ſhall fall under the Liferent Eſcheat by the firſt Liferenter's Rebellion: But the remnant Liferenters, or Heirs, ſhall not be prejudged.

IT is fit here to obſerve, that if a Tack be ſet for Fifty or Sixty Years, yet it falls under the ſingle Eſcheat, for all that falls not under Liferent-eſcheat, falls under ſingle Eſcheat; and this, nor no ſuch Number of Years is a Liferent, but *quid juris*, if a Tack be ſet for a Hundred Years, which is a Lifetime by expreſs Law. And ſince Tacks were the only *habile* Way of tranſmitting Tiends of old, and are yet the ordinary Way, it is hard that all our Rights to Tiends ſhall fall under ſingle Eſcheat.

XVI. BY this Act, all Reverſions, Regreſſes, or Bonds for making Reverſions or Regreſſes, or Aſſignations thereto, and all Saſines are to be regiſtrated within Sixty Days, after the Date of the ſame; and I find that *Sand. deciſ. Friſ. lib.* 3. *tit.* 12. *def.* 15. ſhews that they have the ſame Regiſtration of Hypotheques *in immobilibus*.

*Obſerv.* I. THIS Neceſſity of Regiſtration is only introduc'd in Favours of ſingular Succeſſors, acquiring poſterior Rights; and therefore the Nullity of not Regiſtration, was not ſuſtain'd at the Inſtance of one who had no ſtanding Right in his Perſon, *March* 25. 1633. Nor is this Nullity ſuſtain'd in Favours of the Diſponer, or his Heirs; for *quoad* them, theſe Rights are valid without Regiſtration; nor was it ſuſtained at the Inſtance of the Son, who got the Eſtate diſpon'd to him by his Father, with Power to the Father to burden it with a Sum, ſince this Son was found to be no Third Party, *February* 27. 1667. And for the ſame

ACT XVI. Reaſon it was found, that the Superior's Saſine was not quarrellable by the Vaſſal: This Neceſſity of Regiſtration being only introduc'd in Favours of ſuch as have Poſterior Heretable Rights, *June* 12. 1673.

*Obſerv.* II. It is thought that the Sixty Days, within which Saſines are to be regiſtrated, are ſo to be counted only, that either the Day upon which the Writs are dated, or the Day on which they are regiſtrated, muſt be free.

*Obſerv.* III. That ſince the Act ſays, *That theſe Saſines and others ſhall be regiſtrated in the Places deſigned in this Act*; that therefore it may be doubted, whether when Lands ly within different Shires, but are united, if in that Caſe they are to be regiſtrated in the Shire where the Place lyes, at which Saſine is to be taken by the Charter of Union, or at all the Places where the Lands ly.

*Obſerv.* IV. Tho' this Act appoints Renunciations, and Grants of Redemption to be regiſtrated: Yet the Lords found, that Orders of Redemption fall not under this Act, and need not be regiſtrated, *July* 29. 1623. But yet they found, that an Infeſtment of Annualrent could not be taken away by Diſcharges granted by the Debitor, nor by Compenſation of his Debts, in Prejudice of a ſingular Succeſſor, who had Right to the ſaid Annualrent; and that becauſe, I. The Deſign of this Act appears by the Narrative, to be made for Security of Buyers; and Buyers could not be ſecured, if ſuch latent Ways of Extinction were allowed.

II. An Infeſtment of Annualrent, is conſtituted by a Saſine, which muſt be regiſtrated; and therefore it cannot be taken away, but by a Renunciation, or ſome Paper which muſt be regiſtrated.

III. By the 3. *Act, Parl.* 2. Ch. II. Inſtruments of Reſignation, *ad remanentiam*, whereby Rights are taken away, are by the ſame Argument ordained to be regiſtrated in the ſame Way that Saſines are.

IV. Tho' by this Act there be not expreſs Mention of Rights of Annualrents; yet they are comprehended under the Word *Wadſets*; for an Infeſtment of Annualrent is but in Effect a Wadſet of the Rents. And tho' this Act is only urg'd againſt ſuch as annaillie their Lands; and that it was urg'd, that an Infeſtment of Annualrent was not an Alienation of Lands, but rather a ſervitude upon them; yet this is a Miſtake, for an Infeſtment of Annualrent is an Alienation, elſe it could not infer Recognition, as without doubt it does. As alſo they found, that Renunciations of Annualrents, which were holden of the Diſponer, are ſufficient without any Reſignation, *ad remanentiam*; tho' it was alledg'd, that as a Charter without a Saſine cannot conſtitute an Annualrent; ſo neither can a perſonal Renunciation, without an Inſtrument of Reſignation extinguiſh it: But becauſe this Act ordains theſe Renunciations to be regiſtrated; therefore they are valid againſt ſingular Succeſſors, elſe why ſhould they be regiſtrated *January* 7. 1680. *MacCleland* contra *Muſhat*.

Since this Act of Parliament requires, that all Saſines, Renunciations of Wadſets, *&c.* ſhall be regiſtrated, I think the booking of them is neceſſary: Nor is it ſufficient (as ſome pretend) that they are produc'd, and marked by the Clerk; becauſe (as they ſay) the Lieges can do no more, and they ought not to be puniſh'd for the Clerk's Negligence; for if this were ſufficient, no ſingular Succeſſor could be ſecure, and the Producer may purſue the Clerk, if he book them not, ſince the Act of Parliament requires actual Regiſtration.

By this Act, all Grants of Redemption are to be regiſtrated, for ſecuring ſingular Succeſſors; but ſeeing the uſing an Order of Redemption, with a Declarator thereupon, will evacuate the Wadſet, even as to a ſingular Succeſſor; and yet he cannot know whether there be ſuch an Order uſed, and Declarator obtain'd, it not being requiſite that either of theſe ſhould be regiſtrated; it ſeems that ſingular Succeſſors are yet unſecure: As alſo, ſince if a Perſon obtain a Decreet againſt him to whom he ſold his Land, decerning him to grant him a Reverſion, conform to his Promiſe, this will be valid againſt a ſingular Succeſſor (tho' the Promiſe was not) and yet the ſingular Succeſſor cannot know this Decreet, nor needs it be regiſtrated; and therefore this Regiſter ſeems, yet, no ſufficient and adequate Remedy in Wadſets.

*Obſerv.* V. That by this Act it is provided, that Saſines and Reverſions therein contained, given by Provoſt and Baillies of Burgage Lands, needs not be regiſtrated, neither in Burgh nor Shire, as was decided *July* 21. 1666. And that Saſines of Lands in *Leith* need not be regiſtrated, tho' it be no Burgh Royal, *July* 10. 1623. The Reaſon of which Exception, was founded upon the Exactneſs of Town Clerks, and the conſtant Cuſtom thereof, booking how ſoon the Saſine is granted; and ſo far are Saſines within Burgh exeem'd from ſuch Solemnities, that the Lords ſuſtain'd a Saſine within Town, being ſubſcribed by the Town Clerk, tho' there was no Veſtige of it in the Town's Regiſter, nor the Notar's Protocal, and was latent for many Years, *June* 30. 1668. And thus ſingular Succeſſors were not ſufficiently ſecur'd by this Statute within Burghs; for tho' Town Clerks uſe to regiſtrate, yet there being no Neceſſity upon them to regiſtrate, and the Saſine not being annulled for not Regiſtration; it follows clearly that there was no ſecurity; and therefore by the 11. *Act, Parl.* 3. Ch. II.

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this is alter'd, and the Neceſſity of Regiſtration is thereby extended to Saſines within Burgh, and to all other Writs, which by this Act muſt be regiſtrated.

XVII. THE Form us'd in looſing Arreſtments of old, was by the Meſſenger's giving a Teſtificate under his Hand, that the Arreſtment laid on by him was looſ'd. This being too great a Truſt for a Meſſenger, and they receiving oft-times irreſponſal Cautioners; by this Act it is ordain'd, that Arreſtments ſhall be looſ'd only by Letters on Bills paſt by the Lords, which is now obſerv'd; and Caution is found to a particular Servant in the Bill-Chamber, to whom the trying that the Caution is ſufficient is referr'd: And the ordinary Way to hinder an inſufficient Cautioner, is, by getting a Warrant *in præſentia* from the Lords of Seſſion for that Effect; after preſenting whereof to that Servant, if inſufficient Caution be receiv'd, the Lords will give Warrant to arreſt *de novo*; but if the Caution be once found, and the Letters expede, the Lords will not allow, upon a Bill, Arreſtment to be made *de novo*, nor recal their Letters, tho' the Caution be inſufficient, the Clerk of the Bills being anſwerable by his Office for the Sufficiency of the Caution.

XVIII. THIS Act grants Power to all who are infeſt in Forreſtries, to judge ſuch as ſhoot and kill Venniſon and Wild-fowl therein, and that by an Inqueſt, which ſeems to exclude all other Ways of Trial; for *incluſio unius eſt excluſio alterius*; and this Inqueſt was ordain'd to prevent the Partiality and Paſſion of the Heretor.

XX. THIS Act, puniſhing Drunkards by Fining, is not well enough obſerv'd, tho' it be renew'd *Act* 19. *Parl.* 1. Ch. II. It ſeems by this Act, that the Kirk is *regulariter*, founded in the judging and fining of Drunkards, tho' it may be alledged that this were to ſecularize too much Kirk-Seſſions, which is properly an Eccleſiaſtic Judicature; and by the Commiſſion granted to the Juſtices of Peace, the Juſtices ſeem to be made the only Judges, as appears not only by the Inſtructions given to them, but by the ſaid 19. *Act*, *Seſſ.* 1. *Parl.* 1. Ch. II. tho' it be alledg'd, that Kirk Seſſions have likewiſe a cumulative Juriſdiction for Puniſhment of all Scandals; for which the 22. *Act*, 3. *Seſſ.* *Parl.* 2. Ch. II. is alledged, and the conſtant Practice of the whole Nation. And it was found by the Council, *May* 1681. *The King's Advocate* contra *the Juſtices of Peace of* Dumfermling, that the Kirk Seſſions might uplift ſuch Fines as were voluntarily paid to them for ſuch Scandals, without being countable to the Juſtices of Peace for them.

XXI. THE Difference betwixt a *Caulp* and *Herezeld*, is, *that a* Caulp *is the beſt Aught, or Beaſt that a Man has, which is due to the Chief or Maſter, after his Death, for protecting his Bairns; given by expreſs Paction*: Whereas a *Herezeld* is *the beſt Beaſt due to the Maſter only by Law after his Tenent's Death*. *Caulps* are here diſcharg'd, but *Herezelds* were allow'd, *Quon. Attach. Cap.* 23. But it would ſeem that *Herezelds*, and all taking of the beſt Beaſt, is diſcharg'd by this Act, albeit indeed they are not.

XXII. THIS Act is explain'd in the 45. *Act*, *Parl.* 11. Ja. VI. To which is to be added, That by this Act, the Relicts and Bairns of Notars, being oblig'd to bring in their Protocals to the Clerk-Regiſter within Fifteen Days after any Notar's Deceaſe; the Regiſter uſes to appoint a Depute, call'd now, *the Clerk of the Notars*, who draws their Bill, and receives Caution from them; and is by his Admiſſion obliged to do Diligence to mark the Books of Notars, and to receive Bond for their returning their Books; and therefore Sir *William Primroſe*, for not doing Diligence, was depoſed upon a Bill to the Lords, *February* 19. 1680, tho' he alledged that the Wives and Bairns only of the Notars were oblig'd to bring in their Protocals, but not he; and he was content for the Future, to follow what Inſtructions ſhould be given him.

# *PARLIAMENT* XXIII.

I. THERE being a General-Aſſembly held at *Perth*, in *Auguſt* 1618, by *Haddington*, *Southesk*, and *Scoon*, as His Majeſty's Commiſſioners; there were Five Articles therein paſt, in order to Uniformity with *England*, viz. *Kneeling at the Sacrament*, *Private Communion*, *Private Baptiſm*, *Confirmation of Children*, *and the obſerving ſome Feſtival Days*; *for Conformity with the Church of* England *as far as was poſſible.* Which Articles are here ratify'd in Parliament; nor is there any ſtanding Law made ſince to abrogate them, albeit for Peace's ſake they have not been much obſerv'd.

V. *VIDE Obſerv.* on *Act* 3. *Parl.* 22. Ja. VI. *Supra.*

VI. IN this Act it is warranted, that ſuch as compriſed great Eſtates for ſmall Sums, did notwithſtanding, poſſeſs the whole Rents for Payment of their ſmall Annualrent; and therefore to correct this, it is ordain'd by this Act, That the Compriſer ſhall impute in Payment of his principal Sum, the Superplus of the Rents of the Lands intrometted with by him. And the true Reaſon of the former Cuſtom was, becauſe by the 37. *Act*, *Parl.* 5. Ja. III. the Lands compriſed were to be adjuſted by the Sheriff, with the Sums compriſed for, and ſo the Rent was at firſt but anſwerable to the Annualrent, tho' thereafter all being compriſed, the Compriſer appropriated all the Rents, without imputing, as ſaid is.

*Obſerv.* II. THAT this Act makes only the Compriſer liable for his actual Intromiſſion; and it has been found that the Compriſer is not bound to intromet: But yet this is ſo ſevere to the poor Debitor, and the other Compriſers, all whom the firſt Compriſer may debar, and ſo ſuffer the Tenents to bankrupt, and the Lands to become waſte; that therefore if a Compriſer once intromet, he is bound to continue his Intromiſſion; and where there are Tacks ſtanding, he is bound to do Diligence, *February* 9. 1639. or where there are more Compriſers, the Lords may force the firſt Compriſer to do Diligence; or if he do not betwixt and ſuch a Time yearly, they may allow Acceſs for the Second to enter to the Poſſeſſion, *February* 11. 1636. *July* 1662. Or if the firſt Compriſer exclude any Diligence that the Second is uſing, he will *eo ipſo* be liable thereafter to do exact Diligence.

*Obſerv.* III. BY this Act it is declared, That upon Payment of the principal Sum and Annualrent, and the Expence beſtow'd by the Compriſer in paſſing and obtaining Infeſtment, together with the Annualrent of the ſaid Sums, and the neceſſary Expences beſtow'd in leading the Compriſing, that then the Compriſing ſhall expire *ipſo facto*; that is to ſay, by way of Exception without Declarator, tho' ordinarily an Order of Redemption be uſed. And not only does Payment or Intromiſſion with the Mails, extinguiſh the Compriſing, and prove againſt ſingular Succeſſors; but even any Acknowledgment of Payment by the Leader of the Compriſing, will extinguiſh the Compriſing againſt thoſe ſingular Succeſſors, *July* 23. 1662.

*Obſerv.* IV. THAT the Compriſer is to get Allowance of a Year's Duty, as due to the Superior by this Act; and tho' he get himſelf entred for leſs by the Superior than the Year's Duty, yet he will get Allowance of the full Year's Duty that was due to the Superior, whoſe Gratuity will be of no Advantage to the Debitor, *July* 2. 1625.

*Obſerv.* V. THAT by this Act, what is paid to the Superior bears Annualrent, as do the neceſſary Expences; but it may be doubted if Annualrent be due for Sheriff-Fees.

*Obſerv.* VI. THAT Compriſings are not to run againſt Minors, but that it is lawful for the Minor at any Time within the Age of 25 Years to redeem: Which Privilege was found not only to be due to Minors when the Compriſing is led againſt themſelves, but even when a Minor has Right to the legal Reverſion, he being himſelf a ſecond Compriſer; for even in that Caſe, a Minor having led a Compriſing, may be prejudged as well as the Minor againſt whom the Compriſing is led, there being the ſame Parity of Reaſon in both. And tho' this be not clear by the firſt Words of the Exception, yet it is clear by theſe Words, *And that notwithſtanding of the preceeding Laws and Practiques of this Kingdom, by the which the legal Reverſion of the compriſed Lands expired within Seven Years after the leading of the Compriſing; from the which, His Majeſty and Eſtates hath, by this preſent Act and Statute, excepted Minors in all Time coming, declaring the ſame nowiſe to run againſt them.*

ACT

*Obſerv.* VII. That becauſe this Act appointed only the Superplus of the Mails and Duties, which exceeded the Annualrent to be imputed in the Payment of the principal Sum during the Seven Years of the Legal, but did not expreſly extend this to the Caſe of Minority; therefore it was found, that Minors not redeeming within the Seven Years, the Compriſer had, from the expiring of the Seven Years, the whole Rent of the Land for Payment of his Annualrent, without imputing the Superplus in Payment of the principal Sum, becauſe the Act corrected only that Cuſtom, *quoad* the Legal, *& leges correctoriæ, non extendi debent ultra verba directa & expreſſa, February* 22. 1639. and therefore by the 10. *Act, Parl.* 1. *Seſſ.* 3. Ch. II. this Deciſion was corrected; and it was by that Act ordained, that Compriſers ſhould impute the Superplus of the Rent, beyond the Annualrent, for Payment of the principal Sum, not only during the Legal, but during the whole Courſe of the Minority.

THIS Act extends all the Privileges granted to Minors in Compriſings to Minors againſt whom Adjudications are led; and from this it would ſeem to follow *argumento hujus legis*, that whatſoever is competent in Adjudications, is not competent in Compriſings; for elſe this Act had been needleſs. And the Lords would not extend the Privileges of the one to the other in many other Caſes, and ſo would not allow the Superior to get a Year's Duty, becauſe the immediate preceding Act did allow compris'd Lands to be redeemable upon the Payment of the Sums compris'd for, and a Year's Rent for their Entry: But in this Act of Adjudication there is no Mention of a Year's Duty, and which therefore was thought to be of Purpoſe omitted, and ſo needed a new Law, notwithſtanding of the Parity of Reaſon; whereupon a new Law was made, *viz.* the *Act* 18. *Parl.* 2. Ch. II. whereby not only the Superior is ordain'd to have a Year's Duty, but it is expreſly declared, *That in all Caſes relating to Superiors, Adjudications ſhall be in the ſame Condition with Compriſings*; and conſequentially to this laſt Act it was found, that the Superior might at his Option either enter the Adjudger, or pay the Sums for which the Adjudication was led, ſince the Act of Parliament *Ja.* III. *Parl.* 5. and *Act* 37. *appoints this in Compriſings, June* 10. 1671. *Scot* of *Thirlſtoun contra* the Lord *Drumlanrig*. As alſo upon the ſame Reaſon the Lords found, That the Superior was bound to receive the Adjudger, tho' he could not produce his Authors Rights, Debitors abſtracting their Writs, becauſe Compriſers are not bound to produce, *February* 9. 1667. *Ramſay* contra *Ker*. VII.

*Nota*, That Compriſers intrometting, are liable for their Intromiſſions with the Victual, according to the Sheriffs Fiars, and not according to the Commiſſars; not only becauſe the Commiſſars Fiars are made only to regulate Prices betwixt Tutors and Pupils, and in other conſiſtorial Caſes; but becauſe this Act ſays, *As the ſamen were commonly ſold between* Yule *and* Candlemaſs, *in the Sheriffdom where the Lands ly.*

THO' regularly Infeſtments upon Compriſings and Adjudications ought to be perfected by appending the Great-Seal, yet an Extract of the Debitors Infeſtment under the Privy-Seal is here declar'd equivalent, in ſo far as concerns the Debitor's Heirs, becauſe it is preſumeable that the Debitor has deſtroy'd or abſtracted the Writs of the Lands compriſed from him. VIII.

*Quæritur*, Whether this Act ſhould be extended to Adjudications, ſince they are not mention'd here in the very next Act to the Act anent Adjudications?

THIS Act, allowing Biſhops to Feu out their Ward-lands, is but temporary for Three Years, and ſo is expir'd, becauſe not renew'd; and conſequently Biſhops have not Leave to Feu out their Ward-lands now. IX.

AS Miniſters Gleibs were to be Teind-free, ſo ought the Soums Graſs that is allow'd to Miniſters in place of Gleibs, be Teind-free. X.

The Reaſon given by this Act is, becauſe the ſame is dedicated and appointed *ad pios uſus*, which is no adequate and ſufficient Reaſon, ſince Lands mortify'd to Hoſpitals are deſtinate *ad pios uſus*, and yet are not Teind-free, that being a ſpecial Privilege only granted by the Pope to the *Cæleſtines*, or *Ciſtertians*, and ſome few other Orders; but ordinarily Hoſpitals and others are free from Taxations, as *Act* 1. and *Act* 15. *Parl.* 1. Ch. I.

BY the 2. *Act, Parl.* 22. Ja. VI. Deans and Chapters were reſtored; but by this Act all the Offices and Dignities of the Chapter are likewiſe reſtor'd; and it is declared, *That all Deeds done ſince the Date of that Act, or to be done thereafter, whereby any Member of a Cathedral Kirk, being an Office or Dignity, hath, or ſhall be ſuppreſt; or any Land Parſonage, Vicarage, or other Living belonging to the ſaid Dignity, diſſolved from the ſame without expreſs Warrant from His Majeſty and Parliament, ſhall be null.* XI.

For underſtanding this Act, it is fit to know that in every Biſhopric there are ſeveral Dignities, allow'd by the Canon Law; by which Law, the Word *Dignity* is either taken largely, ACT. ſo as to comprehend all Eccleſiaſtical Dignities, as in *Cap. denique diſt.* 4. But properly it imports *adminiſtrationem Eccleſiaſticum cum honore vel juriſdictione conjunctum, Gloſſ. in Cap.* 1. *de conſuetud. in* 6. and generally, all ſuch to whom the Cognition of Cauſes could be delegated, were accounted Eccleſiaſtic Dignities, *Cap. cum olim de offic. legat.*

There are in every Chapter, and Biſhopric with us ſome of thoſe Dignities, but of a different Rank and Juriſdiction, not only from thoſe in the Canon Law, but the Dignities in our own Biſhoprics differ from one another, tho' all of them agree in this, that thoſe Dignities which were appointed at the Foundation of the Biſhoprics continue to this Day, and the Foundations are the Rule, and are very different.

The ordinary Dignities common to all, are the Dean, the Arch-dean, the Chanter, the Chancellor, and the Treaſurer.

The Office of the Dean has been fully explain'd in the *Act* 2. *Parl.* 22. Ja. VI.

The Arch-deacon (call'd improperly by us *Arch-dean*) is the *Archi-diaconus* of the Canon Law, who tho' they be inferior to Deans, yet they are in Effect the Biſhops Vicar, and have the chief Juriſdiction next to him; being in the Canon Law *oculus Epiſcopi*: Their Office in that Law was to examine ſuch as were preſented to the Biſhop, and to put them in Poſſeſſion of their Benefice after their Admiſſion; as alſo, to viſit the Diocy every Three Year, if the Biſhop be not preſent, and to overſee the Manners and Living of the Clergy.

The Chanter is in the Canon Law called *Primicerius*, becauſe he is firſt of the Order of the Singers; and by the Greek Church πρωτοψαλτης his Employment was to overſee ſuch as Sung and Read in the Church; and with us the Subchanter is a Dignity called Succentor in the Canon Law, and that likewiſe he was allow'd a Dignity by the Canon Law is clear, *Innocent cap.* 3. *inter dilectos de exceſſ. præl.*

The Chancellor was ſo called, becauſe he kept the Seal of the Church, *Cujac. ad tit. ut Eccleſ. bon. ſine diminut. conſerv.* he was likewiſe Superviſer of the Bibliothec of Schools, and of theſe who taught the Clergy, *Cap. penult.* & *ult. de tranſlat. Epiſ.* & *Cap. veniens de reg.* & *tranſ. ad monaſt.*

In *England* the Chancellor is in Effect a Church-Lawyer, who judges for the Biſhop through the whole Diocy, and is univerſal Commiſſary; whereas theſe only are called Commiſſars by that Law to whom the judging in particular Places or Caſes is committed: But with us the Chancellor is ſtill a Churchman, and the Province of Saint *Andrew*'s has its Chancellor as well as the ſpecial Biſhoprics, the Biſhop of *Edinburgh* being the Chancellor of the Province of Saint *Andrew*'s.

The Treaſurer is he who did overſee the Treaſury, and all Things elſe belonging to the Church, who in the forecited *Cap. cum olim*, is accounted to have Eccleſiaſtic Dignity.

It is obſerv'd by *Bengeus, de beneficiis Eccleſiaſticis, Renat. Chopin.* and other Canoniſts, that both the Juriſdiction and Precedency amongſt thoſe Dignities, is now conſuetudinary, and alter'd much according to the Cuſtom of the ſeveral Places; and it is ſo with us where they are regulated according to the ſpecial Foundations or Cuſtom, if theſe be wanting or loſt.

XII. THIS Act is explain'd in many other Acts concerning the Privilege of Burghs-Royal.

XIII. THIS Act is formerly explain'd in *Act*, 47. *Parl.* 11. Ja. VI.

XIV. By this Act, all playing at Cards or Dice in any Inn or Ale-houſe is diſcharg'd under the Pain of Forty Pounds, and all playing at Cards or Dice even in private Houſes is forbidden, except where the Maſters of the Families play; and all playing at Cards and Dice, even tho' the Maſter play, and all Horſe-Races are ſo far reſtrain'd, that the Gainer cannot have Action for any Thing he wins above an Hundred Merks: But yet it was found that the Loſer is ſtill lyable in Payment, and therefore the King's Advocate was found to have Intereſt to compear, and crave the Money to be conſign'd, *November* 12. 1668. *Park* contra *Somerwel*; where it was debated, if this was *vitium reale*, and might be taken from an Aſſigney, tho' he knew not how the Money was due; for elſe this Act might be eluded, by filling up the Name of an Aſſigney.

By the Civil Law, *Tit.* 43. *lib.* 3. *l.* 1. *Cod. de aleatoribus*, he that is overcome at ſuch Games is not oblig'd to pay, and tho' he pay, he, or his Heirs have Repitition; and by the Canon Law, Churchmen who uſe ſuch Games cannot be promoted to Benefices, *Cap.* 11. *de exceſt prelat.* but yet wagering *ſeu ſponſio* was by that Law allowed, *l.* 17. §. *ult. ff. de preſcript. verb.* and ſo our Horſe-Races were not condemn'd by that Law, tho' they are by ours; for that Law did think that, *nullam turpitudinem continet in ſe ſponſio*; *nam inde rixæ oriri non ſolent*; but our Law did condemn Horſe-Races, becauſe they occaſion'd great Idleneſs and Expence: This Act is ſtill exactly obſerv'd, but is not extended to other Wagers, ſuch as that Ships will arrive at ſuch a Day, or in ſuch a Place, which was not found to fall under this Act, which ſpeaks only of Cards, Dice, and Horſe-Race. It ſeems that this Act would not be extended to any other Game *ex paritate rationis*; but yet I find that by the late Deciſions of moſt Nations, theſe are not ſuſtain'd *tanquam otioſi & aleatorii contractus qui nihil in ſe continent præter inanem animorum concertationem*, Stockman. *deciſ.* 134. Molin. *Tract. de uſur. queſt.* 3. *num.* 97. ACT

By the Civil Law likewiſe, tho' wagering was allow'd, yet where either of the Parties did certainly know the Thing whereupon he wagered, but conceal'd his Knowledge; as for Inſtance, if a Man ſhould wager that ſuch a Man ſhould be dead before a Year elapſed, and that he knew him to be already dead, the Law would not allow Action upon that Wager, becauſe in Effect that were to cheat, and accordingly our Courts in *Scotland* have moſt juſtly decided.

Wagers likewiſe upon the Deaths of Princes are diſcharg'd as giving Occaſion of Jealouſie; as alſo Wagers concerning the Event of public Undertakings for the Good of the Country, ſuch as the Succeſs of Arms, *&c.* and that, leſt Men ſhould be tempted, either to wiſh the Armies of their native Country not to proſper, or to reveal their Secrets to the End they may not proſper, *Vid.* Zipeum *in not. juris belli, lib.* 3. *in fin.* There is ſuch an Act as ours made by *Lewis* XIII. King of *France* amongſt his Statutes, *Cap.* 138. *& ſeq.*

THIS Act is fully explain'd in *Act* 200. *Parl.* 14. Ja. VI. XV.

THIS Act is fully explain'd in the 114. *Act*, *Parl.* 11. Ja. VI. XVI.

THIS Act diſcharging that a Peck ſhould be taken to the Boll, tho' with Conſent of Parties, was made to prevent Extortion, upon the ſame Ground that Uſury is diſcharg'd; but yet it not having been obſerv'd for a long Time, the Council ſtopt a Gift that was granted thereof, as to Bygones, till His Majeſty ſhould be acquainted. XVII.

THIS Act concerning Diſpoſitions made by Bankrupts, is fully explained by me, in a Treatiſe apart already printed upon this ſingle Act. XVIII.

THIS Act regulating the Prices of all Writs and Seals, is for the moſt Part either in Deſuetude, or is innovated by the 16. *Act*, *Seſſ.* 3. *Parl.* 2. Ch. II. Wherein new Regulations are ſet down; and from this Act it is obſervable, that the Secret Council may make Prices in all ſuch Caſes; for this Act ratifies only their Act: And tho' the Act ratify'd bear, this Act to have been made by the Secret Council and Seſſion; yet the Act of Parliament which does ratifie that Act, ratifies it only as an Act of Privy Council, and ſo inſinuates, that the Privy Council hath Power to regulate both the Price of Seſſion, and Exchequer. XIX.

These Regulations of Prices in our Law, are like to the *Notitiæ* mentioned, *Cod. de Ann. & Cap. Lib.* 1. *Tit.* 52. *Quæ ſingulis officiis delegabantur, quibus continebatur, quantum ſinguli pro dignitate & officio, pro libellis mandatis codicillis accipiendis vel inſinuandis pendere, quantum pro annona & capite accipere deberent.*

FOR underſtanding this Act, it is fit to know that Annualrents are only due by our Law, either by Statute or Paction, ſo that regularly they are not due otherwiſe. XX.

They are due by Statute, either by the *Act of Sederunt*, 1613. appointing, *That where Cautioners are diſtreſſed, and forced to pay, they ſhall have Annualrent from the Term that they pay*, tho' the Bond wherein they are Cautioners bear none; yet this is in Effect *ex pacto*, becauſe it ariſes from the Clauſe of Relief, this being a Damage incur'd by them: Or by this Act of Parliament, by which Annualrents are due, after the Party is denounc'd, tho' the Bond whereupon he is denounc'd bear no Annualrent, upon the ſame Ground that in the Civil Law *uſuræ debentur ex mora in bonæ fidei contractibus*, *L.* 32. § 2. *ff. de uſuris:* So that as by the Civil Law they were due *ex pacto vel ex mora*, they are due only with us *ex pacto vel ex lege*, which is the ſame Thing almoſt, ſince *lex in hoc caſu apud nos fundatur in mora*; for tho' there may be *mora ſine uſuris*, yet by this Act there are never *uſuræ ſine mora.* But this Denunciation muſt be at the Head-burgh of the Shire where the Debitor lives; Denunciations at the Mercat-croſs of *Edinburgh* being a Warrant only for Caption, but not inferring Annualrent, which may ſeem ſtrange, ſince Annualrents are by this Act inferr'd after Denunciation, becauſe of the Debitor's Negligence; but the Reaſon of the Deciſion is, that the Lords thought the Debitors did not know exactly when they were denounc'd at *Edinburgh*. But it has been found that the Debitor is liable in Annualrent after he is denounced at the Head-burgh of the Shire, tho' the Horning be not regiſtrated, ſince the Act only appointed Denunciation; and yet there can be no Caption till the Horning and Executions be regiſtrated. And thus it is clear that Caption and Payment of Annualrents are very different Effects of a Horning, ſince ſometimes Caption will follow where Annualrent cannot, and ſometimes Annualrent will follow where Caption cannot, *February* 11. 1673. *Smith* contra *Wauch.*

ACT ANNUALRENTS are ſometimes due, without either expreſs Law or Paction, becauſe of the tacite and preſumable Conſent of the Party; as if a Party pay Annualrent for one Term, or if he promiſe to pay bygone Annualrents, tho' he promiſe not for the Future; yet *January* 13. 1669. *Hume* contra *Seton*, the Lords found that he ought to pay conſtantly Annualrent for the Future, tho' the Obligation did bear no Annualrent: Or from the Principles of natural Equity, as in the Price of Lands which pay Annualrent tho' none be pactioned, becauſe the Buyer has the Rents of the Lands; or in Tochers, becauſe they are given *ad ſuſtinenda onera matrimonii*, and the Husband entertains the Wife; or where the Sum is ordain'd to bear Annualrent after her Marriage, to whom it is left *quo caſu*, before Marriage the Lords found that Annualrent was due, ſince *matrimonia debent eſſe libera*; but yet *regulariter*, Annualrent is not due in Caſes alimentary. And a Father providing his Daughter to a Sum for her Portion, without mentioning any Thing of Annualrent, the Lords would not decern Annualrent, tho' Annualrent was only ſaid to be omitted there, thro' the Ignorance of the Notar; but becauſe of the preſum'd Will of the Father, they modify'd the Aliment equal to the Annualrent. But ſo unfavourable are *uſuræ uſurarum*, call'd *uſuræ judaicæ* by the Doctors of the Civil Law, that an Obligation to pay Annualrent for Annualrent, if it were not paid at the Term, was not ſuſtain'd, tho' it was alledg'd that here *pactum & mora* were join'd with Equity, the Woman to whom they were due being a poor Widow, who behoved to borrow Money to live upon, if her Annualrent were not paid, and to pay Annualrent for that Money which ſhe ſo borrow'd, *January* 26. 1669. Lady *Braid contra* the Earl of *Kinghorn*. It is fit to know that the Statute 2. *Robert* III. appointing Annualrents not to run againſt Minors, is now in Deſuetude, tho' it would ſeem reaſonable that their *mora* ſhould not prejudge them; but Minors Money do ſtill bear Annualrent by our Law.

THE King uſes to pay Annualrents for the Balance of his Accompts *de facto*, but is not obliged thereto by Law.

XXII. THIS Act is explain'd, *Crim. Pract. Tit.* Falſhood.

XXIII. NOTA, That Uſury is excepted from this Commiſſion to uplift Money due by penal Statutes, &c. ergo, Acts againſt Uſury ſeem penal Statutes. It is obſervable, that tho' by this Act it be declared, *That Commiſſions for penal Statutes be not put to Execution, till they be authorized by the Lords of Secret Council*, yet this is too much in Deſuetude; but the Lords of Secret Council do uſe to diſcharge them till they acquaint the King.

XXV. THE Laws of the Twelve Tables contain'd ſeveral ſumptuary Laws, tho' there was then little Luxury, and particularly at Burials. And Saint *Chriſoſtom* condemns feign'd Mourners, whom we call *Saulies*, becauſe they pray for the Souls of the Dead. *Vide* 14. *Act*, *Parl.* 3. Ch. II.

XXVI. THIS Act, appointing Houſes in *Edinburgh* to be ſklated, and Letters of Horning to be direct to that Effect, ſhews that the Parliament may diſpoſe upon private Eſtates *ob bonum publicum*, *Vide Act* 6. *Parl.* 1. *Seſſ.* 3. Ch. II. It may be argued from this Act, that if the Town of *Edinburgh* could have made ſuch Acts by their own Authority, this Act had been needleſs.

XXVII. THIS Act is explain'd in the 106. *Act*, *Parl.* 7. Ja. V.

XXVIII. THIS Act is explain'd, *Crim. Pract. Tit.* Uſury.

XXXI. THIS Act diſcharges any Man to Hunt or Hawk at any Time who hath not a Plough of Land in Heretage, under the Pain of One Hundred Pounds, but it is now in Deſuetude.

# King CHARLES I.

## *PARLIAMENT* I.

KING *Charles* I. having come to *Scotland*, to be Crown'd in *Anno* 1633. the Parliament does, by this Act, grant Him not only a Subſidy upon the Land-rent, but likewiſe the Sixteen Peny of all Annualrents, the Annualrent being then at Ten in the Hundred: But becauſe the Annualrent was thereafter brought down from Ten to Six, therefore by the 49. *Act*, *Parl.* 1. Ch. II. it is declared, That the ſaid Six of the Hundred *ſhall be free of all Retention, and other public Burdens whatſoever.* I.

THERE is no Immunity allow'd by this Act to any from this Taxation, ſave the ordinary Lords of the Seſſion, and Mortifications to Univerſities, Colleges, and Hoſpitals; and this was the firſt Time the Lords were ſeparated from the Advocates and other Members of the College of Juſtice: And yet by the 23. *Act* of this Parliament, all the Immunities and Privileges that ever were granted to the College of Juſtice are ratify'd. And tho' it may ſeem that this Act, being poſterior, derogates from the former, yet *ſpecialia ſemper derogant a generalibus.*

BY this Act likewiſe, the Lords of Erection are to be taxed in the ſame Way that they were before the Erection.

THIS Act is but a Continuation of the firſt Act, and ſhews the Way of upliſting the Taxation thereby given. II.

THE Parliament having granted by the 8. *Act*, *Parl.* 20. Ja. VI. Power to the King to appoint Apparel for Judges and others; becauſe that Act was but temporary, they, by this Act, *continue the ſame to our Sovereign Lord and His Succeſſors, who now is*; which certainly is wrong printed, and reads ill; for the Words ſhould run, *Our Sovereign Lord that now is, and His Succeſſors.* III.

*Obſerv.* I. THAT Acts referring any Thing to the King's Majeſty, and not mentioning His Succeſſors, are but temporary, elſe this Act had been needleſs.

*Obſerv.* II. THAT theſe err who think the Parliament cannot delegate their Power; for in the former Act and this, it is clear that the Parliament did delegate this Power; and it is declar'd, that the King's Letter regulating this Affair, ſhall be equivalent to an Act of Parliament; and this ſame Parliament 1633. did grant a Commiſſion *to reviſe the Laws*, and did declare, *That what they did ſhould have the Force of Laws, without Reporting to the Parliament.* And the Lords of Articles, *Anno* 1681, did grant a Commiſſion, with a parliamentary Power to ſome *to reviſe the Earl of* Argyle*'s Rights*, and the Commiſſion of Teinds is of the ſame Nature.

ACT IV. THERE having been great Debates in *Anno* 1633. concerning the ſecuring the Proteſtant Religion, it was at laſt agreed, that the old Acts made by King *James* were in themſelves ſufficient, and the beſt that could be fallen on, as being made when there were greateſt Fears of Popery, and by the Help of which, the Proteſtant Religion grew to the Conſiſtency it is now at; and therefore the Parliament acquieſced in this ſhort Act, ratifying in general the former Acts made for ſecuring the Religion. *Vide Act* 1. *Parl.* 3. Ch. II.

V. THE former Parliaments which had determined Miniſters Stipends, forgot to provide School-maſters, and therefore the Privy-Council did provide them by an Act of Council; and tho' it may ſeem ſtrange that the Privy-Council could impoſe a Burden, tho' for a juſt Cauſe, yet that their Act is here approv'd, and the Secret-Council are made Judges to all Proceſſes concerning School-maſters Dues, tho' now the Lords of the Seſſion are the only Judges; nor are there any ſuch Proceſſes intented before the Privy-Council.

SINCE by this Act the planting of Schools is referr'd to the Biſhop with the Conſent of the Heretors, and moſt Part of the Paroch, it would appear that they, and not the Kirk-ſeſſion where they live, ſhould have the Placing of them. And albeit it be alledged, that the School-maſter of the Paroch is by the 17. *Act*, *Parl.* 3. *Seſſ.* 5. Ch. I. to be Clerk to the Kirk-ſeſſion, and therefore they ſhould have the chief Intereſt; yet this Conſequence is not ſufficient, and the Act whereupon it is founded is likewiſe abrogated. This is conform to the reform'd Church of *Saxony*, wherein *cura ſcholarum paſtoribus, ac ſuperintendenti commiſſa eſt*. Carpz. *Lib.* 1. *Tit. Def.* 77.

VI. BY this Act all Mortifications by Gift, Legacy, or otherwiſe, are declar'd not to be alterable to any other Uſe, than the ſpecial Uſe to which they were deſtinated by the Mortifier; but yet if that Uſe become unlawful *ex poſt facto*, ſo that the Perſons in whoſe Favours they were mortify'd, be diſabled to poſſeſs, I think they ſhould fall to the King, as caduciary, if the Property has been once transferr'd, and the Perſon upon whom it was transferr'd, became thereafter uncapable, for *quæ ſunt nullius, ſunt Domini Regis:* And thus the Mortifications made to Monaſteries, fell not back to the firſt Proprietors, or their Heirs, but to the King; but if the Property was never transferr'd, but before the firſt Acquiſition, the Perſon to whom the ſame was left, was incapable to receive the Right mortify'd; as if a Man ſhould leave a Legacy to his Brother, who were a Capucine, whoſe Monaſtery, and not himſelf, is only capable of Legacies; it ſeems that if the Mortifier knew, that his Brother was uncapable, and that it would fall to the Monaſtery, that in that Caſe alſo the Mortification ſhould belong to the King, and ſhould not be retained by his Heirs, as a due Puniſhment of his Fault: But if the Mortifier knew not the ſame, it were more reaſonable to determine, that the Mortifier's Heirs ſhould retain the Right, *Vid. Tit. Cod. de Caduc. Tollend.*

*Thomas Mudie*, having left a Sum to be employ'd on the building a Church in the Graſs-Mercat of *Edinburgh*, the Magiſtrates thereof were upon their Supplication, allow'd to build a Steeple, and Buy a Pale of Bells with the Money, becauſe a Church was uſeleſs wanting a Stipend, tho' this Act againſt inverting pious Donations was objected; for the Parliament thought, that if a Mortification be left, which cannot take Place, either becauſe it is againſt Law, or is uſeleſs, the Parliament may allow the ſame to be fulfilled by an Equipollency, that being more ſuitable to the Deſign of the Mortifier, and better for the Commonwealth, than if the Mortification ſhould become extinct, which is conſonant to the Civil Law.

*George Heriot*, having appointed by one of the Statutes of his Hoſpital, that nothing ſhould be altered, tho' for the better; and one of the Statutes bearing, none ſhould lodge within the Hoſpital, ſave Students; it was doubted, if ſome unfurniſht Rooms which the Overſeers could not furniſh for want of Money, might be ſet out to ſuch as undertook to furniſh them, for ſome few Years Tacks? And it was thought that they might, ſince that was no Caſe which any wiſe Man could think to exclude, if he had had it under his Conſideration, and theſe Rooms might be ſeparated from the Hoſpital for that Time by a Wall.

VII. THE Act here ratify'd, is the 27. *Act*, *Parl.* 11. Ja. VI. *Whereby all ſuch as trouble Miniſters for ſeeking of their Livings, or ſiklike Quarrels, and put violent Hand in them, are to be puniſh'd with the Tinſel of their Moveables, albeit no Slaughter or Mutilation follow*; which Act is here extended to Arch-biſhops, Biſhops, and all others having Power to Preach, and adminiſtrate the Sacraments. From which it is obſervable, that Acts in Favours of Miniſters, cannot be regularly extended to Biſhops, tho' a Biſhop may ſeem to be a Miniſter and more; and becauſe the former Act mentioned only *ſiklike Quarrels, as for ſeeking their Stipends*, &c. and that this might have been eluded by forg'd Pretexts; therefore this Act extends the ſame to all Invaſions: And from both theſe Caſes, it may be urg'd,

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That Acts of Parliament are *ſtricti juris*, and cannot be extended *de Caſu in Caſum*; elſe this Act had been unneceſſary.

Observe likewiſe from this Act, a Caſe wherein all Land-lords, Heretors, and Chiefs of Clans, upon whoſe Bounds the Invaders of Miniſters ſtay for Ten Days, the ſame being intimate to them, are to be puniſh'd as Connivers: This Act is ratify'd by the 5. *Act, Parl.* 2. Ch. II. By which it is further appointed, *That if any invade Miniſters, either in their Perſons, or Goods, not only within their Houſes, but Paroches, the Parochiners ſhall be liable to pay his Damage, if they cannot apprehend the Malefactors.* The Parliament there likewiſe ratifies Two Proclamations of Privy Council, which ordain'd the ſame Thing formerly; and which Ratification is a great Proof of the Council's Power, in Things relating to the Government.

VIII. TEINDS are declar'd to be the Patrimony of the Kirk; and therefore were not annex'd to the Crown by the 29. *Act, Parl.* 11. Ja. VI. But becauſe the leading of other Men's Teinds, occaſion'd great Confuſion, therefore in *Anno* 1628. There were Three ſeveral Submiſſions made, one by the Laic Heretors, a ſecond by the Churchmen, and a Third by the Burrows, wherein they refer to His Majeſty what ſhould be pay'd by every Heretor for his Teinds, to the Titular or Tackſman; and accordingly His Majeſty pronounced Three ſeveral Decreets, dated in *September* 1629. wherein he appointed, that the Rate of all Teinds ſhould be the Fifth Part of the conſtant Rent of what each Land pay'd in Stock and Tiend, where the ſame are valu'd joyntly, and where they are valu'd a Part, the Rate is according as the ſame were valu'd by the particular Commiſſioners for Valuation of Teinds, with Deduction of a Fifth Part, call'd, *the King's Eaſe*; and that all Teinds ſhould be bought at Nine Years Purchaſe, where they conſiſted in Money; and if they conſiſted in Victual, that they be firſt liquidate into Money, and then they ſhould be bought at Nine Years Purchaſe: And if there were but Temporary Rights, then the Price is to be abated; or hightned proportionally; and the ſaid Teinds being ſo bought, the Heretors are to relieve the Titulars of His Majeſty's Annuity, and Miniſters Stipends *pro rata*, and in Caſe of Wrong done by the Commiſſion, there is a Place for Appeals left to the Parliament.

The Submiſſion made by the Biſhops, did only relate to Teinds, payable to them, whereof they were not preſently in Poſſeſſion; and therefore where any Churchmen were preſently in Poſſeſſion of any Teinds, His Majeſty by His Decreet Arbitral, did not ordain them to ſell the ſame; but they are ordain'd to ſell ſuch Teinds as belong to them, that were not in their preſent Poſſeſſion, which they were ordain'd to ſell at Nine Years Purchaſe, with Deduction always of His Majeſty's Annuity, forth of the Excreſce of the Bolls and Rents, ariſing to the Submitters, after the expiring of their preſent Tacks. The Determination upon the Submiſſion of the Burrows, differs nothing from the former Two; but that the ſaids Burrows are to pay the Annuity forth of the Superplus of their Teinds, if they ſhould be found to exceed what is due for Entertainment of their Miniſters, Colleges, Schools, and Hoſpitals; and the Terms of Payment, of what is to be pay'd for theſe Teinds, is declar'd in all the Three Decreets Arbitral, to be betwixt *Yule* and *Candlemaſs*; ſuch likewiſe as had Church-lands and Teinds, erected in their Favours, in Temporal Lordſhips, did grant Commiſſion to ſurrender their Rights in His Majeſty's Hand, upon the Condition therein expreſs'd; and therefore by this Act, the Commiſſion granted by His Majeſty for providing the Miniſters ſerving the Cure with competent Stipends, is here ratify'd, and it is declar'd, *That the loweſt Stipend ſhall be Eight Chalders of Victual, or proportionally in Silver, except ſuch particular Kirks occur, wherein there ſhall be good Reaſon to go beneath the ſame*: But it ſeems that by this Act, they can only go beneath the ſaid *quota*, where there have already Valuations been led; the Reaſon whereof ſeems to be, becauſe till a Valuation be led, it cannot be known whether there be more free Teinds in the Paroch, than will amount to Eight Chalders Victual: As alſo, becauſe this high *quota* was granted to the Miniſter, in reſpect of the Power granted to the Heretors, to value their own Teinds; therefore, where the Heretors had not taken the Benefit of the Valuation, the Miniſter ought not to have the high Stipend: But yet the Commiſſion for Plantation of Kirks, do uſe to modifie leſs Stipends, where it is notour, that the Paroch is not able to bear the ſame; and that albeit that *quota* was condeſcended on in the Commiſſion of Surrenders, and is renew'd in the 19. *Act*, of this Parliament.

By this Act it is likewiſe declar'd, that *where Valuations are lawfully led againſt all Perſons having Intereſt, that the ſamen ſhall not be drawn in Queſtion upon the Pretence of enorm Leſion, at the Inſtance of the Incumbent*, *not being Titular*, *or His Majeſty's Advocate, except in the Caſe of Colluſion*, which is declar'd to be *preſumptione juris & de jure*, where the Valuation is led with Diminution of the third of the real Rent preſently pay'd, as is clear by the laſt Paragraph of the Nineteenth Act.

IX. THIS Act contains that Revocation drawn by Sir *Thomas Hope* His Majeſty's Advocate, which is ſaid to be of the Things which gave the firſt Riſe to our late Troubles; for therein His Majeſty, not only revokes all Alienations of Lands formerly annex'd, and all

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Rights made to His Caſtles, Meadows, Woods, and Parks; but His Majeſty likewiſe revokes all Rights made to any Church-lands, and all Infeſtments of Erections of Abbacies, Prelacies, &c. Spirituality, or Temporality; and a Reduction of theſe Rights, was thereupon raiſ'd: Notwithſtanding that by the 2. *Act, Parl.* 18. Ja. VI. His Majeſty to remove all Miſtruſt, does *for Him and His Succeſſors, perpetually confirm all Erections, Confirmations, Patronages of the ſaids whole Benefices, and Promiſes* in verbo principis, *never to quarrel the ſame.* But what was done afterwards being voluntar, and upon the Submiſſion of all Parties concern'd, did not at all impinge upon the former Statute.

It is likewiſe declar'd in the End of this Act, that the Poſſeſſion of any Thing hereby revoked, ſhall not prejudge His Majeſty; and therefore it may be urg'd, that Forty Years Poſſeſſion of any Lands, or others falling under this Revocation, would not debar the King by Preſcription; and yet it was found, That if the King be denuded in Favours of a Donator: This Revocation does not interrupt Preſcription without a Reduction.

X. THIS Act is wrong plac'd, for it ſhould be after the 14. *Act*, for the Superiorities of Kirk-lands, being by the ſaid 14. *Act, declared to belong to the King*; the ſaids Superiorities are by this Act annex'd to the Crown; but they could not have been annex'd to the Crown, till they were firſt declar'd to belong to it.

XI. THERE is here a Diſſolution of the Annexation, made in the former Act, in which it is declared, *That this Diſſolution ſhall not Warrant the Alienation of His Majeſty's Caſtles, Woods, Parks, Meadows, and Offices*; which is conform to the 235. *Act, Parl.* 15. Ja. VI. Whereby all Diſpoſitions of theſe are declar'd null; and tho' the *Lomonts* of *Falkland* be diſſolv'd particularly by the 19. *Act, Parl.* 18. Ja. VI. yet it is declar'd particularly in this Act, that they ſhall remain inſeparably with the Crown.

XII. BECAUSE by the Act of Preſcription 1617. it is appointed that ſuch as might be prejudg'd by that Preſcription of Forty Years run before that Act 1617. might intent Actions within Thirteen Years after the Date of that Act; and becauſe the King could not intent particular Summons againſt every Perſon, whoſe Rights he might challenge; therefore it is allow'd by this Act, that His Majeſty might interrupt the ſaid Preſcription by open Proclamation, at the Mercat-Croſs of *Edinburgh*, and other particular Mercat-Croſſes, where the the Lands ly; and at the Mercat-Croſs of *Edinburgh*, Peir, and Shore of *Leith*, againſt ſuch as are out of the Kingdom. But leſt this Interruption might have too much alarm'd the Subjects: It is upon the King's own Conceſſion declar'd, that the ſaid Interruption ſhould be reſtricted to the annulling of Rights of the annext Property of the Crown, and the un-annex'd; whereof Account hath been made in the Exchequer, and of the Principality unlawfully diſpon'd by His Majeſty's Predeceſſors, againſt the Laws and Acts then ſtanding, and to the annulling of Erections, and other Diſpoſitions of whatſoever Lands, Teinds, Patronages, and Benefices, formerly belonging to the Kirk, and ſince annex'd to the Crown, and of any other other Lands, or Patronages, which ſhould any Way juſtly belong to the Kirk, or Crown, and of whatſoever Lands and Benefices mortify'd, and devouted to pious Uſes; and of Regalities, and Heretable Offices; and of the Change of Holdings, from the ancient Holding of Ward and Relief, to Blench and Taxt Ward, ſince the Year of God 1540. Years.

The Earl of *Southesk* having Right to the Muir of *Montromant*, as heretable Forreſter, intented a Declarator againſt the adjacent Heretors, concluding that they ſhould be debar'd from paſturing therein. Againſt which it being alledg'd, 1. That they had preſcriv'd the Right of Paſturage. It was reply'd, that the Preſcription was interrupted by this Act. To which it being duply'd, that this edictal Interruption was introduc'd without a Warrant, the Act 1617. having allow'd Thirteen Years for the Subjects to interrupt, without any Reſervation, in Favours of the King. 2. This is neither His Majeſty's annext Property, nor is it a Part of that un-annext Property, whereof the Ferms, or Feu-duties have been counted for in Exchequer, ſince the Year 1455. And ſo the Interruption which is reſtricted to theſe, reaches not to this Caſe. 3. This Paſturage is but a Servitude, and this Interruption extends only to Alienations, but not to Servitudes, or Things of ſo ſmall Moment. To which it was triply'd, that as to the Firſt, there was no Neceſſity that there ſhould have been a Reſervation in Favours of the King, by the Act 1617. ſince the King not being mention'd in the Act, which was the Rule, there was no Neceſſity to reſerve His Right by Way of Exception; but this Act of Parliament has ſupply'd that Want, tho' there had been an Omiſſion in that Act. To the Second, it was triply'd, that the Interruption 1633. being to ſecure His Majeſty againſt Preſcriptions, upon the Act 1617. it was juſt that it ſhould extend as far as the Act 1617; and theſe Words, *Whereof the Farms have been counted for in Exchequer*, are only demonſtrative, and not taxative; the counting in Exchequer being only a public Evidence of His Majeſty's Right; and therefore, where there were other public Evidences of His Majeſty's Right, as ſtrong as this, His Majeſty's Interruption by this Act, behov'd to take Place, elſe it ſhould not extend to ſecure His Majeſty, as to any Thing, for which

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which there were Blench, or Ward-holdings; this Act mentioning only Feu-farms; it ſhould not extend to His Majeſty's Caſtles, or other Things, for which he gets no Advantage. 3. This has been counted for, in ſo far as the Sheriff counts for the Blench-duties; and *Southeſk* pays Blench-duties for his Foreſt. 4. By an Act of Parliament in King *David's* Time, 1357. and another 1367. all the King's Foreſtries are ordain'd not to be diſpon'd without Conſent of Parliament, and ſo are to be lookt upon as a Part of the annext Property. To the Third it was duply'd, that this Act, as the Act 1617. was to be extended to Preſcriptions; and there were Things of leſs Conſequence than Servitudes ſecur'd againſt by this Act, ſuch as Change of Holdings, Patronages, &c. this Caſe is not decided.

The Reaſon why this Act reſtricts itſelf in this Clauſe to the Year 1455, is, becauſe in that Year was the firſt Act for annexing any Property to the Crown, *viz.* the 41. *Act*, *Parl.* 11. Ja. II.

It being alledged upon this Act, That the King behov'd to produce the Letters of Publication at the ſeveral Mercat-croſſes, and the Executions thereof, elſe His Majeſty could not have the Benefit of the Interruption. It was anſwered, That the Act of Sederunt of the Seſſion, did indeed appoint Letters of Publication; but Two Years after that Act, this Act of Parliament was made, allowing the King this Interruption, wherein the Parliament did certainly conſider the Publication, as having preceded, & *ſtatuit lex hoc caſu ſuper præſumpto*, and ſo the Letters of Publication and Extenſions need not now be produced. Which Anſwer the Lords found relevant, *November* 1682. Sir *William Ker* contra *Grubbet* and Others.

Interruption being thus made by the King, does laſt for 40 Years, ſo that no Preſcription can run againſt the King till 40 Years after the Date of this Act; and that tho' the Executions and Publication required by this Act of Parliament cannot be found for every particular Shire; it may be likewiſe doubted, whether Preſcription ſhould run againſt the King whilſt he was out of the Country. For which, *vide Obſervation* on the Act of Preſcription 1617.

XIII.

By this Act, the Parliament reſcinds all Rights of Regality made by King *Charles*, King *James*, or Queen *Mary*, belonging to Abbots, Priors, or any benefic'd Perſon; reſerving alwiſe to the heretable Bailies, and Stewarts of the ſaids Regalities and Stewartries, their Rights granted to them prior to the ſaids Erections; for ordinarily, even when theſe Regalities were in benefic'd Perſons own Hands, they made heretable Bailies. But I confeſs I underſtand not what is meant by the Stewart of a Regality; for Stewartries and Regalities are diſtinct and inconſiſtent Juriſdictions: A Stewart being a Judge in the King's Property only, having the ſame Power that a Lord of Regality has of the Lands erected in the Regality holding of himſelf, and the Lands holding of him: But this Act has in this followed the Words of the Act of Annexation 1587.

By the Act of Annexation 1587. *Act* 29. all Regalities belonging to Archbiſhops and Biſhops, were thereby annexed, becauſe their whole Lands and Temporalities were then annexed; but being reſtor'd in *Anno* 1606, their Regalities are hereby reſerved to them.

XIV.

UPON the Submiſſion and Surrender made by the Lords of Erection and other Titulars, it is condeſcended to by this Act, That His Majeſty ſhall remain not only Superior to the Lords of Erection, but even to all the Vaſſals who held formerly of any Abbacy, Priory, or other Benefice erected; and therefore by Virtue of this Act they may hold of the King if they pleaſe; but according to an expreſs Condition in the Surrender itſelf, there is by this Act reſerv'd to the Lords and Titulars of Erection, who ſubſcribed this Surrender, the Feu-mails and Feu-farms due by their Vaſſals, ay and till the King pay to the ſaids Lords and Titulars of Erection One Thouſand Merks for ilk Chalder, or One Hundred Merks of Feu-duty payable to them; for there is nothing allowed to them for the Service of Tenents. Tho' the Lords of Erection did not expreſly reſerve to themſelves the Caſualities that might fall to them by their Vaſſals during the not Redemption; for they reſerv'd only their Feu-mails and Feu-farms, ſince *incluſio unius* ſeems to be *excluſio alterius*, and the Superiority being by this Act declar'd to belong to the King, the Caſuality ſhould follow the Superiority; yet by a Deciſion the 24. of *July* 1632. the Lords found, That the Lords and Titulars of Erection had Right to the Caſualities of theſe Superiorities ay and till they be redeem'd; but by the 30. *Act*, *Parl.* 1. Ch. II. it is declared, *That the Feuars ſhall be bound to make Payment of their Feu-farms and Duties contained in their Infeftments, to the Lords of Erection, ay and till they be redeemed.* But it is not clear whether Eſcheat and Non-entry will belong to the King, or Feuars, except it be comprehended under the general Word *Duties*.

Tho' the Feu-mails and Feu-farms be reſerv'd to ſuch Lords and Titulars of Erection as ſubſcrib'd the Surrender, ſo that it may ſeem neceſſary to prove that theſe who ſeek Feu-duties did ſubſcribe, or elſe that theſe ſhould belong to the King; yet becauſe the Surrender cannot be found, the Lords found it ſufficient that the Titular acknowledg'd the King's

ACT XIV. Right, conform to this Act; but they found that they had not Right to the Arrages and Carriages of theſe Kirk-lands, becauſe by this Act all the Rents and Duties are declared to belong to the King, and the Reſervation in Favours of the Superior is only of Feu-duties, if they found no Abatement of the Feu-duty in reſpect of Vaſtations, ſince the Feu-duties were ſmall, and the Feuar might have gain'd by prior and ſubſequent Years, *June* 27. 1662. *Watſon* contra *Elleis*; becauſe the Superiorities of theſe Kirk-lands, is by this Act declar'd to belong to the King; therefore the Lords of Erection cannot purſue a Reduction of theſe Feus; nor is the Concourſe of His Majeſty's Advocate ſufficient, except there be an expreſs Warrant under the King's Hand for that Effect.

Albeit it be uncontroverted by this Act, that the King has no Right to the Feu-mails and Feu-farms, due by the Vaſſals of Erection, until he redeem the ſame, as ſaid is; yet it may be doubted, whether the King has Right to the Feu-mails, and Feu-farms of the Lands, which pertain'd in Property to the Lords of Erection, before the ſaid Surrender, and which were mentioned in the old Infeftments, before the Date of the Erection, and that without paying for the ſaids Feu-farms, and redeeming them as ſaid is, as he is oblig'd to do in the Caſe of the Feu-farms, due by the Vaſſals of Erection: And it may be urg'd for the Lords of Erection, that the King has not Right to the Feu-farms of their proper Lands, except he Redeem them; and that becauſe, I. The Act of Parliament is relative to the Submiſſion, made by the Lords of Erection, whereupon the Act proceeds; but ſo it is, that by the Submiſſion, they reſign the Superiorities, reſerving only to themſelves the Feu-duties, till they receive Satisfaction; but it is expreſly provided, that under this Reſignation, their proper Lands ſhould not be comprehended, but that they ſhould hold the ſame of His Majeſty, as the ſame was holden before the Date of the Erection; and ſo the Meaning is, that tho' they ſhould hold the ſame in Feu, yet they ſhould not be oblig'd to pay the Feu-duties, till they receive Satisfaction.

II. It were abſurd that the Lords of Erection ſhould not quite the Feu-duties of their Vaſſals, till they receiv'd Satisfaction; and yet they ſhould be oblig'd to quite the Feu-duties of their own Property, in which they had far more Intereſt, than in the Lands of their Vaſſals, without any Satisfaction.

III. Custom is the beſt Interpreter of Law, and by the general Cuſtom of the Nation, the Lords of Erection have never counted for the Feu-duties of their proper Lands.

IV. There being a Reſervation made in the firſt Part of the Act, of the Feu-duties only in Caſe of Payment; the Reſervation in the ſecond Part of the Act, muſt in Annalogy of Law be conſtructed to be burden'd with the ſame Quality, except the contrary were expreſly declar'd in the Act.

But on the other Side it may be more ſtrongly urg'd for the King, that he has Right to the Feu-farms of theſe their proper Lands immediately, without any Satisfaction, and that for theſe Reaſons; I. Becauſe by the Act of Parliament, they are expreſly to hold their proper Lands of the King, and to pay him the Feu-duties mentioned in the old Infeftments, without any Clauſe obliging the King to make Satisfaction; *Ergo*, The King is not oblig'd.

II. The Parliament having had that Reſervation, of making Satisfaction under their view, in the Caſe of the Vaſſals, they had certainly renew'd it in the immediate ſubſequent Caſe of the Property, if they had not expreſly deſign'd the contrary.

III. By the Charters granted under the Great Seal, to the ſaids Lords of Erection, ſince the Surrender, and this Act of Parliament, they are expreſly by different *reddendo's* made liable, both to the general Blench-duty, due for the whole Lands of the Erection, both Property and Superiority, and for the Feu-duty of their own proper Lands: *Ergo*, This Feu-duty of their proper Lands, is due by their Charter, which is a Feudal Contract, and that without any Reſervation of Payment.

IV. The Blench-duty of the Erection, and this Feu-duty is due upon different Accounts: *Ergo*, The Payment of the Blench-duty is not ſufficient; for the Blench-duty is due by the Lords of Erection, for the Intereſt that they have in the Vaſſals Lands, and for the Teinds: Whereas this Feu-duty is due only for their own proper Lands feu'd out before the Erection.

And to the contrary Objections it may be anſwered, That Acts of Parliament are not to be extended *de caſu in caſum*, eſpecially in ſuch infavourable Caſes as this, which tends moſt ungrately to take from the King a Part of that which himſelf gave freely.

II. There was very good Reaſon why they ſhould be liable to pay the Feu-duties of their proper Lands, without any Satisfaction; becauſe the King having rais'd a Reduction of all the ſaids Erections: The Lords of Erection did redeem themſelves from the Hazard of this Plea, by this Surrender; and the Reaſon why the Quality of Satisfaction was adjected, as to the Vaſſals, and not as to the Property, was, becauſe the Lords of Erection had no Intereſt in their Vaſſals Lands, but the Feu-duties; and ſo it was fit they ſhould get a Satisfaction for theſe; tho' the Satisfaction was made eaſie for the King: But as to their proper Lands, it was juſt, becauſe of the great Advantage they had by them; and that they were by this Act ſecur'd in the Property of them. It was juſt that the King ſhould get the Feu-duties without any Acknowledgment; and without this the King had got nothing for ſecuring them, when he might have with Succeſs quarrell'd their Rights. And the Pretence of the Vaſſals, not having pay'd theſe Feu-duties, for their proper Lands formerly, is of no Import, ſince the Negligence of the King's Officers cannot prejudge him; and the Times were Rebellious, ſince the Year 1633. Nor is this true, tho' it were relevant; for the Earls of *Roxburgh*, and others have pay'd.

Because theſe Arguments and Difficulties gave ſome Colour to the Lords of Erection, to think that they were not liable, therefore they us'd to get Eaſe as to Bygones; but they are made liable ſtill for the Future, in the Payment of theſe Feu-duties.

The Superiorities belonging to Biſhops and their Chapters, is reſerv'd to ſecure them againſt the Annexation, 1597. and their Superiorities, are likewiſe reſerv'd from the Annexation mention'd in the Tenth Act of this Parliament.

Some think it fit for His Majeſty's Intereſt, that theſe Superiorities ſhould be redeem'd; for he might thereby have a great and ſure Revenue, and a great Dependance of Vaſſals; and it ſeems alſo fit for the Intereſt of the Poor Vaſſals.

XV. His Majeſty having oblig'd ſo far the Heretors, as to get them the Leading of their own Teinds, it was thought fit by this Act, to give Him ſome ſmall Intereſt in the Teinds, *viz.* Out of every Teind-boll of the beſt Wheat, Ten Shilling; of the beſt Teind-bear, Eight Shilling; of the Teind-meal, Oats, Peaſe, and Ry, Six Shilling; and where the Oats will not render half Meal, Three Shilling.

Where the Victual was of inferiour Goodneſs, Power is granted to the Commiſſioners to modifie accordingly, and in order thereto, they did proportion the Price on the ſeveral Shires, which ſtands as a Rule in the Payment of Annuity to this Day: Tho' it be ſaid in this Act, that the Annuities ſhall be pay'd out of all Teinds, except the Teinds pay'd to Biſhops, Miniſters, Colleges, Hoſpitals, and other pious Uſes; yet it was thought, *January* 3. 1632. *Renton* contra *Ker*, tho' there was no formal Deciſion, that *decimæ incluſæ*, are liable in Payment of no Annuity, for they did not belong to the Titular, nor needed the Heretor buy them; in Contemplation of which Liberty, this Annuity is granted, and in Effect they are likewiſe lookt upon as incorporate with the Stock, and participating of its Nature.

This Annuity was found to be made *debitum fundi* by this Act of Parliament, and ſo to oblige all ſingular Succeſſors; becauſe the Act ſays generally, that the King ſhall have Right to all the Annuity bypaſt, and to come, tho' it be not expreſly declared, that ſingular Succeſſors ſhall be obliged, as our Law ordinarily uſes to do, when it reſolves to make any Thing *debitum fundi*.

It is declar'd by this Act, That Annuity ſhall not be annext to the Crown, whereby the Crown got a great Prejudice, ſince thereby the King would have obliged every Man to a Dependance upon him; whereas Commiſſions having been granted to ſell to every Man his own Annuity, the King made no Advantage thereby.

XVI. THIS Act is formerly explain'd in *Act* 71. *Parl.* 14. Ja. II.

XVII. By this Act it is declared, *That every Man ſhall have the Leading of his own Teind, the Teinds being firſt valued*; and all Teinds in *Scotland* may be valued, except, 1. Where the Lands are feu'd, *cum decimis incluſis*, and confirm'd before the Year 1589. as was found, *January* 21. 1631. 2. Teinds belonging to Eccleſiaſtic Perſons, and whereof they were in Poſſeſſion the Time of the Submiſſion, as is clear by the foreſaid Determination upon their Submiſſion; conform to which, by the 9. *Act*, 2. *Seſſ.* 1. *Parl.* Ch. II. all Valuations led againſt the Biſhops, or benefic'd Perſons, being Miniſters, ſince the Year 1637. of any Teinds, Parſonage and Vicarage, wherein they were in Poſſeſſion by leading, or drawing of Rental-bolls, are declared null: But by a Letter the 13. of *May* 1634. it is declared, that where ſuch Teinds are ſet by Biſhops, or beneficed Perſons, to Tackſmen, that *eo caſu* the Heretors ſhall have the buying of their own Teinds but Prejudice to the Biſhop, &c. to enjoy the ſame after Expiration of the Tacks, as they were accuſtomed; the Heretor always having the Prerogative of Buying, if he pleaſed; and this to be extended to the Heretors and Tackſman of the Teinds of Laic-patrons. And conform to this, the Lords of the Commiſſion decided, *February* 1679. *Hamilton contra* Earl of *Roxburgh*; tho' it was there alledged, that this would prejudge Churchmen, ſince it would diſcourage Laics to take Tacks from them at due Rates: But Teinds holden of Collegiate-Kirks are ſubject to Buying and Selling, as other Teinds, the 3. of *February* 1632.

Tho' it would appear by this Act, that every Man ſhall only have the leading and drawing of his own Teind, after the ſame is valued, ſince the Act ſays, *the ſame being firſt truly and lawfully valued*; yet if the Heretor intent a Purſuit for Valuation, he will, during the Dependance, get Liberty to lead his own Teinds if he offer Caution to pay his Teinds, conform to the Valuation that ſhall be led, *July* 14. 1630.

But this Benefit of Leading is only granted to Heretors by the foreſaid *Act*; and therefore no Liferent Tackſman hath this Benefit, except the Liferent be conſtitute by Infeftment of Conjunct-fee, or the like, *November* 30. 1631.

ACT NEITHER can Rentalers, or Tenents, crave this Benefit *ex eodem capite, March* 8. 1630. it is only granted likewiſe to ſuch Heretors, whoſe Teinds were drawn before, but not to theſe who paid Rental-bolls, *July* 24. 1635. And yet the contrary is found the 3. of *July* 1643. but the Heretor may have the Leading of his own Teinds, tho' he does not inſtruct a public Infeſtment, if he ſhew that he is not *in mora* to be infeſt, and that he is the Perſon who ſhould be infeſt, *July* 6. 1642. But the Teinds belonging to Churchmen, whereof they were in Poſſeſſion the Time of the Submiſſion, are not to be led upon Caution; and yet by a Miſſive the 9. of *May* 1634. His Majeſty declares His Favour not to be extended to their Tackſmen, being Laics; but that during theſe Tacks, the Heretor may lead, he finding Caution, as ſaid is.

BY the Submiſſion, the Decreets following thereupon, and the expreſs Words of this Act, *Miniſters are to be provided before the Heretors have Liberty to buy or value*; and therefore the Titular may allocate what Teinds he pleaſes towards the Maintenance of the Miniſter; and the Heretor *eo caſu* cannot force the Titular to ſell, *February* 17. 1645. But tho' the Kirk be not provided, yet the Heretor may buy his Teinds, if he be content to undergo his Part of the Augmentation when it ſhall be granted, the 20. of *January* 1645. Earl of *Haddington contra* the Laird of *Bearford*. So that it appears, that albeit a Titular may aſſign any one Man's whole Teinds towards the Miniſters Maintenance, when there is no preſent Proviſion; yet if there be any, tho' it be ſmall, he may not: But the ſame ſhould burden proportionally the whole free Teinds of the Paroch where there is a preſent Proviſion; and where the Teinds are once bought, the Heretor will not be burdened, as long as there is any Tack-duties free in the Titular's Hands, *February* 15. 1643. but the Tackſman will not be found liable in the ſaid Relief, *January* 27. 1635. but if there be no free Teinds in his Hand, then the Buyers, and all the Heretors muſt be burdened with the Augmentation, *January* 16. 1635.

IT ſeems that the Titular cannot aſſign the Teinds of one Paroch for paying the Stipend of another; for by this Act it is ſaid, *That the Teinds ſhall be burdened with the Stipend of the Miniſter ſerving the Cure of the Kirk*: But the Commiſſion allocates ſometimes the Teinds of one Paroch, to make up a Stipend to the adjacent Paroch, if the Miniſter of the Paroch out of which the free Teinds are allocated, be competently provided; for the Commiſſion thinks the Teinds, as the Spirituality of the Church, to be burdenable in general; and yet if this Argument prove any Thing, it will prove there can be no free Teinds as long as there is any Miniſter in *Scotland* unprovided competently.

XVIII. BY this Act the Exchequer is declar'd a Sovereign Court, and Power is given them to paſs and diſcuſs Suſpenſions, and to decern in all Things concerning His Majeſty's Property, and all Things concerning the Annuities of Teind, which was the particular Reaſon of making this Act at this Time: But becauſe of this Act giving them Power to decide every Thing relating to the Property; therefore by the 59. *Act, Parl.* 1. *Seſſ.* Ch. II. *It is declared, That the Deciding concerning the Validity and Invalidity of Infeſtments, ſhall only belong to the Seſſion.* And whereas this Act allows the Exchequer only to proceed in Things relating to His Majeſty's Property and others depending thereon, that Act declares *they have Liberty to judge in all Things relating to His Majeſty's Rents and Caſualities*, as they might have done before the Year 1633. And it being doubted, whether the Lords of the Seſſion were Judges competent to the diſcuſſing Suſpenſions, rais'd againſt the Cuſtomers by the Maſters of Manufactories, who pretended, that as to Goods imported for the Uſe of their Manufactories they were free from Cuſtom; the Lords did juſtly determine, that tho' the Exchequer were only Judges competent to diſcuſs Suſpenſions, as to Cuſtoms, or any Part of His Majeſty's Revenue, where the ſame were due by a clear Law, or conſtant Uſe of Payment; yet the Lords of the Seſſion were Judges competent to clear what was due by Law, and to interprete Acts of Parliament.

*Nota*, THE Act of Parliament alledg'd to be made upon the 22. of *May* 1584. concerning the Exchequer, ratify'd by this Act, can neither be found amongſt the printed nor the unprinted Acts.

THO' by Virtue of this Clauſe, and a Letter from His Majeſty, it is declared, *That the Exchequer are Judges competent to liquidate Wards and Marriages, and that the Exchequer has decided in ſome ſuch Caſes*; yet *regulariter*, the Seſſion are only Judges competent to ſuch Actions: And albeit the Seſſion be only Judges competent to Contravention of Lawburrows, yet after the Contravention is decided in His Majeſty's Favours, if the Party againſt whom the Decreet is obtain'd, ſuſpend the ſame, the Charge being at His Majeſty's Inſtance, it ought only to be judg'd by the Exchequer, that being a Caſuality already ſtated, and the Point of Law being already determined; altho' it be alledged, that this being a Suſpenſion of the Lords of the Seſſion's Decreet, it ſhould only be diſcuſs'd before them *ob continentiam cauſe*.

THO' by the 25. *Act, Parl.* 16. Ja. VI. it is appointed, *That all Hornings benorth* Dee, *ſhall be upon no leſs than Fifteen Days*; yet that is to be reſtricted, as has been there obſerved in Caſes before the Council; for by this Act, *all Charges of Execution before the Exchequer, are to be upon Twenty Days upon the North-ſide of* Dee, *and Ten Days upon the South-ſide of* Dee. ACT

THIS Act is the Firſt Commiſſion granted for valuing of Teinds, conform to the Surrender, and Decreets-arbitral pronounced thereupon; which Commiſſion is renew'd in ſeveral ſubſequent Parliaments. And for clearing ſomewhat of *the Form of Proceſs* before that Court, it is fit to know, that all Diets before the Commiſſion, *are with Continuation*; and becauſe of their uncertain Sitting, there needs no Wakening. All Procurators appearing before them ſhould have written Warrants: But this is not in Obſervance; but Conſents by Advocates muſt be ſubſcribed by Advocates, elſe Decreets given thereupon are null, *July* 20. 1664. and Executions are ſufficient by a Sheriff in that Part, *July* 10. 1643, and thereupon the Defender will be holden *pro confeſſo*. XIX.

THE Commiſſioners did of old appoint Sub-commiſſioners in every Presbytery, who were to be choſen by the Presbytery itſelf, and Five to be a *Quorum*, for trying the Valuation of every Man's Teinds, and before them Proceſs were intented at the Inſtance of the Procurator-fiſcal or the Heretors; and their Reports being return'd to the Commiſſion, were allowed. The Injunctions given to them then were, That none ſhould be Witneſſes before them who were not worth One Hundred Pounds of free Gear; That ſuch as dwell within the Presbytery ſhould be cited upon Ten Days, and ſuch as were without it upon Twenty; That the Depoſitions ſhould be ſubſcrib'd by the moſt Part of the Sub-commiſſioners, and the Clerk; and when any Man would make Uſe of another's Servant, as a Witneſs, that the Maſter ſhould produce him upon his Hazard. That where both uſed Probation, not the greateſt Number, but the cleareſt Deponers ſhould be preferr'd, and no Witneſſes to be received but only Ten for each Party, which was thereafter expon'd to be Ten for each Room, *July* 18. 1634.

THE Probation is oft-times allow'd to both Parties in this Court, and where it is ſingle it is called, *The Prerogative of Probation*, and is much contended for: Wherefore it is thus regulated, *viz.* either the Teinds are drawn *ipſa corpora*, by Titular, or Tackſman, and then they have the ſole Probation allowed them, to prove what the Teinds were worth, they proving that they led Seven Years of Fifteen before the Year 1628. And tho' after ſo long a Time this cannot be proven, yet the proving immemorial Poſſeſſion is found equivalent; or elſe they have Rental-bolls paid them, & *eo caſu* they have the ſole Probation likewiſe, they proving Twenty Years Poſſeſſion of upliſting Rental-bolls, condeſcending upon the Quantity and Quality. Or in the Third Caſe, the Heretor has Tacks of their own Teinds for Payment of Silver-duty; and then there is Joint-probation allowed both to Heretor and Titular: Albeit the Heretor have the Benefit of a Conjunct-probation, yet he may refer the Worth to the Titular's Oath before Witneſſes be received, but not after, *February* 21. 1622. But where the Titular has the ſole Probation, the Heretor cannot *eo caſu* lead any Probation of the Stock, except it be for Certification, *id eſt*, except where the Heretor ſummons the Titular, who was in Poſſeſſion of drawing of the Teind, to prove the Worth thereof; with Certification to him, if he appear not, the Heretor will prove the Worth of the Stock, *quo caſu* the Fourth Part is declared to be Teind, *February* 19. 1634. and *February* 24. 1643. Where the Stock and Teind are valued jointly, the Teinds are made the Fifth Part, but where the Titular and Tackſman has the ſole Probation, the Heretor has the Fifth Part down, as *the King's Eaſe*; and therefore, where the Titular takes a Diet for proving of the Teind by itſelf, the Heretor may take the ſame Diet to prove the Stock, that in caſe the Heretor fail, he may have *the King's Eaſe*, *July* 8. 1642. Where there is Joint-probation of Stock and Teind, the preſent Rent ſhould be proven, as well as the Rent in all Time coming, elſe the ſame is null, *January* 19. 1631.

THERE are Two Diets granted for Probation in this Court; and if the Firſt be not made Uſe of, the Term may be circumduced, and the Second will not be granted, *February* 2. 1643. and tho' Diligence be extracted after the Diet, yet if it be extracted before the other Party crave the Term to be circumduced, the ſame will be ſuſtained, *November* 22. 1634.

BY this Act alſo it is declared, That where Valuations are lawfully led againſt all Parties having Intereſt, and allowed, they ſhall not be called in Queſtion at the Inſtance of the Miniſter, not being Titular; nor at the Inſtance of His Majeſty's Advocate for his Annuity, except the Colluſion be proven to have been to the Diminution of the Third of the juſt Rent preſently paid; and therefore all Reductions upon this Head are at the Inſtance of His Majeſty's Advocate. But it may be doubted, whether His Majeſty has any Intereſt where the Party has bought his own Annuity, tho' it may be alledged, that even in that Caſe the Decreet is reducible, together with the Alienation founded thereupon, if ſubſequent to the Decreet, becauſe the Exchequer has ſold upon a Miſtake, occaſioned by the Colluſion, albeit *regulariter* with us Venditions are not quarrellable, as in the Civil Law, tho' made *infra dimidium*.

By

ACT By this Clauſe it is likewiſe declared, That this Colluſion ſhall be probable by the Parties Oaths; and thereupon it has been doubted, whether this Clauſe be excluſive of other Probation. And in *Meldrum*'s Caſe againſt *Tolquhon*, before the Commiſſion in *January* 1672. it was found, That a Decreet of Valuation might be reduced upon this Clauſe, if it were proven by Witneſſes that the Valuation was led far within the Third of what the Teinds were then worth.

XX. and XXI. THESE Acts are but Temporary.

XXIII. BY this Act the Liberties of the *College of Juſtice* are reſtricted to *the Senators of the College of Juſtice*; and this is the firſt Time that the Senators of the College of Juſtice were divided from the other Members; but thereafter, the Privileges of the Senators are communicated to Advocates, Writers, and Others, by the 23. *Act*, *Parl.* 1. Ch. II. *Vide Obſerv.* on that Act.

XXIV. THIS Act anent the Privileges of Royal-Burrows, is innovated by, and therefore ſhall be explained in the 5. *Act*, 3. *Seſſ.* 2. *Parl.* Ch. II.

XXV. THIS Act gives a very large Commiſſion to the Lords of Secret-Council, to grant to the Juſtices of Peace, and Conſtables, whatever Power the Parliament could have granted them; but this being in Effect but a Commiſſion, may be alledg'd to expire with the King and Parliament who gave it, as all Mandates laſt no longer than the Mandator; and the Power being given to the Privy-Council indefinitely, without adding, *for the Time being*, it may be urg'd, That it could laſt no longer than that Commiſſion of Council; and from this many new Doubts may be ſtarted, which ſhall be elſewhere conſidered; but however the Council does ſtill grant Inſtructions by Virtue of this Act.

XXVI. THIS Act, impowering the Lords of Seſſion to exact 12 Penies of the Pound of all Sums decerned by them, is now obſolete.

XXVIII. THIS Act concerning the Privileges of Baronets, is fully explained in my Treatiſe of Precedency; but from this Act it is obſervable, that the Convention of Eſtates have been in Uſe to ratify and approve general Orders granted concerning Honours, tho' it be generally believed, that the Convention of Eſtates can only grant voluntary Taxations, and nothing elſe; and I formerly obſerv'd that they were in Uſe to regulate the Mint alſo.

XXIX. *VIDE Obſerv.* on *Act* 13. *Parl.* 18. Ja. VI.

XXX. THO' by this Act the Clan-*Grigor* were aboliſh'd, and they ordain'd to alter their Sirname becauſe of their Bangſtry; yet becauſe of their good Services done to His Majeſty during the late Rebellion, they were reſtored in *Anno* 1661.

IT has been always believed, that no Clan or Family can change its Sirname in *Scotland*, without expreſs Act of Parliament or Act of Council; for that might occaſion great Confuſion, and might be a Ground of cheating the People in their Evidents and Securities. But any private Man may, as we ſee daily in Tailies; and it does not follow, that becauſe the Parliament only can force Men to change their Sirname, that therefore they cannot do it voluntarily themſelves.

XXXI. BY this Act it is expreſly declared, That becauſe particular Acts of Parliament, and Acts of Ratification, are made without hearing of Parties, that therefore the Lords of Seſſion ſhall judge in theſe Caſes, without Reſpect to theſe Acts, according to the private Intereſts of Parties. The immediate Occaſion of making this Act, was the Caſe betwixt *John Stewart* of *Coldinghame* and the Earl of *Home*, which was this:

THE Earl of *Bothwel* having been forfeited, the Priory of *Coldinghame* was diſpon'd by the King to the Earl of *Home*, which Earl of *Home* ſet in Tack a Part of the Teinds of the ſaid Priory to the Laird of *Wedderburn*; but thereafter the Earl of *Home* having entred in a Tranſaction with *John Stewart*, Son to the Earl of *Bothwel*, he ſuffers, by Colluſion, a Decreet of Parliament to paſs in *Anno* 1621. whereby *John Stewart* was not only rehabilitate as to his Blood, but the Forfeiture reſcinded, in ſo far as concerned his Right to the Priory of *Coldinghame*, upon a Pretext that he had a *Commendam* of it ſettled in his Perſon before his Father was forfeited; whereupon *Douglas* of *Evelaw* purſuing the Laird of *Wedderburn* for a Spuillie of Teinds in *Anno* 1627. he obtains a Decreet, notwithſtanding of very unanſwerable Grounds then alledged, becauſe the Lords of the Seſſion would not call in Queſtion the Act of Parliament 1621, notwithſtanding of the Act *Salvo* ſubjoined to the Acts of that Parliament; for the Lords found, that the Seſſion, as an inferior Judicature, could not canvaſs ſpecial Acts of Parliament: But becauſe the Subjects might be extremely prejudged

judged in their private Rights by ſuch Acts of Parliament, therefore the foreſaid Clauſe was inſerted in this Act, and that it might extend to this Caſe, tho' anterior, it is expreſly declared in this Act, that this was the Meaning of all former Acts *Salvo*; and accordingly the Lords of the Seſſion did, in *February* 1679. repone the Laird of *Wedderburn* to debate upon his juſt Rights, notwithſtanding of the Act of Parliament 1621.

ACT XXXI.

By this Act, ſeveral private Rights and Ratifications are excepted from this Act *Salvo*; but ſince the Act *Salvo* proceeds upon the Principle of Natural Reaſon and Juſtice, it ſeems that even theſe Exceptions are queſtionable, for elſe the Act *Salvo* ſhould ſignify nothing; for theſe who had the Intereſt to obtain private Acts of Parliament, would likewiſe have the Intereſt to get them excepted from the Act *Salvo*. And upon this Reaſon it was doubted, and not decided, whether Exceptions from the Act *Salvo* made in private Rights, tho' not repeted in the Act *Salvo*, were ſufficient to ſecure theſe Rights againſt the Act *Salvo*; for tho' it might be alledged, that in theſe there is a Speciality from this Caſe, ſince the Act *Salvo* being poſterior and ſimple, annuls and derogates from the former Reſervation; yet even there it may be alledged that it cannot derogate, ſince in the former ſpecial Act, the Parliament declared their ſpecial Inclination that it ſhould not derogate.

*Nota*, The Act *Salvo jure* is never voted in Parliament, becauſe it is but an Act in Courſe; and for the ſame Reaſon Ratifications are not voted now, ſince no Man can be concern'd in either; albeit of old, I find that Ratifications were paſt in Parliament in the Form of Decreets, and ſo muſt have been voted; but it ſeems ſtrange, why Acts for granting of Mercats, and impoſing Cuſtoms for the maintaining of Bridges, ſhould not be voted. And in the Parliament 1681. the Reports of the Articles thereof, as to theſe, paſt the laſt Day without being voted, which was oppos'd by ſome as irregular, becauſe there the Conſent of ſome Parts of the Nation was requiſite. But I conceive, that this likewiſe proceeded from the Numerouſneſs of the Things that were brought in, and the general Acquieſcence of the Members, and the Time they were to ſit being ſo ſhort, and it ſeems ſecurer to ſettle theſe by a Vote.

# King CHARLES II.

## PARLIAMENT I.

### SESSION I.

ALBEIT King *Charles* II. did hold a Parliament at St. *Johnſtoun*, in *Anno* 1650. yet *This* Parliament, being the firſt after His Majeſty's happy Reſtauration, is by the Inſcription, intitled, *The Firſt Parliament of King* Charles II. tho' that Parliament 1650. is not reſcinded by the general Act Reſciſſory, which is the Fifteenth Act of this Parliament; nor by any other ſpecial Act: And ſo that Parliament ſtands ſtill in Force; ſo that this Inſcription ſeems unwarrantable.

I. THE Rebellious Parliaments in the former Age, did chooſe their own Preſident, tho' the Chancellor ought to have preſided in all Courts, as is inſinuated by the 40. *Act*, *Parl.* 5. Ja. V. but this they did, to have the Preſident of Parliament depend upon them, and not upon the King; and therefore by this Act it is declar'd, that the Chancellor is *ratione officii, to preſide in all public Judicatures where he is preſent.*

*Obſerv.* I. That this Act ſays, *That the Lord Chancellor, and ſuch as ſhall be nominated by His Majeſty, ſhall preſide*; and therefore if the King pleaſe, He may nominate another Preſident, tho' the Chancellor be preſent: And I find that His Majeſty has nominated others to preſide where the Chancellor was preſent.

*Obſerv.* II. That tho' (when the Chancellor is abſent) His Majeſty can only nominate another Preſident; yet this does not exclude His Majeſty's High Commiſſioner from the Power of nominating a Preſident, ſince he has *mandatum cum libera*; and *Middleton* did nominate the Earl of *Crawford* to preſide in this Parliament, when *Glencairn*, then Chancellor, went to *London*.

*Obſerv.* III. That the Chancellor is to preſide, not only in the Parliament, but in all other public Judicatures; and therefore tho' it was pretended by the Treaſurer, that notwithſtanding of this Act, the Chancellor could not preſide in Exchequer, tho' he was named in the Commiſſion; becauſe the Exchequer was rather the King's Chamberlain's Court, than a public Judicature, in which the Treaſurer was chiefly intruſted, becauſe he was chiefly to be anſwerable; yet this Pretence was groundleſs, ſince the Exchequer is a Judicature which hears, and diſcuſſes Cauſes, relating to the Revenue, and is declar'd a Judicature by the 18. *Act*, *Parl.* 1. Ch. I. But by a Letter in *Anno* 1663. the Chancellor is diſcharg'd to preſide in Exchequer; and this ſhews His innate Power to diſpenſe with Acts of Parliament, which relate only to Government, and His own Service.

*Obſerv.* IV. That tho' by Virtue of this Act, it may be pretended that the Chancellor may preſide in the Juſtice, or Admiral Court, if he pleaſes to be preſent; yet I conceive he cannot come to any of theſe Courts, without a ſpecial Nomination: And even this Act ſays, *That the Chancellor, and ſuch as ſhall be nominate by His Majeſty, ſhall preſide.*

THIS Act likewiſe ſets down the Oath of Allegiance, wherein the King is acknowledg'd to *be Supreme over all Perſons, and in all Cauſes*; which is founded upon the 2. *Act*, *Parl.* 18. Ja. VI. and is the Foundation of the *Act of Supremacy*; which is the firſt Act of the 2. *Parl.* Ch. II.

II. THE Parliament 1641. had taken from the King, the Nomination of the Officers of State, Counſellors and Judges; and therefore by this Act, the Power of nominating theſe, *Is declar'd to be a Part of the King's Royal Prerogative*, which is conform to the Law of all Nations, *l. unica. ff. ad l. Jul. de ambitu. Hæc lex hodie in urbe ceſſat, quia ad curam principis Magiſtratuum creatio pertinet, non ad populi favorem:* By this Act alſo, *It is declar'd that our Kings hold their Royal Power over this Kingdom from God*; which was expreſt here, to condemn that fundamental Treaſon of the laſt Age, which taught, *That the King was ſubject to His People*, becauſe, *He deriv'd His Power from them:* And from that they inferr'd *their Power of reforming*; and at laſt, *of depoſing the King*.

BUT leſt it might have been obtruded, that tho' by this Act it be declar'd, *That the King holds His Power from God alone*; yet the Holding it from *God*, did not exclude the Intereſt of the People; for all Men hold of God, whatever they hold of others: Therefore by the 5. Act of this Parliament, *It is declar'd, that our Kings hold their Crowns from God Almighty alone:* And leſt it might ſtill have been ſaid, *That tho' the King holds His Power of God, yet He derives His Power from His People*; therefore the Convention of Eſtates in their Letter to the King, 1678. and the Eſtates of Parliament, in the 2. *Act*, 3. *Parl.* Ch. II. *Anno* 1681. acknowledge, *That He derives His Power from God alone:* And tho' Conventions of Eſtates cannot make Laws; yet it may be ſaid, that they may declare and acknowledge their Obedience as fully as Parliaments may.

*Obſerv.* THAT theſe Words, *To hold the Crown from God*, is ill expreſt; for by our Law, *he that holds from me, holds not of me*; for *a me & de me*, are diametrically oppoſite in Matters of Holdings.

III. THE former rebellious Parliaments, eſpecially the Convention of Eſtates, 1643. did ſit without a ſpecial Warrant from His Majeſty; and therefore by this Act, *The Power of Calling, Holding, Proroguing, and Diſſolving of Parliaments, is declar'd to be inherent only in His Majeſty, as a Part of His Royal Prerogative*; and therefore the 6. Act of this Parliament, annulling in ſpecial Terms the ſaid Convention, 1643. was unneceſſary.

I conceive that the Word *Proroguing* here, is us'd for *Adjournment* only, tho' the Word in its Property ſignifies only to *adjourn*, ſo as to make all the Overtures paſt in that Seſſion, to be null, which Diſtinction is unknown to, and unneceſſary with us.

THE Impugners, or Contraveeners of this Act, are declar'd by this Act guilty of Treaſon.

IV. BY this the former Acts againſt Convocations, and Leagues, or Bonds, are ratify'd, and diſcharg'd under the Pain of Sedition; and the keeping of all Aſſemblies and Meetings, upon Pretence of preſerving the King's Majeſty, or for the public Good, are declar'd unlawful, notwithſtanding of theſe Gloſſes, except in the ordinary Judicatures. The Deſign of which Act was occaſioned by, and levelled againſt ſuch Meetings, as the Green Tables in *Anno* 1637. whereat the Nobility and Gentry did formally meet in great Numbers, tho' their Papers did always begin; *We the Noblemen, Gentlemen, and others occaſionally met at* Edinburgh.

V. THE former rebellious Parliaments having rais'd Armies, fortify'd Gariſons, and treated with the *French* King, without the Authority of their own King; it is therefore declar'd by this Act, *That the Power of making Peace and War reſides ſolly in His Majeſty; and that to riſe, or continue in Arms, or to make any Treaties, or Leagues with foreign Princes, or amongſt themſelves, ſhall be Treaſon.*

*Obſerv.* I. THAT by this Act the *King is declar'd to have the only Power of riſing Armies, and making Gariſons*, the Subjects always being free of the Proviſion, and Maintenance of theſe Forts and Armies; and therefore it was aſſerted, that free Quarter, except in the Caſe of actual Rebellion, was unlawful, and that even then it behov'd to be warranted by a Parliament, or Convention, tho' it ſeems, that Rebellions may be ſo ſudden, or Parliaments and Conventions ſo dangerous, that free Quarter may be warranted by the King's own Authority in Caſes of Neceſſity; and if any Part of *Scotland* ſhould riſe in Rebellion, it is not imaginable that they will either give Quarter for Pay, or deſerve to be pay'd; and ſo to refuſe the King the Power of free Quartering, without Parliament, or Convention, in that Caſe, were to deny Him the Power of raiſing an Army, without which it cannot be maintain'd. But free Quarter is expreſly diſcharg'd by the 3. *Act*, *Parl.* 3. Ch. II.

ACT

*Obſerv.* II. SOME likewiſe think by this Clauſe, that tho' the King may force Towns, and adjacent Countries, to carry Baggage and Ammunition of His Soldiers, the public Good ſo requiring; yet He muſt pay them for it; ſince by this Act, the King is to pay for the Proviſions, as well as Maintainance of the Army; and to take away Countrymen's Horſes without Pay, is as great a Tax upon them, as free Quarter: But yet our Kings have ſtill been in Uſe, by immemorial Poſſeſſion, to exact ſuch Carriage without Payment; and ſo the only Doubt remains, whether this Act innovates the former Cuſtom? And whether the Subjects, not ſeeking Payment, being *meræ facultatis*, preſcrives againſt them, *jus non petendi?*

*Obſerv.* III. IT has been controverted, whether tho' by this Act the King may diſpoſe upon all Forts, Strengths, and Gariſons, if He can thereby make any private Man's Houſe a Gariſon, that was not ſo originally; it being pretended, that if this were allow'd, no Man can be ſure of his Dwelling-houſe, which is the chief Part of his Property; but it cannot be deny'd, but that all Houſes with Battlements, or *turres pinnatæ*, as *Craig* obſerves, are *inter regalia*; and of old could not be Built, without the King's ſpecial Licence: And as to theſe, the King may Gariſon them; for ſince He has the abſolute Power of making Peace and War, it were abſurd to deny Him the Power of gariſoning convenient Places, without which the War cannot be manag'd.

IT having been controverted, whether the Earl of *Caithneſs* might Gariſon one of his Caſtles, without expreſs Warrant from the Council; they found he could not, tho' it was alledg'd that he was a Stranger in *Caithneſs*, and the Country was broken: For this Act of Parliament having diſcharg'd all gariſoning of Houſes, upon any Pretext whatſomever, if it ſhould be allow'd upon ſuch Pretexts as this, not only would the expreſs Letter of the Law be overturn'd, but all Perſons diſſaffected might Gariſon upon this Pretext; whereas on the other Hand, there can be no Inconveniency, ſince the Council will allow Liberty to Gariſon; and if preſent Danger do preſs the Heretor, he may Gariſon his Houſe for his own Defence, till he obtain that Order.

VI. THIS Act annulling the Convention of Eſtates 1643. was unneceſſary, it being formerly annull'd by the Third Act of this Parliament.

VII. THIS Act declaring *the League and Covenant* null, and the Diſcharging the renewing thereof, under the higheſt Peril, ſeems unclear, becauſe of the Indeterminatneſs of the Puniſhment, and ſeems unneceſſary, becauſe by the Fourth Act of this Parliament, Subjects making Leagues amongſt themſelves, or with Foreigners, are guilty of Treaſon.

VIII. THIS Act does in the firſt Part command all Jeſuits, Prieſts, and traffiquing Papiſts, not to ſay Maſs, and to remove forth of the Kingdom within a Month, under the Pain of Death; whereupon it was doubted, whether within that Month, they could be puniſhed with Death, elſe this Month had not only been eluſory, but might have prov'd a Snare, ſince they might have thought that this Month was allow'd for preparing for their Departure, and ſo they might have appear'd, and gone about their Buſineſs in order thereto.

BY the ſecond Part of this Act, Children are ordain'd to be taken from Parents, Tutors, or Curators, Popiſhly affected, that they may be bred with well affected Proteſtants, at the Sight of His Majeſty's Privy Council; which Act is renew'd by a Proclamation of Council, in *January* 1679.

IX. THO' the Parliament 1648. be here ratify'd; yet it is thereafter abrogated by the general Act Reciſſory, which is the Fifteenth Act of this Parliament, that not having been reſolv'd upon till after this was paſt.

THE Parliament 1649. is by this Act abſolutely reſcinded, and that without a general *ſalvo*; and tho' by the Act Reſciſſory, there is a general *ſalvo* in Favours of the Rights, and private Securities paſt in other Parliaments, as is clear by the laſt Words of the Fifteenth Act, yet there is none ſubjoyn'd to this Parliament.

THAT Parliament 1649. had taken from Patrons the Power of preſenting, they having conceiv'd it moſt Antichriſtian, that the Miniſter who was to care for Souls, ſhould be choſen by one Man, and oft-times by one who would never hear him; but they reſerv'd to the Patron the Right of Teinds, without Prejudice to the preſent Stipend; and therefore that Act is hereby reſcinded, and Patrons reſtor'd to the Power of Preſentation: And tho' it cannot be deny'd, but that the People had a Share in the Elections, as is clear by St. *Cyprian*'s Epiſtles, yet this was when they pay'd them, and were themſelves very judicious, and dis-intereſted in the Infancy of Chriſtianity, and before Patrons had by founding Churches, the Intereſt they have now; and now the People are by an Edict cited to declare what they know, why ſuch a Man ſhould not be choſen: And in the reform'd Churches of *Germany*, as *Carpz.* in his *jus Conſiſt.* relates, the People have *vocationem*; from which the Presbyterians borrow'd their Word *Call*.

BY

ACT By this Act it is declar'd, *That ſuch Parſons, and Miniſters, as are in preſent Poſſeſſion of Kirks belonging to Laic Patrons, ſhall claim no Right, nor Poſſeſſion, but what they had before the making of this Act, they being otherwiſe ſufficiently provided.*

X. THIS Act was unneceſſary, becauſe theſe Parliaments are taken away in the general Act Reſciſſory.

XI. THIS Act appoints all Officers of State to take the Oath of Allegiance, and to aſſert under their Hands, all the former Royal Prerogatives; but now the Council do put the ſame to all who are ſuſpected; and fine or baniſh ſuch as refuſe to take it, becauſe the Act having left to the Council to put this Oath to any, and having nam'd no Penalty, the Penalty is to be underſtood arbitrary. But now all who are in public Truſt, take the *Teſt* appointed by the 6. *Act*, 3. *Parl.* Ch. II.

XII. THIS Act confirms all judicial Proceedings, under the Uſurpers, except when they were quarrel'd within a Year; and this Act having appointed, that within that Time, the Sentences of the Uſurpers might be quarrel'd, without Suſpenſion, or Reduction; and the Writ by which they were quarrel'd, was call'd a Review, which was in Effect a Reduction, and was like both in the Name and Matter, to that *reviſio* allow'd by the civil Law.

XIII. and XIV. THE Uſurpers having, by the Example of our rebellious Parliaments, laid on an Exciſe upon Beer and Ale, this Loyal Parliament did grant His Majeſty 40000. Pounds Sterling, to be uplifted yearly out of the Cuſtom and Exciſe, in Manner mentioned in the Fourteenth Act: But it has been much doubted, whether it had not been better to have continued the Exciſe upon the Beer and Ale, than to have laid it upon the Malt; for now Brewers endeavour to take as many Pints out of the Boll of Malt, as they can, which hinders much the Conſumption of the Malt, by making the Drink weak; whereas if it had been laid upon the Drink, they would have endeavoured to make the Drink ſtrong. And for which Exciſe, the Commiſſioners of the reſpective Shires, are liable perſonally, and they have their Relief off the Deficients, the Goods of which Deficients, are hereby to be poinded, without carrying them to the Mercat-croſs, they being appriſed at the next Paroch Church-door, which is like the Privilege given to Miniſters Stipends, by the 21. *Act* of the 3. *Seſſ.* of this Parliament.

THO' by this Act, the Exciſe is laid upon the Retailer of Commodities; yet by the 12. *Act*, *Parl.* 2. Ch. II. *The Importers are declar'd to be liable for the ſame Exciſe.*

XV. AFTER this Parliament had reſcinded ſome private Parliaments, they conſidered that all the Parliaments from the Year 1640. till the Year 1650. were but Branches of one and the ſame Rebellion; and therefore they did annul them all by this Act, which is call'd, *The Act Reſciſſory:* But private Parties Rights, obtain'd in theſe Parliaments, are *ſalved.* In this Act, it is acknowledg'd by the Parliament, *That our Kings hold their Crowns immediately from God Almighty*, which was done to exclude that Rebellious, Republican, and Sectarian Principle, *That our Kings deriv'd their Power from the People*; for if ſo, then the People might call them to an Account, depoſe, or ſuſpend them: And our very Stiles, which acknowledge our Kings to be *by the Grace of God*, does convince us, that they are not Kings by the People; and therefore *Argentorat. pag.* 206. obſerves well, that *formula illa quæ eſt in Titulis Dei Gratia, utuntur illi ſoli qui nulli mortalium imperium ſuum debent, vid. Obſ.* on the 251. *Act*, *Parl.* 15. Ja. VI.

XVI. THIS Act allowing the Government by Synods, Presbytries, and Seſſions, is reſcinded by the 1. *Act* of the 2. *Seſſ.* of this Parliament.

XVII. THIS Act appointing *a Solemn Anniverſary Thankſgiving for His Majeſties happy Reſtauration*, was ſcrupled at, becauſe this Act did appoint it to be ſet apart as a Holy-day; and therefore it was thought fit by the 12. *Act* of the 3. *Seſſ. Parl.* 2. Ch. II. to renew it as an *Anniverſary Thankſgiving*, leaving out the Word *Holy-day*.

XX. THIS Act againſt Curſing and Beating of Parents, is fully explain'd, *Crim. Pract. Tit.* Paricide.

XXI. THIS Act is explain'd *Crim. Pract. Tit.* Blaſphemy.

ACT XXII. THIS Act concerning caſual Homicide, is explain'd *Crim. Pract. Tit.* Homicide; but it is fit to add here, that the Rubric of this Act of Parliament bearing, *Act concerning the ſeveral Degrees of caſual Homicide*, is very ridiculous, for the Degrees mentioned in the Act, are caſual Homicide, Homicide in lawful Defence, and Homicide committed upon Thieves; and no ſober Lawyer can think, that either Homicide in Defence, or Homicide committed upon Thieves, are Degrees of caſual Homicide.

XXIII. BY this Act, the whole Privileges belonging to the College of Juſtice, that is to ſay, *Senators, Aavocates, Clerks, Writers, and remanent Members*, or whereof they have been in Uſe, or in Poſſeſſion at any Time bygone, are expreſly ratify'd, and that notwithſtanding of whatſoever Act, Cuſtom, or Practice to the contrary, *Vid. Act*, 8. *Parl.* 2. *Seſſ.* 2. Ch. II. where the Privilege of Immunity from Taxes, is only given to the Lords of Seſſion.

UPON which Act, it was debated in *December* 1678. whether Advocates ſhould not be free from the Annuity impos'd by the Town of *Edinburgh*, ſince they were by this Act freed from all Impoſitions: And tho' by a ſpecial Act of this ſame Parliament, *Charles* II. the College of Juſtice was made liable to the Annuity; yet they being free by this Act, and the other Act being but an unprinted Act, and an Act to which they were not call'd, their Privilege could not be thereby taken away; albeit it was contended, that the being free from Annuity was no Privilege, ever expreſly declared in their Favours: But on the contrary, was a Debt upon them, *as Hearers of the Word of God*; and ſo the Parliament might very well, by a general Law, declare this Privilege, not to prejudge the Annuities; nor was that Law concerning Annuities, a ſpecial, but a general Law, binding all the People who came to live in *Edinburgh*; and therefore there needed no Party be cited, nor was it neceſſary to the Eſſence of an Act of Parliament, that it ſhould be printed.

XXIV. BY this Act the Creditors of the Defunct are preferr'd to the Creditors of the appearand Heir, as to all Execution againſt the Defunct's Eſtate, they doing Diligence within Three Years after the Defunct's Death, which Three Years was found to be *tempus continuum*, and not *utile*, and that theſe Three Years did run even *contra non valentem agere*, *December* 19. 1678. *Paterſon* contra *Bruce*. The Reaſon of which Act of Parliament is, that it is juſt that every Man's Eſtate ſhould pay his own Debt, tho' upon the other Hand it is likewiſe juſt, that in the next Place, the appearand Heirs Creditors may likewiſe do Diligence, even againſt that Eſtate, to which their Creditor may ſucceed, nor ought his voluntary lying out to prejudge them; for which Cauſe likewiſe it is, that they may charge the appearand Heir to enter, and compriſe, or adjudge the Predeceſſor's Eſtate.

XXV. BY this Act it is ordain'd, *That Forty Days after the Sentence of Excommunication, Letters may be raiſed at His Majeſty's Advocate's Inſtance, for denouncing the Perſons excommunicate, Rebels*; the Proceſs being firſt reviſed by the Lords of the Seſſion: But this Power of the Lords of the Seſſion being made before the Biſhops were reſtored, is abrogated by the 23. *Act* of the 3. *Seſſ.* of this Parliament.

XXVI. BY this Act, the Perſon from whom Goods were ſtoln, is to have his Goods, or the Value thereof reſtor'd to him out of the readieſt of the Thief's Goods, he always purſuing the Thief to Sentence.

*Obſerv.* I. SINCE this Act reſerves to the Sheriff, or Takers of the Thief, the Expence war'd out by them in taking the Thief and putting him to Execution, it ſeems that they ought to be preferr'd to the Owners of the Goods, tho' the Act ſays, *That he is to be paid out of the readieſt.*

*Obſerv.* II. IT may be doubted, whether the Juſtices, or the Judge-ordinary ſhould reſtore; and tho' the Juſtices have no civil Juriſdiction, yet I have ſeen them reſtore in ſuch Caſes: And this is in Effect an incident Juriſdiction, *ob continentiam cauſæ*.

*Obſerv.* III. THAT it has been doubted, whether Third Parties buying the Goods, tho' in a public Mercat, are obliged to reſtore.

XXVII. THIS Act, pardoning penal Statutes, ſeems by a Miſtake to except Uſury; for Uſury is properly a Crime puniſhable by all Law, at all Times: Whereas a penal Statute is properly a Statute, which puniſhes a Delinquency that is only puniſhable upon ſome Occaſions by an arbitrary Puniſhment; and therefore Acts of Grace, or general Indemnities, diſcharging the Execution of penal Statutes, ſhould no more be extended to Uſury, than it ſhould be extended to Murder or Adultery; and Uſury is by the Act of Indemnity, which is the 29. *Act*, 3 *Seſſ*, of this Parliament, excepted from that Indemnity amongſt Murderers, Thefts, and other Crimes of that Nature; and it was excepted only in this Act *ad majorem cautelam*, becauſe the Chancellor had then the Gift of Uſury.

What are properly counted penal Statutes may be ſeen *Act* 9. *Parl.* 21. Ja. VI. where amongſt other Crimes, Uſury is ordain'd to be puniſhed, and not to be pardoned as a penal Statute; and if Uſury fell under penal Statutes, it would very much encourage Uſury; for Men would ſtill expect a Diſcharge of it, becauſe penal Statutes are frequently diſcharg'd; But yet the Lords in the Caſe betwixt the Laird of *Haining* and *Cruik*, found that Uſury was diſcharg'd by the *Act of Grace*, 1674. becauſe of the ſpecial Conception of that Act.

XXVIII. BY this Act the *Quotes* of Teſtaments are taken from the Commiſſars; but upon the reſtoring of Biſhops, this Act is abrogated by the Firſt Act and Second Seſſion of this Parliament.

XXIX. THIS Act is formerly explain'd, *Act* 177. *Parl.* 13. and *Act* 10. *Parl.* 18. Ja. VI.

XXX. THIS Act is formerly explained in the 14. *Act*, *Parl.* 1. Ch. I.

XXXI. BY this Act, all Compriſings are to be allow'd within Sixty Days after the Date thereof, with Certification, that if they be not allow'd and recorded within that Space, a poſteſterior Compriſing firſt recorded ſhall be preferr'd thereto: And upon the 8. of *June* 1665. the Lords, upon a Supplication, ordain'd a Compriſing to be allow'd, tho' the Perſon againſt whom the Compriſing was led was dead, and the Sixty Days were expired; and found, that notwithſtanding thereof, it ſhould be preferr'd to a Compriſing, whereof the Allowance was regiſtrated after its Regiſtration.

*Obſerv.* II. That by this Act, a Compriſing is not declar'd null for not being allowed, and ſo was not excluded by a poſterior Appriſing firſt allowed, but both were brought in *pari paſſu*; which laſt Part of the Deciſion may ſeem ſtrange, ſince it is expreſly declared by this Act, that the not Allowance ſhall be with Certification, *That a poſterior Compriſing firſt allowed, ſhall be preferr'd according to the Date of the Allowance, November* 29. 1672. *Maxton* contra *Cuningham*; and ſo they could not come in *pari paſſu*. But the Reaſon of this Deciſion muſt be, that by the poſterior Act 62. of this ſame Parliament, *all Compriſings led within Year and Day of others, are ordain'd to be brought in* pari paſſu: And theſe Compriſings have been led within Year and Day, tho' the Deciſion mention not this. And this I find decided, *July* 17. 1668. *Stewart* contra *Murray*.

*Obſerv.* III. That if the Appriſer has obtained Infeſtment without Allowance, he will be preferr'd; becauſe (as I think) his Infeſtment being regiſtrated, in that Caſe ſupplies the not Regiſtration of his Allowance, and certiorates ſingular Succeſſors ſufficiently.

*Obſerv.* IV. This Act narrates, That it was ordain'd formerly by Act of Secret-Council, that the whole Compriſings, and not a Breviate, ſhould be regiſtrated: Which not being authorized by any Law or Act of Parliament, is therefore diſcharg'd. From which it appears, that the Secret-Council uſe not only to make Acts relating to Government, or to regulate Prices of Writs, as appears by the 19. *Act*, 23. *Parl.* Ja. VI. or to diſcharge Bakers, and Candle-makers to keep their Broom-ſtacks, or Melting-houſes within Towns, as in the 29. *Act*, 23. *Parl.* Ja. VI. but even to make Acts relating to Regiſtration and Competition of Writs; which tho' the Parliament does here openly condemn, yet tacitely this Act declares their Act was no Law; and they could leſs have made ſuch an Act, than the Lords could have made an Act of Sederunt, ordaining Saſines within Burgh to be regiſtrated, which they found only the Parliament could do; and it is obſervable alſo, that this Act of Council did therefore ſoon run in Deſuetude, and the Parliament confirms the contrary Cuſtom.

*Obſerv.* V. This Act narrates, That by a Cuſtom, Allowances of Appriſings did contain and expreſs the Names and Deſignations of the Appriſers, the Names of the Defenders, (whereas it ſhould have ſaid *Debitors*, tho' the Debitor be a Defender in the Compriſing, which is a Decreet) the Debts for which the Compriſing is deduc'd, the Meſſengers and the Clerks Names, the Date of the Executions, the Witneſſes Names thereto, and the Superiors Names; which Cuſtom being authorized by this Act, it may be doubted, if the omitting any of theſe Particulars in the regiſtrated Allowance would annul the ſame, ſince the Act does not ſubjoin an Irritancy.

XXXII. THE Difference concerning heretable and moveable Bonds, is fully explain'd in my *Inſtit. Part.* 2. *Tit.* 2.

XXXIV. BY this Act, theſe who marry themſelves clandeſtinely, or inorderly, are to be impriſoned for Three Months, and beſide to pay, each Nobleman a Thouſand Pounds, each Baron and Landed-Gentleman a Thouſand Merks, each Gentleman and Burgeſs Five Hundred Pounds, each other Perſon an Hundred Merks.

*Obſerv.* I. The Want of the Parent's Conſent, or of the Conſent of Others having Intereſt, ſeems by the Narrative, to infer the Clandeſtineneſs of the Marriage: But yet by our Practique, Children marrying without the Conſent of their Parents, if they be of Age, and

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the Marriage otherwiſe regular, they are not puniſhable, wherein we ſeem to agree rather with the Council of *Trent*, than either with the Law of God, *Exod.* 22. and 17. *Numb.* 30. *Deut.* 7. 3. or the Civil Law, *Inſtitut. de Nuptiis, & L.* 2. *ff. de Ritu. Nupt.*

*Obſerv.* II. That it may be doubted, Whether ſince this Act appoints no Puniſhment to Women, if a Noblewoman, being an Heretrix, marry a Gentleman diſorderly, ſhe may be puniſhed as a Noblewoman, or he only as a Gentleman? And I think ſhe ſhould be puniſh'd as a Noblewoman, having Precedency as ſuch.

*Obſerv.* III. That it has been doubted, If an Expectant having Power to Preach, and being appointed a Presbyter, but having no ſettled Kirk, and marrying Perſons, the Marriage can be puniſhed? Or, If ſuch as marry by a lawful Miniſter of another Paroch, without Warrant, either from the Biſhop or the Miniſter of their own Paroch, may be puniſhed by this Act?

*Obſerv.* IV. By the 9. *Act, Seſſ.* 3. *Parl.* 2. Ch. II. ſuch as enter into theſe diſorderly Marriages loſe their *jus mariti*, or *jus relictæ*, by and attour the Penalties here expreſſed.

*Obſerv.* V. That the marrying in *England* or *Ireland*, without Proclamation of Banns in *Scotland*, and againſt the Order obſerv'd in this Church, infers the former Fines: But the marrying without Proclamation of Banns, is not *per ſe* ſufficient; and therefore if there be a Diſpenſation from the Biſhop, *quær.* If the Marriage is not clandeſtine? And it ſeems it is not; for the Biſhop may be miſinformed, as if the Woman wanted Parents. And by the Narrative of this Act, the Want of the Parents Conſent is made an Impediment, as well as the having granted a prior Promiſe to another; and therefore, as the Biſhop's Warrant ſhould not defend in the one Caſe, ſo neither ſhould it in the other; but it is ſtill *periculo petentis*, elſe Biſhops ſhould innocently become the Inſtruments of robbing us of our Children and Eſtates, and of taking them away in ſuch Manner, as that Parents can neither ſee their Daughters provided to competent Jointures by the Huſband, nor the Huſbands who marry them ſufficiently provided by the Father-in-law. *Quær.* 2. Whether is the Conſent of the Mother neceſſary when the Father is dead? And I conceive it is, eſpecially when ſhe is intruſted by the Father, and the Child ſtays with her; for (tho' the Daughter be not *in poteſtate materna*, yet) ſhe is a Parent; and this Act requires *the Conſent of Parents*; and the *Inſtitutes* tell us, that *naturalis & civilis ratio requirit conſenſum parentum.* Nor can it be denied, but the Mother has an equal natural Relation; and by this Intereſt, Law encourages and rewards the Mother's Pains. *Quær.* 3. What if the Parents refuſe reaſonable Offers, and yet the Child is marriageable? To which it is anſwered, That the Conſent ſhould be firſt ask'd, and why they refuſe, that the Judge may, when the Parent thereafter complains, conſider if the Parent was culpable in refuſing his Conſent. *Quær.* 4. If the being married by their own Miniſter, without Proclamation, or Diſpenſation from the Biſhop, be ſufficient; and tho' the Miniſter have a Warrant from the Biſhop, yet by Act of Synod, *he is diſcharged to marry in a private Houſe, except the Warrant diſpenſe therewith expreſly.*

XXXV. THIS Act ſhall be explain'd in my Obſervations on the 21. *Act. Parl.* 3. Ch. II.

XXXVI. BY this Act it is ordain'd, *That none ſhall have Right to any Benefices till they take the Oath of Allegiance*; and if the Patron omits this, not only is the Preſentation to be null, but the Right of Patronage as to that Vacancy, belongs to the King.

XXXVIII. THIS Act is formerly explain'd in the 8. *Act, Parl.* 22. Ja. VI.

XXXIX. BY this Act, His Majeſty and Parliament having erected Fiſhing-Companies, do declare, *That Salt, Cordage, Hemp, &c. imported for the Trade of Fiſhing, ſhall be free of any Cuſtom or Impoſition*; but yet by the 12. *Act*, of the 2. *Parl.* Ch. II. *the Importers of foreign Salt, are to give Security for Payment of the Exciſe, whether the Salt be employed for ſalting of Fiſhes or not*; but there is Allowance to be given to the Exporters for what ſhall be prov'd to have been employ'd upon Fiſhing.

It is obſervable likewiſe from this Act, That His Majeſty, by His Sovereign Authority, and Prerogative-Royal, without ſpeaking any Thing of the Conſent of Parliament in this Clauſe, declares, *That the Ships and Furniture employ'd in Fiſhing, ſhall not be arreſtable by Creditors, nor the Perſons purſu'd before any Judicature.* And it may be doubted, how this is conſiſtent with the Property of the Subject: Or whether this would defend againſt criminal Purſuits. The Word *Attachments* here expreſt, properly includes criminal Actions, *ſed nulla excuſatio prodeſt adverſus præcepta ei, qui cum leges invocat, adverſus eas committit, L. auxilium, ff. de minor. in fin.* And tho' it may be anſwered to the other Doubt, That the Parliament conſented to this leſſening of Property, yet it is clear, that the Prerogative, and not their Conſent, is only mention'd, except we conſtruct their not oppoſing it to infer a Conſent. And it may be rather urged, that the Parliament has acknowledged that this is the King's Prerogative in Matters of Trade.

ACT XL. THIS Act, encouraging Manufactories, by diſcharging the Cuſtom or Exciſe due upon the Materials, to be therein employed, is much leſſened by an Act of Exchequer, whereby it is declared, That theſe Materials are only to be free, which the Maſters of the Manufactory bring home upon their own Riſque; becauſe this Act, and the 48. Act, in Favours of Soap-work, does ſay, *That ſhall be imported for the Uſe of Manufactories.* And another Deciſion of Exchequer, whereby it is declared, That theſe are only to be accounted privileg'd Manufactories, where the Species of the Thing manufactured is altered; and therefore it was pretended that the Suggar-works were no Manufactory, becauſe they only refine Suggar that is brought in.

It has been likewiſe debated, whether Materials imported for Manufactories, are by this Act free from paying Cuſtom or Exciſe; ſince the Act only ſays, *That Oyl, Dying-Stuffs, Potaſhes, or any other Materials uſual for Manufactories, ſhall be free of Cuſtom, Exciſe, and other public Dues; and that all Cloths, Stuffs, Stockings, and other Commodities to be exported by them, ſhall be free of Cuſtom and Exciſe for Nineteen Years,* muſt be ſubjoin'd both to the Export and Import, both theſe being in one Sentence, and not divided by a *Punctum*, but by a *Semicolon*: By which we are to obſerve, that not only the right Wording, but the right Pointing of Acts of Parliament are to be obſerved. But in my Opinion, the Materials are ever to be free, and the Export is only to be free for Nineteen Years; which is clear, not only from the Wording of this Act, but likewiſe from the 48. Act of this ſame Parliament.

XLI. BY this Act, any Perſon incloſing his Ground at the Sight of the Sheriffs, Stewarts, *&c.* may caſt about the Highway Two Hundred Ells; and where Incloſures fall to be upon the Borders of any Perſon's Inheritance, the next adjacent Heretor is to be at equal Pains in Building, Ditching, and Planting that Dike which divideth their Inheritance. Which laſt Clauſe was found to be only conceiv'd in Favours of thoſe who had required the Neighbouring Heretor, becauſe he might have employ'd his own Servants, or Materials. But yet the Lords, in the Caſe of *Garleton* againſt *George Seton, February* 1679. found, *That if the Neighbouring Heretor was not required, they would abate to him in the Modification what he might have ſaved by uſing his own Servants and Materials.* By the 17. *Act, Parl.* 2. Ch. II. it is added, *That the Sheriffs, and Juſtices of Peace, may force the neighbouring Heretor to ſell as much of his Lands as may cauſe the Dike or Ditch to run upon even Ground, or as may be capable of a Dike or Ditch, where the Builders own Ground is incapable of either Dike or Ditch. Bacon*'s Hiſtory *Henry* VII. obſerves, That that King reſtricted the Frequency of Incloſures, becauſe much Graſs could be managed by a few Herdſmen, which occaſioned a great Decay of Infantry, Towns, Taxes, Tithes. *Vide Pag.* 73. of that Hiſtory.

XLVI. BY this Act, *broken Copper, and Braſs, are diſcharged to be exported*; and the Reaſon truly is, becauſe it hinders the Manufactory of making Things of Braſs or Copper within the Kingdom; but yet becauſe there was ſo much allowed to be taken for broken Braſs and Copper exported by the Book of Rates; which ſeem'd to imply that Exporting was allow'd, and that this Act had not been in Obſervance; therefore the Council diſcharg'd the Confiſcation *quoad* Bygones, preceeding 1684. but diſcharg'd Exportation for the Future. And it muſt be noticed, that Cuſtom is impoſ'd by the Books of Rates upon many Things that cannot be exported.

XLVII. THIS Act *diſcharging Trades-men to import made Work, and declaring the one half to belong to His Majeſty,* is not ſo well obſerv'd as in Reaſon it ought to be, ſince it makes them lazy in improving the manufactorable Commodities of our own Nation: But it may be doubted, whether this Act does not alſo diſcharge the Importation of all ſuch made Work, by Merchants as well as Trades-men, ſince this diſcourages Manufactories more than the other; for it is leſs probable they who can make ſuch Work, will bring it Home; and why ſhould ill Work be confiſcated, when made by our own Trades-men, whilſt any ill Work may be brought from abroad? And the Words of the Act being, *The Parliament inhibits and diſcharges all Trades-men to import made Work, or any ſuch Ware brought Home by Merchants.* The Prohibition may by the particle *or*, be extended to made Work, brought Home by Merchants; to which nothing can be anſwered, but that the Rubric bears, *Act diſcharging Trades-men to import*; this ſelling was diſcharg'd formerly to Crafts-men only, Ja. II. *Parl.* 14. *Act* 67. Ja. III. *Parl.* 2. *Act* 12. and *Parl.* 14. *Act* 107. But it is alledg'd, that ſome Work cannot be ſo well made; and that our own Trades-men would Extortion us, if we were not in a Capacity to overawe them by bringing Home made Work; and yet to encourage our own Work-men, there is double Cuſtom laid upon all Foreign made Work by the Book of Rates, and Ten *per Cent.* by a late Proclamation, which being joyn'd with the Sea-riſk that thoſe run who bring Home made Work, and the Exchange pay'd for the Price of it, is a ſufficient Encouragement to our own Trades-men; who, becauſe they may live cheaper, may likewiſe work cheaper than thoſe abroad, even beſide theſe other Encouragements.

XLVIII. THIS Act in Favours of Sope-work, ſeems needleſs, becauſe it was comprehended under the general Act concerning Manufactories, being the Fortieth Act of this Parliament; but probably it has been thought neceſſary for clearing the Time, for which the Privilege of Manufactories was to endure, as has been obſerv'd upon that Act.

XLIX. THO' by this Act it be declar'd, that upon the bringing down the Annualrent to Six of the Hundred; that Six is declar'd to be free of all Retention, or other public Burdens; yet ſubſequent Parliaments have burdened, even the Annualrents with Retention, and otherwiſe, expreſly contrary to this Act, upon Pretext that the Impoſitions were voluntar Offers, and not formally Impoſitions.

*Nota.* IT may be doubted, if the King's Officers may not lawfully ingage for more than Six *per Cent.* to get Money for public Uſe.

LI. BY this Act it is declar'd, that all Sums whereupon no Infeftments have follow'd, may be arreſted, tho' they be heretable otherwiſe of their own Nature; and becauſe *regulariter* heretable Sums are not arreſtable, therefore this Diſpenſation was neceſſary.

ALBEIT this Act bear only, *That Sums whereupon no Infeftments have follow'd, be arreſtable*; and determines not, if Arreſtments may be us'd at his Inſtance, to whom ſuch Sums are due; yet *a paritate rationis*, this may follow.

LII. THIS Act is formerly explain'd in the *Act* 7. *Parl.* 1. Ja. VI.

LIII. THIS Act is only a Ratification of the 10. *Act*, of the 1. *Parl.* of *Charles* I. ſave only that it is here declar'd, *That notwithſtanding of this Act, any who have gotten, or ſhall get any new Infeftment of Superiority of Kirk-lands, the ſame ſhall ſtand good, as to ſuch Vaſſals who have given their Conſent to the ſaid Right of Superiority, in regard that ſuch a Conſent, as to His Majeſty, is of the Nature of a Reſignation of their Property, in Favours of the ſaid Superior, to be holden of the King; but Prejudice nevertheleſs to His Majeſty, of His Highneſs Right of Reverſion, of the Feu-farm-duties, and Caſualities, conform to the foreſaid Act of Parliament* 1633. The Deſign of which Clauſe was, to ſecure ſuch Lords of Erection, as had got Bonds from their Vaſſals, holding Kirk-lands of them, to continue their Vaſſals and not to hold of the King, notwithſtanding of the Act of Parliament 1633. *declaring the King to be the Superior of all Kirk-lands:* And albeit the Lords did not think that the ſingle taking of an Infeftment from a Lord of Erection, did infer the Conſent mentioned in this Act; after giving of which Conſent, the Vaſſal could not return to be the King's Vaſſal; yet upon the 28. of *July* 1669. in a Caſe betwixt the Duke of *Hamilton* and *Weir* of *Blackwood*, the Lords found, That ſuch a Conſent as this might be inferr'd by Preſumptions, ſhewing that the Vaſſal deſign'd to oblige himſelf to hold of the Lord of Erection, and not of the King; and in that Caſe they found, That *Blackwood*'s Father having granted a Bond, that ſo ſoon as the Duke ſhould obtain the Superiority, his Son ſhould become his Vaſſal; and tho' the Duke had not then obtain'd it, yet he has ſince; the Lands being lately diſſolv'd from the Crown; and tho' the Father was but a Tutor, yet he was the Perſon who was inſtrumental to ſettle his Son in the Right; and the reſt of the Vaſſals of that Abbacy, did take their Lands expreſly, holden of the Duke only: But in my Opinion, no Conſent can be founded upon by this Clauſe of the Act of Parliament, except it be a clear and expreſs Conſent, to hold only of the Lords of Erection, and not of the King, it being ſo much the Intereſt, both of King and People, that the Subjects ſhould hold of the King; and the Parliament, 1633. having ſo clearly introduc'd in the Favours of Vaſſals of erected Church-lands, that they may hold of the King, it were hard to take that Benefit from them without their expreſs Conſent.

LIV. FOR underſtanding this Act, it is fit to know, that becauſe Titulars of Prebendaries, Chaplainries, and Altarages cannot be infeft, and that there is nothing ſtanding in any Regiſter, to ſhew who is Titular; therefore ſingular Succeſſors who are Vaſſals, could not know by whom to enter; to ſupply which, this Act provides that *the Vaſſals of the ſaids Proveſtries, Chaplainries, and Altarages, and others of that Nature, may be infeft by the Laic Patrons, holding immediately of the King*; becauſe it is eaſie to diſcover by the Regiſters, who is Laic Patron of the Benefice, ſince it paſſes by Infeftment: But yet the Laic Patron is to have no Advantage; and ſo the Liferent-eſcheat will not fall to him as Superior, but will belong to the Titular, who is true Superior; nor can the Laic Patron purſue Reduction: But yet it ſeems that ſince the Vaſſal did enter by him, that therefore he is bound, both to produce to him, and that he will have Right to the Emoluments of the Superiority, except the Vaſſal can ſhow who is the true Superior.

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*Nota.* THAT when the Patron preſents in ſuch Caſes, he needs not the Conſent of the Chapter, or Convent of the ſaids Prebendaries; and the Provoſt and Baillies are declar'd the only undoubted Superiors, where ſuch Benefices ly within their Towns, they having formerly been Patrons of theſe Chaplainries, which *ablative abſolute poſiti* ſeem to import a Condition, and ſo they muſt prove that they were formerly Patrons.

LV. ALBEIT by this Act it be appointed, that there ſhall be a Cocquet for every Ship, and that there ſhall be Forty Shilling pay'd for it; yet it was alledg'd that a general Cocquet, for a Ship, was not ſufficient; but that every Merchant ſhould have a ſpecial Cocquet, containing ſpecially his Goods, and enumerating particularly all the Kinds of theſe Goods; becauſe, *Firſt*, The Deſign of Cocquets was, to know whether the Goods belonged to Free-Traders; which could not be done, if the Goods and Merchants Names were not condeſcended on particularly; nor could it be known, if His Majeſty's Dues were pay'd for the Goods, for which the Cocquets were granted. 2. It were unjuſt that a great Ship with rich Wares ſhould pay no more than a ſmall one with coarſer Goods. 3. By the Cuſtoms of *England*, and other Countries, there were for theſe Reaſons, ſpecial Cocquets given for proportional Dues. 4. By the 255, 256, and 257. Acts of the 15. *Parl.* Ja. VI. *The Cocquets are to contain the particular Quantities of the Goods*; *Vid. Obſerv.* on theſe Acts.

LVI. THIS Act is explain'd in the 11. *Act*, *Parl.* 18. Ja. VI.

LVII. THIS Act diſcharges the Cuſtom of Two and a Half *per Cent.* and all raiſing of His Majeſty's Cuſtoms, directly, or indirectly, without Conſent of Parliament: And ſo tho' by the 27. *Act* of the 3. *Seſſ.* of this *Parliament*, aſſerting His Majeſty's Royal Prerogative in the ordering of Trade with Foreigners; it ſeems that His Majeſty may lay what Reſtraints and Impoſitions He pleaſes upon Foreign imported Commodities, and as He pleaſes; yet it ſeems the Cuſtoms by this Act cannot be rais'd: For tho' that Act be poſterior, yet this is ſpecial, and is not particularly abrogated; albeit by that Act, all Acts and Statutes contrary to that Act, are abrogated. By this Act likewiſe, His Majeſty diſcharges *the taking Maſters, Merchants, and Mariners Oaths in the Matters of Cuſtoms*; but ſince their Oaths are taken in the Matters of Exciſe, this Privilege ſignifies nothing, *Vide Obſerv.* on the *Act* 12. *Parl.* 2. Ch. II.

LIX. THIS Act is explain'd in the Obſervations upon the 18. *Act*, *Parl.* 1. Ch. I.

LX. THIS Act allows any of His Majeſty's ordinary Officers, to whoſe Charge the ſame belongs, to docquet *Signatures*; and by ordinary Officers, I think are only meant, *Officers of State*; and this was formerly eſtabliſhed by the 20. *Act*, *Parl.* 10. Ja. VI. But by this Act is added, That *theſe who do docquet, ſhall ſend a double of the Docquet to the Secretary to be regiſtrated*; but yet the Deed is not annull'd, tho' this be omitted: And therefore the Deed I think would ſubſiſt, but the Omitters would be puniſh'd. The Reaſon why a Double is to be regiſtrated, is, becauſe by this His Majeſty may know what is formerly granted, which will prevent double Gifts of the ſame Thing.

LXI. THIS Act is formerly explain'd in the former Commiſſions for Plantation of Kirks, *viz.* Ja. VI. *Parl.* 22. *Act* 3. Ch. I. *Parl.* 1. *Acts* 8. and 19.

LXII. THIS Act for the moſt Part is but Temporary, and was made to give ſome Eaſe to the poor Debitor, whoſe Lands had been ſo waſted and burdened in the late Rebellion, that he could neither pay Annualrent, nor redeem Compriſings, or Wadſets, as formerly, being founded upon the ſame Reaſon, by which the *novæ tabulæ* were introduced in *Rome* by *Julius Cæſar*, after the Civil Wars betwixt *Pompey* and him: But the chief Things obſervable in it, are Firſt, That the Legal Reverſion of all Compriſings to be led, or that were led ſince *January* 1652. whereof the Legals are expired, and all Compriſings whereof the Legals were not expired before that Month, ſhall endure for Ten Years; and tho' it might have been pretended, that this Act does not prorogate the Reverſion, but only makes the Lands to be redeemable, and ſo the Rents of the laſt Three Years above the Seven, which was the ordinary Legal, was not to be reſtored, but that the Compriſer had Right to them, as *fructus bona fide percepti & conſumpti*: Yet the Lords found that the Compriſer was countable for his Intromiſſion, even for theſe Three Years, ſince in Effect theſe Three Years are added to the Reverſion, and ſo the Compriſer is liable for theſe Three Years, as he would have been for the other Seven, *January* 20. 1666. *Clapperton* contra *Torſonce*.

ALBEIT by our former Law, the Compriſer could have poſſeſs'd the whole Rents of the compriſed Lands during the Legal; yet in reſpect the Rents do often exceed very far the Annualrents; therefore by this Law, Allowance is given to the Lords of Seſſion, to reſtrict the Compriſer to ſuch Part of the Land as will pay him the Annualrent of his Sum and

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Expence: The Debitor from whom the Lands were compriſed, ratifying the Appriſers Poſſeſſion of the reſt; but it is ſtill to be remembred, that after the Legal is expired, the Compriſer has undoubted Right, and cannot be limited.

UPON this Clauſe of the Act, the Lords upon the 27. of *June* 1662. reſtricted *Wilſon* who had compriſed Sir *William Murray*'s Eſtate, to meddle with any Part of the Eſtate compris'd that he pleas'd, effiering to Eight *per Cent.* he counting for the Superplus above this Annualrent, and for the public Burdens; but thereafter in *February* 1684. in a Caſe betwixt *Wilſon* and Sir *Alexander Home*, it was contended, that this Clauſe was a Part of the temporary Regulation paſt in Favours only of ſuch Debitors as had taken the Benefit of this Act, by Payment of their Annualrents, and was only ill plac'd here amongſt the Clauſes, relating in general to Compriſings, for it was againſt the whole Current of our Laws, that during the Legal, the Creditor who was forc'd to want his Money, ſhould be forc'd during the long Legal of Ten Years, to accept of naked Annualrent; eſpecially ſeeing oft-times they got Land at laſt, that they could not ſell, nor car'd not for the Poſſeſſion of it; nor would this ever ſpur, and excite Creditors to pay the Sums compris'd for, and this was a very univerſal Prejudice, moſt Part of Rights being now founded on Compriſings; and the Practique being ſingle, and not upon Debate, was not to be reſpected. To which it was anſwered, *That the Clauſe was oppon'd, and it was dangerous to alledge that Clauſes were tranſplac'd by Miſtake; nor could any Thing gloſs a Law better than a Deciſion paſt ſo recently, after the Act made*: At the making of which Deciſion, many eminent Perſons were preſent who had been the very Penners of the Act, and the Reſtriction was moſt reaſonable; for ſince great Eſtates were to be carry'd away by Compriſings for ſmall Sums, it was juſt that till the Compriſing expir'd, the poor Debitor ſhould be favour'd: Nor was the Creditor a Loſer, ſince a Compriſing being a legal Pledge only for his Money, he got the Annualrent duly pay'd him, and a Ratification of his Poſſeſſion, even during the Legal: And if his Money was not pay'd *cum omni cauſa*, with Annualrent, for his very Expence he got the whole Land, tho' the Sum were never ſo ſmall; upon which Debate, the Lords adher'd to the former Deciſion, tho' it ſeems very ſtrange to the beſt Lawyers. The Lords likewiſe found upon the 28. of *July* 1671. That this Power granted to them, was only in Favours of the Debitor, from whom the Lands were compriſed, and could not be extended in Favours of poſterior Compriſers, who could not upon this Clauſe crave, that the firſt Compriſer ſhould be reſtricted to his Annualrent; for the Privilege is granted to the Debitor in Contemplation of his being oblig'd to ratifie: Nor are the ſecond Compriſers prejudged by the firſt Compriſer's Poſſeſſion, ſince it will extinguiſh his compriſing *pro tanto*, and make Way for them.

BY this Act alſo, all Compriſings led ſince the firſt of *January* 1652, before the firſt effectual Compriſer, or after, but within Year and Day of the ſame, ſhall come in *pari paſſu*, as if one Compriſing had been led for all the Sums. Upon which Clauſe it is obſervable, 1. That Compriſings led ſince 1652, come not in with Compriſings led before that Year, tho' within Year and Day thereof. *December* 12. 1666. *Home* contra *Home*.

FOR clearing this and all other Acts of Parliament, which appoint Diligences to be done within Year and Day; it is fit to know, that the Year is the Time deſign'd by theſe Acts, and the Day is adjected only *ad majorem evidentiam*; and therefore *dies ille inceptus pro completo habetur*, *February* 25. 1680. *Weddel* contra *Salmon*; where the Husband was found to have the Tocher, tho' the Wife liv'd not the intire Day following the Year, but died in the Morning of that adjected Day.

*Obſerv.* II. THAT the firſt effectual Compriſing is interpreted to be a Decreet of Appriſing, whereupon Infeftment follows; and therefore if the ſecond Compriſing be led within Year and Day, after Infeftment was taken upon the Firſt, it will not come in *pari paſſu* with it, except it be within Year and Day of the Decreet of Appriſing; for the firſt Compriſing was expired, and ſo the next Creditor could compriſe nothing, ſo that his Compriſing could not come in *pari paſſu*; which was ſo decided, albeit it was alledged, That by this Act, *all Compriſings led within Year and Day are*, fictione juris, *to be repute as if one and the ſame Compriſing had been led for all the Sums contained in all theſe Compriſings*, quo caſu *one of the Creditor's Rights could not have expired in Prejudice of another*. And in Effect this Year is a new Prorogation of the Legal *quoad* that Con-creditor who has led his Compriſing within Year and Day of the other, *July* 4. 1671. Laird of *Balfour* contra *Douglas*.

UPON this Clauſe it was alſo debated very ſubtilly, whether an Infeftment of Annualrent having interven'd betwixt a prior Compriſing and other poſterior Appriſings, could be preferr'd to the poſterior Appriſings; for all theſe Compriſings having been led within Year and Day, it was alledged, That by this Statute they behoved to come in *pari paſſu*, as if one Compriſing had been led for all; and therefore ſince the Firſt was preferable to the Infeftment of Annualrent, ſo ſhould the reſt, tho' poſterior to it. But to this it being anſwered, That the Meaning of the Act was, *That Compriſings led within Year and Day, ſhould come in* pari paſſu *only in Competition with one another*; but that Infeftments of Annualrents, or other Rights, could not be poſtpon'd to poſterior Rights, for which Annualrents, if the Creditor had com-

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pris'd, he had been preferr'd: The Lords brought them all in *pari paſſu*, the Matter being dubious, and the Doubt ariſing on the Unclearneſs of a new Statute, *February* 6. 1673. *Brown* of *Calſton* contra *Nicolas*; which ſhews what *επιεικεια*, the Lords have, and what is done for clearing of new Statutes.

*Obſerv.* III. That this Computation is only to be made with reſpect to the firſt effectual Compriſing; and therefore tho' it be extinguiſhed by Diſcharge or Intromiſſion, yet the Third Compriſer will not, upon this Act of Parliament, come in *pari paſſu* with the Second, upon Pretence that the Second becomes Firſt, by extinguiſhing the firſt Compriſing, *December* 13. 1672. *Street contra* the Earl of *Northesk*.

*Obſerv.* IV. That this Act of Parliament being correctory of a former Law, was found not to be drawn back, ſo as to make ſuch as intrometted prior to that Act obliged to communicate their Intromiſſions before the Act, tho' their Compriſings were led within Year and Day, the Intrometter having been *bona fide poſſeſſor*, *January* 7. 1665. *Graham* contra *Brown*. But yet ſome think, that after the Act the firſt Compriſer will be liable for his Intromiſſions, and to communicate them with a ſecond Compriſer, compriſing within Year and Day from the very Date of the ſecond Compriſing, and not from the Date of a Citation only: For tho' it may be alledged, that before a Citation a Firſt Compriſer is *bona fide poſſeſſor*, and is not obliged to know that there was a ſecond Compriſing, or whether he was paid *aliunde*; yet to this it may be anſwered, That by this Act the firſt Compriſer is to count as if the ſame Compriſing had been led for both the Debts, *quo caſu* Intromiſſions would have been communicated even before Citation. And by the foreſaid Deciſion the Lords found, That *bona fides* defended only as to Intromiſſions prior to the Act; *ergo* it did not defend as to Intromiſſions ſubſequent to the Act.

*Obſerv.* V. That this Clauſe of the Act is ſomewhat innovated by the 22. *Act*, *Seſſ.* 3. of this Parliament, whereby in Favours of thoſe poſterior Compriſers who bought in the firſt Compriſing, to prevent its Expiration, it is declared, *That the firſt Compriſing ſo ſtanding in their Perſon, ſhall not be brought in* pari paſſu *with other Compriſings, tho' led within Year and Day.* But it being doubted, whether that Act of Parliament ſhould only ſecure ſuch as were neceſſitated to buy in the firſt Compriſing, becauſe that ſeems to be the Deſign of the Legiſlator; yet the Lords extended it to all Compriſings ſo bought in, the ſtatutory Words being general, *December* 9. 1664. *Vetch* contra *Williamſon*.

*Obſerv.* VI. That ſince poſterior Compriſers were brought in *pari paſſu* with the firſt Compriſer, it was juſtly ordered by this Act, *That the Firſt Compriſer ſhould be paid of his Expences by the poſterior Compriſers*; which was found to extend to all the Expences laid out by the firſt Compriſer, who is to contribute no Part thereof himſelf, that being all he has in Recompence of their coming in *pari paſſu*. But *quæritur*, Whether if one of theſe Compriſers were only purſuing to come in, if he would be obliged to pay all the Expence, or *pro rata* off his Sums? And I think he would be obliged to pay all, reſerving his Relief.

It is likewiſe doubted, whether one of many Compriſers, coming ſo in, will have Right to any, more than proportionally to his Sums, all the reſt remaining with the firſt Compriſer till the reſt of the Compriſers ſeek to come in? Or if that Compriſer will force the firſt Compriſer to divide with him, according to the Proportion of their Two Sums only, without reſpect to the other Compriſers, till they come in.

*Obſerv.* VII. That Compriſings led for real Debts, and *debita fundi*, remain as formerly; ſo that Compriſings led within Year and Day of theſe, come not in *pari paſſu* with Compriſings led upon theſe real Debts, ſuch as Ground-annuals, Annualrents due upon Infeftments, or Sums whereupon Inhibition was raiſed. For clearing whereof it is fit to know, that *debita fundi* are either when Lands are burdened by an expreſs Act of Parliament, which makes the Burden real, and to affect the Ground againſt ſingular Succeſſors. Or 2. What is paid to a Superior as a Part of his *Reddendo*, are likewiſe *debita fundi*, and do in like Manner affect the Land.

*Obſerv.* VIII. That tho' Adjudications and Compriſings have generally the ſame Privileges, yet where Adjudications are not led for liquid Sums, but are granted by the Lords for completing Diſpoſitions and Rights made by the Party, where the Granter refuſes to complete the Right himſelf; in that Caſe, ſuch Adjudications come not in *pari paſſu* upon this Clauſe, *July* 16. 1675. *Campbel* of *Riddoch* contra *Stewart*, *December* 2. 1676. Lady *Frazer contra* Creditors of the Lord *Frazer*.

By this Act alſo it is declared, *That if the appearand Heir, or any Perſon to his Behoof, ſhall buy in any expired Compriſings, the ſaid Compriſings ſhall be redeemable by poſterior Compriſers from the appearand Heir, or his Confident, for Payment of the true Sums paid out by them, and that within Ten Years after the ſaid Right was acquired.* LXIII.

*Obſerv.* I. That tho' this be a correctory Law, and ſo ought not to be extended, yet it is ſo favourable, that the Lords extended the ſame to Rights bought in by eldeſt Sons, whilſt their Father lives, tho' the eldeſt Son cannot be properly call'd in that Caſe an appear-

ACT and Heir, ſince an appearand Heir is only he who can ſucceed *in hæreditatem jacentem*; but the Lords would not extend it to the Right of an Appriſing bought by the Husband, where his Wife was appearand Heir. For tho' the Lords found this reaſonable, yet they found the Act to be *ſtricti juris*, and ſo would not extend it to this Caſe, except it could be alledged that the Sums were truly paid for the Wife's Behoof, and the Lands provided to her Heirs: And ſome doubt, whether Compriſings bought in by the Tutors and Curators of appearand Heirs, be redeemable upon this Act. And ſince their Pupils may oblige them to diſpone the ſaids Rights to them, tho' the Compriſings were bought in, in the Tutors and Curators own Name, if they had as much of the Pupil's Means in their Hands; it ſeems that by the ſame Reaſon, the Pupil's Creditors, who compriſe *omne jus* that was ſtanding in their Perſon, ſhould have the ſame Privilege.

*Obſerv.* II. Tho' this Clauſe runs only in Favours of Appriſers, from which it may ſeem that they are only allow'd to redeem, yet the Lords decided, *January* 9. 1677. *Hay* contra *Gregory*, That a Creditor having an Infeftment of Annualrent, might redeem from a Compriſer who excluded him: And it ſeems by that Deciſion, that any Creditor may have this Benefit as well as Compriſers, ſince they may compriſe. Nor are the ſtrict Words of the Act to be conſidered; for elſe Adjudgers could not redeem, ſince they are not nam'd in the Act.

By this Act alſo, not only the Appriſing is redeemable, but even Bonds granted for the Sum thereafter compriſed for, are null, if the Appriſing be ſatisfy'd as ſaid is, ſo that appearand Heirs cannot make Uſe of the Bond, or Inhibition upon it: And tho' a Diſpoſition was bought in by the appearand Heir before the Act of Parliament; yet if the Infeftment was taken after the Act, the Compriſing was found redeemable by the Act: For it is the Infeftment, and not the Diſpoſition, which gives the Right; becauſe if a Third Party had been firſt infeft, he had been preferr'd to the appearand Heir, notwithſtanding of this Diſpoſition, *July* 21. 1671. *Maxwel* contra *Maxwel*. In which Caſe it was alſo found, That tho' the Act bears, *That expired Compriſings bought in by the appearand Heir, ſhould be redeemable*; yet if the appearand Heir buy in a Compriſing *in curſu*, the ſame will be redeemable if it expire whilſt he had Right to it. So that upon the whole Matter it is obſervable, that even correctory Laws with us are to be extended in favourable Caſes, ſo far as to make them anſwer the Deſign of the Legiſlator, which is to help the Ill that was to be corrected.

*Obſerv.* III. That this Privilege is allowed to the ſecond Compriſer, not only by Way of Order of Redemption, but even by raiſing an ordinary Action; ſo that if he raiſe that Action within Ten Years, the Lords will find the ſame ſufficient, providing he has rais'd a Declarator concluding Count and Reckoning within the Ten Years; which the Lords will ſuſtain by Way of Reply, being propon'd upon *Incidenter* in the ordinary Action for Payment, *June* 26. 1677. *Kincaid contra* Laird *Abergeldie*.

*Obſerv.* IV. That theſe Ten Years run from the Infeftment taken by the appearand Heir, or ſome other public Deed, as Decreets, &c. done upon the Right ſo bought in, elſe the apperrand Heir might keep his Rights latent for Ten Years, and conſequently the Creditors could not redeem, becauſe they could not know them.

It is fit to know, that by our Law Wadſets are either proper or improper: A proper Wadſet is, where Lands being impignorated for a Sum, the Rents of the Land are accepted in Satisfaction of the Annualrents of the Money, and that without any Reſtriction upon either Side. And as to theſe Wadſets, it is by this Act ordain'd, That the Wadſetter ſhall be obliged upon Offer of ſufficient Surety by the Lender, either to quite his Poſſeſſion, or reſtrict himſelf in his Poſſeſſion to his Annualrent, counting for the Superplus. But this Act innovating the private Paction of Parties, was found only to oblige the Wadſetter to be countable from the Date of the Offer of Surety, and not from the Date of the Act of Parliament, *February* 21. 1666. Lord *Borthwick contra* his Wadſetters. But in this Computation the Wadſetter is to get Defalcation of what he hath depurſed upon Reparations, or hath loſt by Quarterings, or any other Manner of Way. Improper Wadſets are theſe, whereby it is expreſly declared, *That the Wadſetter ſhall not be liable to any Hazard of the Fruits, Tenents, Wars, or Troubles*; ſo that the Wadſetter is to have Repayment of theſe by and attour the Rents of the Lands, which are declared to be Uſurary in Time coming, and the Wadſetter in all ſuch Wadſets taken ſince the Year 1649. is obliged to count for the Superplus more than pays his Annualrent, and to impute the ſame *pro tanto*, in Payment of his principal Sum.

LXIV. *Nota*, This Act of Adjournment is the Firſt that I find in all the preſent Impreſſion of the Acts of Parliament; for Parliaments were of old diſſolv'd, but now they are ordinarily adjourned, and the Act of Adjournment is neither touched with the Sceptre, becauſe it is an Act of the King's, and He needs not touch His own Acts; nor is it read in Parliament, becauſe by the very Adjournment the Parliament is diſſolv'd, and it being no more a Judicature, nothing can be read in it.

But by the 12. *Parl.* Ja. I. by the *Black Acts*, I find, That *de mandato domini Regis Parliamentum fuit continuatum uſque ad feſtum beati* Joannis Baptiſtæ, *ſub præmonitione* 15. *dierum.* Whereas, tho' our Adjournments bear now no Days, upon which Premonition is to be made, yet when the King adjourns Parliaments by Proclamations, beyond the Days to which it was adjourned by Act of Parliament, He uſes to adjourn them upon the Premonition of Forty Days, and Fifteen was too ſhort.

It was doubted, Whether if the Day to which the Parliament was adjourned by Proclamation was elapſed, a new Parliament behoved to be called; or if the current Parliament ought to be adjourned by a new Proclamation, notwithſtanding the Day was elapſed: And it was found, that it might be adjourned, ſince the Power of calling and diſſolving Parliaments is the King's Prerogative, and a Letter to this Purpoſe from the King is regiſtrated in the Council Books, in *July* 1683.

# PARLIAMENT I.

## SESSION II.

I. EPISCOPACY having been reſtor'd in *Anno* 1606. Biſhops were by the rebellious Parliaments aboliſh'd; and therefore are, by this Act, reſtor'd to their *undoubted Privilege in Parliament*, (that is to ſay, to be a Third Eſtate) their *Function, Dignities* and *Eſtates*; but before this Act of Parliament, the Secret-Council by their Act in *June* 1662. diſcharg'd any Perſon to meddle with their Eſtates or Revenues, in Obedience to a Letter directed by His Majeſty, which gave the firſt Riſe both to that Act of Council, and this Act of Parliament.

By the firſt *Act*, *Parl.* 12. Ja. VI. King *James* had permitted the Church to be govern'd by General Aſſemblies, Synods, and Presbyteries; which Act was not expreſly abrogated by the 2. *Act*, *Parl.* 18. Ja. VI. and therefore it is by this Act expreſly abrogated. They are alſo reſtor'd to their Commiſſariots, and *Quotes* of Teſtaments; but the preſent Commiſſars Rights are reſerv'd; and albeit they be reſtor'd to the Superiorities, yet Vaſſals having entered by, or having paid to the Superiors for the Interval, are ſecur'd.

II. BY this Act, taking up Arms (tho' in Defence of Religion) *is declared Treaſon*; and conform to this Clauſe, all going to Field-conventicles in Arms, was declar'd treaſonable; tho' it was alledged that this was not a riſing in Arms, ſince every Man went without knowing of his Neighbour; for the Council and Juſtices thought, that at this Rate a Multitude of arm'd Men might eaſily aſſemble; and the levying War, or taking up Arms being imperſonally diſcharg'd, it reaches every ſingle Man. And tho' there were only one ſingle Man in Arms, yet he would be guilty of Treaſon, eſpecially after that Proclamation; for he knew not but Others might be there, & *verſabatur in illicito.*

By this Act alſo, *all Acceſſion to the ſuſpending His Majeſty, or His Succeſſors, or to the reſtraining their Perſons, or inviting Foreigners to invade their Dominions, is declared Treaſon.*

There is one Branch of this Clauſe which may ſeem hard, but was neceſſary, *viz. Or put Limitations upon their due Obedience*; for the former Age and this, having invented new Treaſons, in aſſerting, *they would own the King, in as far as He would keep the Covenant, or own Jeſus Chriſt*; but reſerving ſtill to themſelves to judge how far the King did ſo, they did by a neceſſary Conſequence conclude, *That they were no further obliged than they pleaſed*; and ſo made themſelves in Effect Judges above the King: Than both which, nothing can be more treaſonable. And I remember that Sir *Francis Bacon*, in his Hiſtory of King *Henry* VII. tells us, *That the Judges of* England *found Sir* Robert Clifford *guilty of Treaſon*; becauſe he ſaid, *That if he knew* Perkin Werbeck *were King* Edward'*s Son, he would never bear Arms againſt him*, tho' the Words were alledg'd to be only conditional: For they thought it a dangerous Thing to admit *ands* and *ifs* to qualify Words of Treaſon, whereby any Man might expreſs his Malice, and blanch his Danger.

The denying His Majeſty's Supremacy, as it was then eſtabliſhed, is declared puniſhable by Incapacity, and ſuch other Puniſhment as is thereto due by Law; but it had been fitter to determine that Puniſhment. And from the Words as it is now eſtabliſh'd, it may be

ACT doubted, whether the impugning the Supremacy abſolutely be puniſhable by this Act, ſince the Supremacy is extended by a poſterior Act, *viz.* the 1. *Act*, 2. *Parl.* Ch. II. but that Act being only an Explication of this, all ſuch as impugn the King's Supremacy abſolutely, are puniſhable.

FROM theſe Words alſo, *That they ſhall be puniſhable by ſuch other Pains as are due by Law in ſuch Caſes*; it may be doubted what Puniſhment is due to ſuch as impugn the King's Supremacy, beſides Incapacity; and it ſeems they may be pannal'd upon the 129. and 130. *Acts*, 8. *Parl.* Ja. VI.

IT has been urg'd, *That all ſpeaking againſt the King's Prerogative, is only puniſhable by Incapacity and arbitrary Puniſhments*, becauſe this Clauſe ſays, *That if they Speak, Print,* &c. *againſt the King's Supremacy in Cauſes Eccleſiaſtic, or to juſtifie any of the Actings, or Practices abovementioned, they ſhall be ſo puniſhed*; but ſo it is, that all riſing in Arms to depoſe the King, *&c.* are abovementioned, *Ergo*, ſay they, *The ſpeaking, or preaching in Defence of theſe, is only to be ſo puniſhed*: And they urge this from the Principles of Reaſon, and the Practice of other Nations, and that excellent Law, *ſi quis imperatori maledixerit*; *Lib.* 9. *Tit.* 7. *C.* but this were a moſt abſur'd Gloſs: For certainly, if this Objection prov'd any Thing, it would prove, that no Words could infer Treaſon, which is expreſly contrary to the very Act, whereby all theſe Poſitions are declar'd Treaſon, and conſequently all Words whatſoever, which expreſs theſe Poſitions, are puniſhable as Treaſon. And it is fit to know that it is not that very *formula*, or Words, which are condemn'd, but theſe Poſitions are condemn'd, for elſe it were eaſie to make the Act eluſory, and to evade it, by uſing other Words, than the Words here ſet down; and the Analyſis of that Part of the Act is, that, 1. *The Poſitions are declar'd treaſonable.* 2. *The ſpeaking againſt the King's Supremacy, and the Eccleſiaſtical Government, as now eſtabliſh'd, &c.* is forbidden. 3. *The Plotting or Contriving any Thing againſt the King, conſequentially to theſe Poſitions, is declar'd puniſhable by Forefeiture.* 4. *That the ſpeaking,* &c. *againſt the Supremacy, and the eſtabliſh'd Government of the Church, is to be puniſh'd arbitrarily*; and the Words, *or to juſtifie any of the Deeds declar'd againſt by this preſent Act*, are to be reſtricted to Words relative to the Supremacy, *&c.* mentioned in that Clauſe only.

IT is alſo obſervable, That the impugning the Government by Biſhops, or the King's Supremacy, are only puniſhable, if they be purſu'd within Eight Months, and ſentenc'd within Four Months thereafter, and are only puniſhable by this Act, if it was done by malicious, and adviſ'd Speaking; and therefore it appears, that ſuch as were drunk, when they ſpoke theſe Words, are not puniſhable by this Act; nor ſuch as are reputed *fatuus* and Fools, tho' they be not declared Idiots, or Furious: And yet it ſeems that *all Writing, Preaching, and Prayers, and ſuch malicious Expreſſions, to ſtir up the People to a Diſlike of His Majeſty's Royal Prerogative and Supremacy in Cauſes Eccleſiaſtic*, are puniſhable indefinitely, and that becauſe either the Law preſumes they are premeditated; or becauſe of the great Danger ariſing therefrom, and therefore it will have them puniſh'd as ſuch; for the Act runs disjunctively, *Writing, Preaching, Praying, or adviſ'd and malicious Speaking.*

IV. THIS is the firſt Act whereby Conventicles are diſcharg'd, and in it they are call'd, *Nurſeries of Sedition*; but yet there is no penal Sanction againſt them in this Act; but by the 2. *Act* of the 3. *Seſſ.* of this *Parliament*, they are declar'd to *be fineable in a Fourth Part of the yearly Rent, every Burgeſs being to loſe the Privilege of his Burgeſsſhip, and Merchandizing, beſide the Payment of a Fourth Part of his Moveables.*

*Obſerv.* I. I ſee by this Act no Fine impoſ'd upon ſuch as Live within Burgh, and are not Burgeſſes.

*Obſerv.* II. BY this Act it is requir'd, *That before Withdrawers from public Ordinances be puniſh'd, they muſt be firſt admoniſh'd by the Miniſter, before Two Witneſſes*, which is not obſerv'd.

*Obſerv.* III. THE Council are impower'd by this Act to impoſe ſuch arbitrary Puniſhment as they pleaſe upon Withdrawers; but it is thought that ſuch general Powers cannot extend to Life, nor Limb.

*Obſerv.* IV. THAT theſe Acts are only to laſt for Three Years, and are by the 5. *Act* of the 2. *Seſſ.* of the next *Parliament*, continu'd for other Three Years, and further if His Majeſty pleaſes; ſo that it is in His Majeſty's Power to diſcharge theſe Acts, when He pleaſes.

BY the Laws of the Twelve Tables, private and clandeſtine Meetings, under Pretext of Religion, were diſcharg'd; and the Word *Conventicula*, is oft mention'd in the Civil Law, *l.* 1. *&* 3. *ff. de collegiis illicitis* Plin. *lib.* 10. complains of them as the *Peſt of the Empire* in theſe Words, *Hæc tempora, ſerio docent, magna monſtra talibus parentibus ali, nec quicquam in tota Republica magis eſſe perniciosſum*; *vid. de crimine Conventiculæ* Farin. *Quæſt.* 113. *inſpect.* 4. There is a Proclamation extant in the Regiſters of Council, in King *James* the Sixth's Reign, declaring all private Convocations, without the King's Conſent, and particularly Conventicles (which is the firſt Time I ſee them nam'd in our Law) to be puniſhable as Treaſon; for *Collegia & Conventicula permittere valde quidem eſt regale.* Argen. *Art. 56. Num. 37.*

ACT V.

THIS Act appoints the Declaration thereto ſubjoyn'd, acknowledging *the League and Covenant to have been unlawfully impos'd, and not to have been obligatory,* &c. *to be taken by all Perſons in public Truſt, or Office under His Majeſty*; and which ſeems to be very ſtrange, *all Members of the College of Juſtice are declar'd to fall under this General; and ſuch as offer to exerce before they take the Declaration, are declared to be puniſhable as Uſurpers of His Majeſty's Authority*; and this Puniſhment is *de facto* arbitrary, and is impos'd by the Privy Council.

This Act is extended to Baillies of Regality, by the 2. *Act* of the 3. *Seſſ.* of this Parliament; and by a Deciſion of the Council, both theſe Acts are extended to Baillies in Burghs of Barony, tho' they be expreſt in neither of theſe Acts; and that becauſe of theſe Words in this Act, *and all who enjoy any other public Charge, Office, or Truſt within the Kingdom;* which is (as all general Clauſes, ought to be) extended to Particulars, that are of the ſame Nature with theſe, to which the general Clauſe is ſubjoyn'd, and there was as great Reaſon to extend this to Baillies of Burghs of Barony, as to Baillies of Burghs of Regality.

By that Act alſo, *ſuch as refuſe to accept Offices within Burgh, are puniſhable by loſing their Burgeſsſhip,* and they may be alſo compell'd to accept, tho' the Act mentions not this expreſly; for by the common Law, *cives cogi poſſunt ad ſuſcipiendum munera Reipublicæ l.* 1. *in fin. ff. de decurio:* But with us they cannot be oblig'd to continue longer than a Year, *January* 2. 1668. *Wilſon* contra Magiſtrates of *Queensferry.*

Tho' this Act of Parliament obliges all who are Privy Councellors, *&c.* to take the Oath of Allegiance and this Declaration; yet His Majeſty by a Letter to the Council in *November* 1679. *declares that the lawful Sons and Brothers of the preſent King, are oblig'd to take no Oaths, becauſe of their preſumed Fidelity, and that Loyalty is their Intereſt, as well as Duty*; and upon this Ground it ſeems to be, that His Royal Highneſs had not formerly taken theſe Oaths as Admiral. We ſee likewiſe, that both the Sons and Brothers of Kings are ſerv'd, not as Subjects, but as the King Himſelf; and tho' they be Dukes or Earls, yet they take not Place, as other Subjects, but as the Sons and Brothers of the Royal Family: And thus the Sons of Kings were call'd *adminicula auguſti, ſubſidia dominationis*; and in St. *Matthew,* St. *Peter* affirms, *that the Sons of Kings are exempt from Tribute*; nor are they in *France* ever ſubjected to any corporal Puniſhment, or put to Death, *Vid.* le Bret. *Tit. des Enfans & Freres du Roy, & leur Prærogatives.* And they are exempted by the Parliament 1681. from taking the *Teſt.*

VI.

THIS excellent Act does appoint all Sheriffs and Juſtices of Peace, to aſſiſt ſuch as are robb'd, or oppreſs'd, in taking back their Goods immediately upon Intimation, and to reſtore them within Fifteen Days; or otherwiſe to be liable: But the Word *immediately* does reſtrict the Act ſo, as that Sheriffs are not thereby empowered after a long Interval, to bring back Goods, or make ſuch Intimations, or raiſe the People for Concurrence; and therefore the Gentlemen of *Caithneſs* were found liable in a Spuillie, for robbing, and away taking an Heirſhip out of *Strathnaver*; tho' they alledg'd that they were convocated, and commanded by the Earl *Caithneſs* ſo to do, he being Sheriff, and Juſtice-General; and they conceiv'd that they might have been puniſhable if they had diſobey'd; which Defence was repell'd, becauſe tho' that Convocation was ſince this Act, yet ſo long a Time having interven'd, the Sheriff could only have proceeded *via ordinaria.*

It may be doubted from this Act, whether when any Man complains of Oppreſſion, as that a Robber, or Neighbour ſits violently down upon his Land, the Sheriff and Country are not oblig'd to concur by this Act, ſince the Act ſeems to be reſtricted to the Way of taking of Goods, tho' it ſpeaks generally of Oppreſſion; and I think they are liable in the one Caſe, as well as in the other; and this Caſe being a permanent Act, is more eaſily redreſs'd.

By this Act likewiſe, the *Heretors, Wadſetters and Feuars within the Paroch where the Goods are found to have been diſpoſed, or ſparpelled, are declar'd liable for the Value of the Goods*; but from the Context of the Act it is clear, that they are only liable ſubſidiarly, in Caſe the Goods cannot be otherwiſe recover'd.

The Words *Wadſetters,* and *Feuars,* needed not to have been ſubjoyn'd to *Heretors,* for both theſe are Heretors: But it ſeems to have been more neceſſary to have added Liferenters; ſince it was juſt that Men who are Liferenters ſhould be liable; for a Father may put his Son who is Minor in Fee, and reſerve the whole Liferent to himſelf; or a Perſon of Quality may Marry one who Liferents the whole Paroch, and ſo this Remedy becomes ineffectual; becauſe the Act mentions not Liferenters, and in ſuch Caſes, Liferenters are found not to be comprehended, *November* 14. 1679. Miniſter of *Morum* contra the Lady *Beanſtoun.*

ACT By this Act ſuch as *Kill, Slay, Hurt, or Mutilate the Away-takers, or their Aſſociats in Proſecution of their Goods, are indemnified.*

*Obſerv.* THAT all who Kill in ſuch Purſuits, are not indemnify'd; but ſuch only whoſe Goods are taken, or who are oblig'd to riſe; for elſe ſuch as had private Grudge, might upon that Grudge follow and Kill; but yet it ſeems juſt that if Men were deſir'd, tho' not oblig'd; or if Gentlemen being in the Houſe when robbed, ſhould purſue and Kill, that they ſhould alſo be indemnified.

THIS Act is generally ſo well conceiv'd, that if it were well proſecuted, it alone might ſettle the Highlands.

VIII. THIS Revocation ſeems to be very ill conceiv'd; for it had forgot the Lands of the Principality, which are ſtill comprehended under all other Revocations; and therefore the Parliament thought fit to add this to the Revocation: And if this be valid, there needs no Revocation under the King's Hand, but an Act of Parliament ſhall be ſufficient without a Revocation.

IT is likewiſe obſervable from this Act, That the Parliament qualifies the King's Revocation, *in ſo far as His Majeſty revokes all Deeds done by His Father*, by declaring, *That ſuch only are revoked as were made againſt the Law ſtanding in Force before the Year* 1637. For otherwiſe all Deeds done by the late King, might have been challeng'd upon that Head of *vis & metus* expreſs'd in this Revocation: But however Acts extorted *vi majori*, either from King or Subject, are null *ipſo jure* by the Common Law, without any ſpecial Revocation; but Revocations are naturally only extended to Deeds done in Minority, but not to Deeds extorted *vi majore*, tho' this Revocation comprehends both.

IX. WHEN the Clergy ſubmitted their Rights to the King, both the Submiſſion and Decreet-arbitral provides, *That the Biſhops and others of the Clergy, ſhould enjoy the Fruits and Rents of their Benefices, as they were poſſeſſed by them the Time of the Submiſſion*; and therefore by this Act it is ordain'd, *That any Valuations of Teinds, whereof the Biſhops and other beneficed Perſons were in Poſſeſſion, either by Leading, Drawing, or Rental-bolls, ſince the Year* 1637. *ſhould be null.* And yet this Privilege is merely perſonal in Favours of Churchmen: For by a miſſive Letter from King *Charles* I. the 9. of *May* 1634, it is declared, *That this Favour ſhall not be extended to the Tackſmen of Biſhops, and other Churchmen, they being Laics; but that during theſe Tacks the Heretor may lead, he finding Caution.* And accordingly a Valuation was ſuſtain'd to *James Hamilton* of the Lands of *Hedderwick*, againſt the Earl of *Roxburgh*, the Biſhop's Tackſman of the Teinds of theſe Lands; tho' it was alledged there, That the Submiſſion and Decreet-arbitral having no ſuch Quality; but the Teinds whereof they were in Poſſeſſion being abſolutely reſerv'd, no poſterior Letter could have prejudg'd them; and it was a great Prejudice to them to have their Teinds valued during the Tacks, for this could not but leſſen the Tack-duty and the Graſſoums.

IN this Cauſe it was likewiſe doubted, what Way theſe Teinds ſhould be valued during the Tack.

X. GOVERNMENT belongs to the King, and Property to the People; yet ſince the public Intereſt muſt over-rule the private, all being ſtill preferable to any One, therefore Government does ſo far influence Property, that all Lawyers are of Opinion, that the Prince may, for a juſt Cauſe, invert or take away Property *res privatorum auferre, & jus alteri quæſitum tollere:* And thus we ſee, that the King may make a Citadel upon any Man's Ground, paying the juſt Price, *&c.* and ſometimes He may throw down the Houſes of Suburbs, when there is either actual War or Fear of War, in which Towns may be beſieged: So that He is the ſole Judge of this *juſta cauſa* by which Property may be inverted; and amongſt other juſt Cauſes, One is the procuring of Peace amongſt the Subjects; for procuring whereof, the Prince may remit both the Civil and Criminal Reparations, due to Subjects that are wrong'd during the Time of the War, Gail. *Lib.* 2. *Obſerv.* 56, & 57. But with us, general Indemnities are ordinarily granted in Parliaments, wherein certainly all private Intereſts may be diſcharg'd, becauſe every private Man is preſum'd therein to be repreſented. And this Act of Indemnity is one of the moſt full and formal that ever we had; and in it all ſuch are indemnified, as acted by virtue of the public pretended Authority of theſe Times. And tho' an Order be neceſſary to be produc'd in Caſes where Orders uſe to be given, yet the Benefit of this Indemnity was extended to ſuch as were in Arms, tho' they could prove no Orders, ſince Soldiers uſe to get no written Orders, except it were offered to be proven by their Oaths that they had no Order, or that they converted the Goods, purſued for, to their own private Uſe, *February* 15. 1666. *Muvask* contra *Gordon*. And that any Promiſes made to reſtore ſuch Goods, did not bind after the Act of Indemnity, tho' it was alledged, that the Promiſe did innovate the Debt from a military to an ordinary Debt, becauſe the Lords thought that, that Promiſe might have been given and emitted upon the

Suppoſition, that the Soldier thought himſelf liable before the Indemnity; and therefore the Lords found him not liable, notwithſtanding of the Promiſe, except it could have been proven that he apply'd the Goods to his own Uſe, or that he wanted a Warrant.

Sometimes alſo the King does, by His Proclamation, grant general Indemnities, as He did in 1666, and 1679. to the Weſtern Rebels; but in this Caſe it was controverted, whether ſuch as had robbed private Men's Horſes were liable in Reſtitution, notwithſtanding of that Indemnity; and it was urged, that they were. Becauſe, 1. Whatever might be alledged where the King had once acknowledg'd Rebellion to be a pretended Authority, & *ſpeciem belli*, by exchanging of Priſoners, and making of Truces with them, &c. yet here there was not even thoſe Pretexts, and ſo they were only to be conſider'd as a Company of private Robbers. 2. Even this Act indemnifies only ſuch as acted by virtue of pretended Authority; therefore ſince even the Parliament did not indemnify ſuch private Robbers, much leſs ſhould they be ſecur'd by Proclamations. 3. Whatever an Act of Parliament might do, becauſe all Perſons injur'd were therein-repreſented, yet thoſe Proclamations were but general Remiſſions, and no Remiſſion could prejudge the Party injur'd of his Reparation and Aſſythment. 4. This would encourage all Rogues to be Rebels, that they might rob, and thereafter be enriched by an Indemnity: Whereas on the other Hand, it would diſcourage them both from Rebellion and Robbery, if they knew they behov'd to be ſtill liable in Reſtitution: And tho' the King did remit *vindictam publicam & privatam*, by this Proclamation; yet that *vindicta privata* was not to be interprete Damage and Intereſt, but that Revenge and Criminal Action, which any private Party might purſue without the King, and *vindicta* is ſtill contra-diſtinguiſhed from *damnum & intereſſe*. 5. When the Law allows to the Prince a Power to remit and diſcharge the Damage done to private Parties, in Contemplation of a public Peace. Lawyers acknowledge, that this can only be done if Peace cannot otherwiſe be procur'd; for otherwiſe public Peace is none of theſe juſt Cauſes for which Property can be inverted; and therefore any ſuch Indemnity after the Peace is eſtabliſhed, cannot prejudge private Subjects, as to their Reſtitution, as *Gail.* expreſly declares, *Obſerv.* 56. *Num.* 6.

# PARLIAMENT I.

## SESSION III.

II. BISHOPS being reſtored in the former Seſſion of Parliament, the King does in this Act declare, *That He will maintain and preſerve that Government in the Church, and not give any Connivance to the Prejudice thereof in the leaſt*; and ſo all Indulgences are from this ſtill urg'd to be contrary to the Royal Promiſe, and the public Faith.

By this Act, Miniſters abſenting themſelves without a lawful Excuſe from the Dioceſan Meeting, or not concurring in the Church-diſcipline, when required by the Archbiſhop, are to be ſuſpended till the next Dioceſan Meeting, and if they conform not then, to be depos'd. And tho' this be deſign'd chiefly againſt the Non-conforming Miniſters, yet it has been repin'd at by ſome of the Epiſcopal Clergy, becauſe the Biſhops have by it a Power to ſuſpend by themſelves; and by the preſent Diſcipline of the Church, the Biſhop may depoſe by himſelf without the Concourſe of the Clergy, even in the Dioceſan Meetings, tho' he uſually takes along with him the Advice of the Miniſtry.

In this Act, Withdrawing from public Worſhip, as well as Keeping of Conventicles, is declared to be ſeditious; and therefore each Heretor Withdrawing loſes the Fourth Part of his Year's Rent; each Yeoman, or Tenent may be fin'd, not exceeding a Fourth of his free Moveables; every Burgeſs is to loſe his Freedom, and may be fin'd in a Fourth Part of his Moveables: And the Council have by this Act a very full and undetermin'd Power, to inflict corporal, beſide the former Puniſhments; but it ſeems that none of thoſe Puniſhments can be inflicted upon Withdrawers, except where they have firſt been admoniſhed by their Miniſter in Preſence of Two Witneſſes; but ſince the Miniſter of the Paroch is not here ſpecify'd, it was thought that Perſons might be fin'd after an Admonition, given by any Miniſter appointed by the Privy Council, or Presbytery.

ACT THIS Part of the Act is not expreſly abrogated; but the Fines are altered by the 7. *Act* of the 2. *Seſſ. Parl.* 2. Ch. II. By which every Proteſtant Withdrawer (whereas this Act extends both to Papiſts and Proteſtants), is to be fin'd thus, *viz.* an Heretor in the Eight Part of his valu'd Rent; a Tenent in Six Pounds *Scots*; a Cottar in Forty Shilling *Scots*; every Perſon above the degree of a Tenent, but having no real Eſtate, in Twelve Pounds; every conſiderable Merchant in Twelve Pounds; every inferior Merchant, and conſiderable Trades-man in Six Pounds; and the other Inhabitants within Burgh in Forty Shilling; and His Majeſty's Privy Council is by this laſt Act allow'd to force all who ſhall withdraw from their Paroch Churches for a Year together, to give Bond that they ſhall not riſe againſt the King, nor His Authority, and to baniſh or ſecure them in caſe of refuſal: Whereas by this firſt Act, there is a general Power given to the Council by the Parliament, *to do every Thing that they ſhall find neceſſary for procuring Obedience to this Act, and putting the ſame to punctual Execution*; upon which Clauſe was founded the Council's putting Heretors to give Bond for their Wives, Tenents, and Servants keeping the Church; for ſince the Parliament might have exacted ſuch a Bond for that Effect, it was thought the Council might, ſince they have by this Clauſe a Parliamentary Power.

BY the other Act alſo it is appointed, *That the ſame ſhall continue for Three Years, except His Majeſty ſhall think fit it continue longer*; and it was thought, that this Power of fining might be continued by the Council, without any new expreſs Order from the King, ſince His Majeſty did not command the contrary: As alſo, upon this Clauſe was founded the Indulgence 1679. the Parliament having put it in His Majeſty's Power to puniſh Withdrawers, or not, as he thought fit, after Three Years were elapſed.

III. THIS Act is explain'd in the 5. *Act* of the former *Seſſion*.

IV. THIS Act againſt Protections is explain'd fully in the *Act* 47. *Parl.* 11. Ja. VI.

V. THIS Act declares the King to have the only *Power of calling or diſſolving Synods*; and that His Majeſty has not only a negative Voice in ſtopping Acts to be made in ſuch Synods, but even a Negative in not ſuffering any Thing to be treated or debated there, except what is contained in His Proclamation, or Inſtructions.

THIS Meeting of the Church, is with us call'd a Convocation, tho' it be here only call'd a Synod; nor can it be deny'd, but that the Emperors did of old call the Synods, and the *formula* was *viſum eſt mihi & juſſi*. Thus *Euzeb.* ſpeaking of *Conſtantine*, ſays, *Cum per varia loca exorirentur inter Epiſcopos diſſentiones, ipſe, ſeu communis Epiſcopus a Deo conſtitutus Synodos miniſtrorum Dei indicebat*. And thus *Leo*, writing to the Emperor *Theodoſius*, *ſi pietas veſtra ſuggeſtioni ac ſupplicationi dignatur annuere; ut intra* Italiam *haberi jubeatis Epiſcopale Concilium, cito poterunt omnia ſcandala, quæ in perturbationem totius Eccleſiæ ſunt commota, reſecari*.

VI. THIS Act is explain'd in the 10. *Act*, *Parl.* 4. Queen *Mary*, and in the Obſervations upon the 226. *Act*, *Parl.* 14. Ja. VI.

VII. BY this Act all Strong-waters are diſcharg'd to be imported, under the Pain of eſcheating thereof, becauſe it prejudged the Sale of Barley, which is the great native Commodity of this Kingdom: But yet by the ſecond *Act* of the 4. *Seſſion* of the 2. *Parl.* Ch. II. All theſe Acts againſt Strong-waters are reſcinded, and an Impoſition thereon is impoſed; but yet it was thought by the Council, that notwithſtanding of that laſt Act, His Majeſty might by His Prerogative, in the ordering and diſpoſal of Trade with Foreigners, aſſerted by the 27. *Act* of this Seſſion of Parliament, diſcharge again the Importation of Brandy, and other Strong-waters, and accordingly a Proclamation was iſſued out, diſcharging them in *March* 1680. and it was urg'd, that the Parliament thought that the King might diſpoſe upon theſe, againſt an expreſs Act of Parliament; for tho' by this Act the Importation of them be abſolutely diſcharged; yet the King had before the other Act allowed the Importation of them; and the Parliament, in the Narrative of this Act, declares, *That the King had done this upon good Conſiderations*.

VIII. THIS Act for preventing the fraudulent Mixture of the finer Sort of Tinn with baſer Mettal, has ordained the Peutherers to put their Name, with the Thiſtle, and the Deacons Mark upon their Work, and that the ſame be as fine as the Peuther of *England* marked with the Roſe.

IT may be argu'd, that this Act does not hinder all Mixture of Lead and Tinn, for one Pound of Lead muſt neceſſarily be mixt with Two Pound of Tinn to make it Work.

THE Peutherers and Plumbers are with us under one Deacon; we had no Plumbers till of late, our Peutherers of old having been our only Plumbers; but now it is pretended from this Act, and upon other Grounds, that the Peutherers ſhould not Work in Lead.

ACT IX. THIS Act diſcharging Advocations from inferiour Courts, for Sums within 200 Merks, did not except the Members of the College of Juſtice; and therefore by the 16. Article of the Act for regulating the Seſſion, Cauſes belonging to the Members, and Sums due to Merchants, Cooks, Vintners, and others in Burgh, for Furniture taken off from them, by ſuch as dwell not within the Shire where the Furniture was taken off, are expreſly excepted from this Act; and becauſe this Act wanted a Sanction or Penalty; therefore by that Seventeenth Article, the Clerk of the Bills is ordained not to preſent, paſs, or write on any ſuch Bill at his Peril, becauſe this Act of Parliament ſays, *That the Lords ſhall not paſs any ſuch Advocations for Cauſes which may competently be decided by inferiour Judges*; therefore it is ordained by the 16. Article foreſaid, *That when the Lords paſs any ſuch Advocations for Sums within Two Hundred Merks, they ſhall write upon the Back of the Bill, that the Lords have found ſufficient Ground why the Cauſe ſhould not be purſu'd in the firſt Inſtance, before the inferiour Judge*; and this was done to prevent any Miſtake, and to Cauſe this Act be carefully obſerv'd.

X. THIS Act is formerly explain'd in the 6. *Act* of the 23. *Parl.* Ja. VI.

XI. THE Exportation of Money being diſcharg'd by many Acts, as Ja. III. *Parl.* 1. *Act* 8. Ja. I. *Parl.* 6. *Act* 84. for making theſe Acts effectual. By this Act every Skipper and Merchant is oblig'd upon Oath to declare before the Treaſurer, Treaſurer-depute, or ſuch as are appointed by them, that they ſhall not carry abroad any more Money than is able to make their Expence to the next Port, and to reveal, either before, or after the Voyage, any who does, and that a Book ſhall be keeped in Exchequer for that Effect; but this Act is not exactly obſerv'd.

XII. BECAUSE by the 40. *Act, Parl.* 6. Queen *Mary, The carrying of Victuals, Tallow, or Fleſh out of the Country*, was then diſcharg'd under the Pain of eſcheating the ſame, Victuals having been then ſcarce; therefore by this Act it is declared *lawful to export Corns, when the Wheat is under Twelve Pounds, the Bear and Barley under Eight Pounds, Oats and Peaſe under Eight Merks the Boll*; and alſo, *to export all Sorts of barrell'd Fleſh for Nineteen Years, free from Cuſtom and Bullion*; but the Cuſtom and Bullion here impos'd upon Corns exported, is abſolutely diſcharg'd by the 14. *Act, Parl.* 2. Ch. II.

IT may be obſerv'd from the former Act of Queen *Mary*, that Skippers are not regularly liable for tranſporting Merchandiſe, forbidden by Acts of Parliament, except the Sanction of the Act do expreſly ſtrick againſt them; ſince that Act is appointed to be extended to Maſters and Skippers, as well as Owners of the Goods; for beſide that the Parliament thought fit to expreſs them, which they needed not have done, if the Act had imported it, theſe Words, *this Act to be extended*, ſeem to imply that the Act naturally did not import it; for to extend an Act, or any Thing elſe, is to carry it beyond its natural Import.

XIII. THIS Act impoſing great Impoſitions upon *Engliſh* Commodities, for the Advantage of our own Manufactories is in Force, but not in Obſervance; and one of the great Diſadvantages of ſetting the King's Cuſtoms in Tacks is, that it is the Tacks-men's Intereſt, that all prohibited Commodities be brought in for the Advantage they get by their paying Cuſtom, and for conniving at the bringing them in.

XIV. BY this Act there is a great Cuſtom impoſed upon Victual brought from *Ireland*; but thereafter by the 3. *Act*, 3. *Seſſ. Parl.* 2. Ch. II. *importing of* Iriſh *Victual is totally diſcharged.*

XV. THIS Act is formerly explain'd in the 63. *Act, Parl.* 11. Ja. VI. but it is further obſervable, that by this Act it is *declared the Duty of all Sheriffs, Stewarts, and Baillies of Regality, to cauſe apprehend all Rebels, and to count for their Eſcheats, and to puniſh all the Contemners of His Majeſty's Authority*; and this is declar'd to be, both by Law and the Nature of their Office, a Duty incumbent to them; and therefore it is fit that Sheriffs and others advert to this.

XVI. THIS Act ratifies, by Miſtake, the 4. *Act, Parl.* 6. Ja. VI. but the Act that ſhould have been cited, is the 74 Act of that Parliament; this Act ratifies alſo the 168. Act of this 15. Parliament, but it ſhould have cited the 268.

THE Act itſelf provides for the Maintainance of Beggars and Manufactures, by putting the one in the other; but the Act was never obſerv'd, tho' in itſelf it be a very excellent Act.

ACT XVII. and XVIII. THESE Acts are explain'd in the 96. *Act, Parl.* 6. Ja. IV. but for further clearing of the Act 16. it is fit to know, that tho' Coals were forbidden of old to be exported by the 84. *Act, Parl.* 9. Queen *Mary*; yet when they grew more frequent, they were allowed to be tranſported, and Cuſtom and Bullion is put upon them, *viz.* Two Ounces of Bullion for every Four Chalders Coals, as is clear by the 37. *Act, Parl.* 1. Ch. II. And by this Act the *Culroſs* Chalder is *declared to be the Meaſure by which the Cuſtom and Bullion is to be exacted*; becauſe, as I conceive, that was the leaſt of all Chalders: The *Lothian* Chalder of Coals being generally a Third more; but thereafter Bullion being only impos'd upon Goods imported, Coals do now pay no Bullion; for Exporters pay no Bullion, and there are no Coals imported to this Nation.

XIX. THE keeping Mercats upon *Sunday* was diſcharged, 122. *Act, Parl.* 12. Ja. VI. and by this Act they are diſcharg'd to be kept upon *Monday*, or *Saturday*, leſt People might be oblig'd to travel to, and from Mercats on the *Sabbath*: But by that Act it was appointed, that they ſhould keep them upon any other Day, not being the Mercat-Day of the next Burgh; which Proviſion in Favours of the next Burghs, was ill forgot here, *vide* the Obſervations upon that Act.

XXI. THIS Act is formerly explain'd in the Obſervations upon the *Act* 48. *Parl.* 3. Ja. VI. and the 7. *Act,* 3. *Seſſ.* 1. *Parl.* Ch. II.

XXII. THIS Act is explain'd in the 62. *Act, Parl.* 1. *Seſſ.* 1. Ch. II.

XXIII. THIS Act is explain'd in the 25. *Act* of the 1. *Seſſ. Parl.* 1. Ch. II.

XXIV. THE Biſhops having conſented by this Act to the Impoſition upon themſelves, in Favours of Univerſities, it is declar'd, *That this Act ſhall be no Preparative for laying on any Burden upon the Clergy hereafter, without their own Conſent*; from which it may be argu'd, that tho' all the reſt of the Parliament ſhould conſent to an Impoſition upon the Clergy, yet that would not be valid, except they themſelves conſented to it, tho' the Impoſition were carry'd by Plurality of Votes: But this Inference is not concluding; for the Parliament is a collective Body, compos'd of the King, and Three Eſtates, in which the major Part determines the reſt; and if this were granted to the Clergy, they being but a Third Eſtate; every one of the other Two Eſtates might pretend the like; and ſo each Eſtate ſhould have a Negative as well as the King: Whereas not only *Craig* has determined that the Parliament may make an Act, without the Conſent of any one of the States, having ſtated this Queſtion expreſly; but we ſee that the Burrows having unanimouſly diſſented from the 5. Act of the 3. Seſſion of the Second Parliament, concerning the Privileges of Burghs-Royal, the ſame was notwithſtanding paſt in Parliament; and we all remember the memorable Story of the Burrows, riſing and leaving the rebellious Parliaments 1649. before the Parliament paſſed the Act for *allowing the Value of Annualrents*, whereupon a worthy Peer ſaid, that *ſince they had ſitten ſo long without the Head, they might well enough ſit without the Tail.*

XXV. BY the 14. *Act* of the 1. *Seſſ.* of this *Parl.* the Annuity of 40000. Pounds *Sterling* being granted to His Majeſty, to be uplifted out of the Exciſe in Manner mentioned in the ſaid Act; by this Act, the Proportion of the ſaid Exciſe is regulated, and laid on upon the ſeveral Shires and Burghs accordingly.

*Nota.* THIS is the only Act wherein I find the Word *Grievances.*

XXVI. BY this Act the Militia of 20000 Foot, and 2000 Horſe is eſtabliſh'd, which was found not to take off the Obligation of raiſing betwixt Sixty and Sixteen according to the ancient Laws, for attending the King's Hoſt, when called for; this Act declares, *That if His Majeſty have further Uſe for their Service, they will be ready every Man betwixt Sixty and Sixteen, to joyn and hazard their Lives and Fortunes, as they ſhall be call'd for by His Majeſty*: And tho' it be pretended, that at leaſt they cannot be called betwixt Sixty and Sixteen by this Act, without an expreſs Order from the King, the Words running, *When call'd for by His Majeſty,* without adding, *or the Council* in this Clauſe, as it did in the former immediate Clauſe of this ſame Act, and which ſhews that this was deſignedly omitted in this Clauſe; yet we ſee that the Council does call to the Hoſt all betwixt Sixty and Sixteen, without expreſs Warrant from the King, and that the Juſtices fine ſuch as are abſent upon theſe Proclamations; and which is very juſt, becauſe the King is ſtill preſumed to be in the Council *fictione juris,* they repreſenting by their Commiſſion His Royal Perſon; and we ſee by many Inſtances, that Rebellions may riſe before any ſuch Warrant can come from the King.

By this Act it is declar'd, *That theſe Forces ſhall be in readineſs, as they ſhall be call'd for by His Majeſty, to march to any Part of His Dominions of* Scotland, England, *or* Ireland, *for ſuppreſſing of any Foreign Invaſion, inteſtine Trouble, or Inſurrection, or for any other Service, wherein His Majeſty's Honour, Authority, or Greatneſs may be concerned*; which Clauſe was much excepted againſt by ſome in the Parliament of *England*, as if *Scotland* had thereby deſign'd to authorize the invading of them; but it cannot be properly ſaid to be an invading of them, if we be called by the King; and the calling of Subjects *etiam extra territorium*, is *inter reſervata principi*, and a juſt Right of all Kings, as is clear by *Caſtal. de Imperatore quæſt. 57. num. 57.* And the Subjects of this Kingdom have been ofttimes fined, and Foreſeited, for not attending the King's Hoſt, when they were called to invade *England*; nor could any War be managed, or Rebellion ſuppreſs'd, even in the juſteſt Caſes, without this.

XXVII. BY this Act, the ordering and diſpoſing of Trade with Foreign Countries, is declared *to be His Majeſty's Prerogative*; and tho' it be alledged, that this Act was only deſign'd as a Power to His Majeſty, for the better debarring *Engliſh* Commodities, whereby to bring, both the Nations to an equal Balance of Trade; which Deſign was ſaid to have been then repreſented to the Parliament, as the only Motive for making this Act, and that if this were allowed in its full extent, our Kings might by debarring us from Iron, Copper, Timber, Spices, and other Neceſſaries, force us to any Condeſcendencies, or might by this Prerogative, grant Monopolies at their Pleaſure: Yet I ſee not how this Gloſs is conſiſtent with the general Words of the Act, or with our declaring that this by the Law of Nations, belongs to all free Princes: Or with ſubſequent Parliaments, allowing the Privileges granted to the Fiſhing-Company, the prohibiting of Brandy, and other ſtrong Waters, and ſeveral other Things, which are founded ſolely upon this Act.

It may be debated, whether under the Word *Foreigners*, the *Engliſh* may be comprehended ſince we are not treated by them as Foreigners in the Point of Succeſſion, it being frequently decided amongſt them, that the *Scots* may ſucceed to Heritage in *England*, notwithſtanding of their Statute, debarring *alibi natos*; and why then ſhould they be repute as Foreigners to us in the Matter of Trade? and this were indeed ſolid Reaſon for both Nations; but ſince the *Engliſh* debar us from their Plantations, and look upon us as Foreigners in the Point of Trade, it is juſt that we ſhould give them the ſame Meaſure.

# PARLIAMENT II.

## SESSION I.

IT is obſervable, that in all the Seſſions of this Parliament, the particular Day of the Month whereupon the reſpective Acts were paſt, is ſet down, and yet ſince the Acts are to take Effect, not from the paſſing, but from the Publication, as is clear by the 3. Act of this Parliament, it would have ſeem'd more rational to have ſet down the Day of the Publication; to which nothing can be anſwered, but that the Laws are preſum'd to be publiſh'd the Day they were paſt in. In no former Parliament the Day is ſet down, but the whole Parliament is ſaid to be held upon ſuch a Day, and the old Uſe was, that the Articles prepar'd all the Acts, and they were all paſt in one Day.

I. THIS Act declaring the King's Supremacy in Eccleſiaſtic Cauſes, is formerly explain'd in the Obſervations upon the 2. *Act, Parl.* 18. *Ja.* VI.

II. IT is obſervable from this Act, that the Militia is come in Place of the old Weapon-ſhowings, and that there being 20000 Foot, and 2000 Horſe granted as a Militia, by the 26. *Act*, 3. *Seſſion* of the Firſt Parliament, which does ſpecifie the particular Proportion of Horſe and Foot, to be given by every Shire; it might have been thought, that theſe Proportions could not have been altered but by the Parliament; and yet the King and Council having converted the Foot of ſome Shires unto Horſe, ſeems to be founded upon the laſt Clauſe of the former Act, whereby His Majeſty is intreated to give Directions to His Privy Council

ACT for managing of that whole Affair, as His Majeſty ſhall think fit; which Acts of Council, and the ſaid Alteration of the Proportions, are hereby ratify'd as having been legal; and in the laſt Clauſe of this Act, His Majeſty's Subjects are commanded to obey whatever Orders and Directions they ſhall receive from the Privy-Council, relating to the Militia, and upon theſe Clauſes was founded the Overtures of the late Converſion of the ſaid 22000 to 5000, augmenting the Number of the Days, wherein the ſaid 5000 are to ſerve, according to what might have been exacted from the whole 22000; ſo that the 5000 are to meet the Number of 176 Days, becauſe the 22000 were oblig'd to meet Forty Days; tho' this laſt model was by ſome objected to be a ſtanding Force: And all Laws are *ſtricti juris*, and to be fulfill'd *in forma ſpecifica*; but eſpecially Taxations, which are a Gratuity, founded upon the free Offer of the People, as this is, to allow Converſions in ſuch Caſes, would diſcourage the Subjects from future Offers.

THIS Act likewiſe did ratify the Acts of Council, which appointed the Shires to provide at their own Charge, Colours, Standarts, Drums and Trumpets, tho' that might ſeem an Impoſition; but theſe being Neceſſaries, and the natural Conſequents of the firſt Grant; and the Parliament having granted to the Council the former Power, as ſaid is, theſe Acts of Council are therefore hereby approven as legal.

BOTH this and the former Act do ordain the Militia *to be furniſhed with Forty Days Proviſion, which was the old Proviſion* that was ordinarily to be made by ſuch as came to the Hoſt; albeit ſometimes *Twenty Days Proviſion be only appointed*, as in the 90 *Act*, 13 *Parl.* Ja. III. And of late the Council has ordain'd this Proviſion to be made in Money, tho' it was contended, that the Parliament having appointed only Proviſion to be made, it was in the Power of the Perſons obliged to furniſh their own Men according to their Conveniency; but Money being thought fitter for expedite Marches, the Council thought they were authorized by the former Clauſes to make this Converſion; and ſome have thought that by the ſame Power, the Council could ordain the Shires, from whom no Proportions of Militia was ſought, to advance free Quarter to ſuch of the Militia as could not furniſh themſelves, or at leaſt might force them to be the firſt Advancers in Caſes of Neceſſity.

THIS Act concerning the Militia, is further clear'd by the firſt Act of the Third Seſſion of this Parliament, appointing ſuch as ſerve either as Officers, or Soldiers in the Militia, to accept and to take the Oath of Allegiance; and that thoſe who are ſet apart for the Militia be not altered, &c.

III. NOTWITHSTANDING of all our former excellent Acts for ſecuring ſingular Succeſſors, yet they were ſtill unſecure, becauſe they could not know if the Vaſſal had reſigned his Feu *ad remanentiam* in his own Superior's Hand; for in that Caſe there was no Saſine requiſite, which is the only Regiſter whereby ſingular Succeſſors know if Lands were formerly diſpon'd; and therefore by this Act it is appointed, that theſe Inſtruments of Reſignation *ad remanentiam* (which are equivalent to Saſines) be regiſtrated in the Regiſter of Saſines within Sixty Days, which is the Time appointed for regiſtrating of Saſines, by the 16 *Act*, *Parl.* 22. Ja. VI.

BY this Act likewiſe, as in that Act, Inſtruments of Reſignation of Lands holding Burgage are excepted; but it ſeems that they muſt be regiſtrated within the Town-Court Books within the ſame Sixty Days: For the Act ſays only, *That ſuch Inſtruments being regiſtrated there, ſhall not fall within the Certification.*

IV. BY this Act, *it is declared unlawful to poind Moveables upon regiſtrate Bonds or Decreets for perſonal Debts, till the Parties be firſt charged, and the Days of the Charge expire.* The Reaſon of which Act was, becauſe Noblemen and Perſons of Quality were oft-times poinded, and ſo affronted, and Merchants ſurpriſed, and thereby ruined before they knew that a Decreet was recovered againſt them, or their Bond was regiſtrated. But this Act was found not to extend to other Diligences *ex paritate rationis*, this being an Act reſtrictive of former Laws and Cuſtoms. From this Act are expreſly excepted *Poindings uſed againſt Vaſſals for their Feu-duties:* But this Exception was very unneceſſary and unproper; for ſuch Poindings did not at all fall under the Prohibition of the ſtatutory Part of the Act, which only prohibites the *poinding Moveables for perſonal Debts.* Exception is likewiſe made of Decreets obtained by Heretors againſt their own Tenents in their own Courts only; and therefore it has been doubted, whether Tenents may be remov'd and ejected without a previous Charge. And tho' upon Decreets before the Lords, previous Charges are neceſſary, yet upon Decreets of Removing before inferior Courts, it is the Cuſtom to eject immediately: And tho' this may ſeem hard, yet it is neceſſary, becauſe the intrant Tenent muſt remove immediately, and ſo muſt have a Place to which he may remove, & *ſibi imputet* the Tenent who being warned did not provide himſelf timeouſly.

ACT V. IT is fit to obſerve from the Narrative of this Act, That the Parliament thought the King and Council had Power to emit Proclamations, commanding the Paroches to protect and defend their Miniſters, and to be liable to ſuch Fines as the Council ſhould think fit, beſides the Miniſter's Reparation, if the Offenders were not brought to condign Puniſhment; which ſhews what great Power the King has in the like Caſes. And the Council are hereby authorized to proceed in taking ſuch Courſes for the Future; which general Power may go very far, eſpecially where theſe Courſes are otherwiſe juſtified by Neceſſity.

This Act is more fully explain'd in the Obſervations upon the 27. *Act*, *Parl.* 11. Ja. VI.

VI. FROM this Act, *diſcharging Suſpenſions againſt Biſhops, Miniſters, and other beneficed Perſons, without Conſignation*, it is obſervable, from comparing the Narrative and ſtatutory Part of the Act, That *Univerſities* and *Colleges* are ſtill accounted a Part of the *Clergy*, and have ſtill the ſame Privileges with them.

VII. SINCE we find, that the Parliament grants Acts for Naturalization of Strangers, as is clear by this and by the 65. *Act*, *Parl.* 8. Q. *Mary*, it may be doubted, if the King can naturalize Strangers by a Deed of His; for elſe thoſe Acts were unneceſſary: And in *England*, tho' the King can grant a Charter of *Denization*, which laſts only for Life, and tho' it enables a Man to tranſmit his Heretage to his Children; yet His Majeſty cannot there naturalize without Act of Parliament. And it may be urg'd, that ſince Third Parties who would otherwiſe ſucceed, are prejudg'd by the Naturalization, that therefore this cannot be done without an Act of Parliament, eſpecially if there be once *jus quæſitum* to any Party: But by the Civil Law the Prince could naturalize, *L.* 1. *ff. de jur. aur. annul.* Of old Strangers acquired only *uſum togæ*, and at laſt were received *inter cives*, *L.* 31. & 32. *ff. de jur. Fiſci.* And with us *Craig* obſerves, that *bona immobilia nemini ablata memini ex eo quod extraneus eſſet*: And I find it decided, that *Strangers may ſucceed with us*, *January* 13. 1675. and that Strangers doing Diligence for their Debts may enjoy and affect Lands in *Scotland*, ſeems more favourable, for elſe there could be no Commerce; for without this none would truſt our Merchants or Countrymen.

The Deſign of proving Trade, by naturalizing Strangers, has been very ordinary; for as *Plinius* remarks, *Nunc factum eſt, ut gens altera, alterius ſuppleret inopiam, & ut quodam modo quod genitum eſſet uſpiam, apud omnes natum eſſe videretur.* In *France*, *Lewis* XI. did, upon the ſame Deſign, naturalize thoſe who traded in the *Hanſeatick* Towns.

VIII. TO encourage the Exportation of Commodities, the Bullion which was formerly payable by the Exporters, by the 37. *Act*, 1. *Parl.* Ch. II. is by this Act impoſed upon the Importers.

IX. BY this Act, all Arreſtments on regiſtrated Bonds, or Contracts, or Decreets not purſued and inſiſted on within Five Years after the Date; and all Arreſtments upon Dependences ſhall preſcrive, if not inſiſted on within Five Years after Sentence: So that there is here a new viſible Difference betwixt Arreſtments on Dependences, and Arreſtments upon Decreets; but upon the Matter that comes to be the ſame: For all Arreſtments upon Dependences are likewiſe, by this Act, to preſcrive within Five Years from the Sentence; that is to ſay, *from the Decreet*; ſo that *utrobique* the Preſcription begins from the Decreet.

By this Act likewiſe, Miniſters Stipends, Multures, Bargains concerning Moveables and Sums of Money, that are probable by Witneſſes, are after this Act declared only probable by Writ, or Oath of Party after Five Years; and all Actions upon Warnings, Spuillies, Ejections, Arreſtments, or Miniſters Stipends, are to preſcrive within Ten Years, except they be wakened every Five Years, but Prejudice always of any of the ſaids Actions, which by former Acts of Parliament are appointed to preſcrive in a ſhorter Time: Which Exception is here added, becauſe of the *Acts* 81, 82, and 83. *Parl.* 6. Ja. VI. by which Spuillies, Ejections and Removings, did preſcrive within Three Years; yet if any Action was intented upon them, it did not preſcrive otherwiſe than in Forty Years: Therefore by this Act, theſe Actions are ordained to preſcrive in Ten Years, except the Action be wakened; that is to ſay, *a new Summons raiſed and executed*: For the raiſing of a Summons is not ſufficient in any Caſe to ſtop Preſcription. *Vide* Obſervations upon theſe Acts. It was found, *Hamilton* contra *Herreis*, *March* 20. 1683. that this Act was not to be extended to the Teind-duties due to Biſhops or other Titulars, being only a correctory Law. And in the Caſe purſu'd by Sir *William Purves* contra                     it was debated, That a Part of what was due to the Miniſter could not preſcrive, becauſe it was mortified Money, and Mortifications are not appointed to preſcrive by this Act. But the Lords found, That if a Mortification became a Part of a Stipend they did preſcrive by this Act, tho' of their own Nature they do not preſcrive. Holograph miſſive Letters, and holograph Bonds and Subſcriptions in Count-books, without Witneſſes, not purſu'd on within Twenty Years, ACT are only to be proven by the Oath of the Subſcriber, ſo that if the Subſcriber die, theſe Debts die with him. I remember the Parliament expreſly refuſed to limit Bills of Exchange to this Time, tho' theſe be holograph Papers, becauſe theſe being the Vehicles and Supports of Trade betwixt us and Foreigners, that were to limit them by too narrow Statutes.

THESE Preſcriptions are ordain'd not to run againſt Minors; and from this and the next Act it may be argued, That Preſcriptions regularly run againſt Minors, except they be ſecured by a poſitive Statute.

X. BECAUSE Citations do interrupt the Current of a Preſcription, therefore this Act does appoint, that only Executions by Meſſengers ſhall interrupt, which was done to exclude Sheriffs in that Part, Meſſengers being Perſons of public Truſt, and who find Caution: But tho' this Act mentions only Meſſengers, and that it is correctory of a former Cuſtom, and conſequently ought to be ſtrictly interpreted, yet Citations by Heraulds or Purſevants will interrupt; *nam majori ineſt minus.* It was alledged, that this Act ſhould extend to all Interruptions, ſo that if an Interruption had been made in *Anno* 1660. it ſhould be renewed after this Act; for the Act ſays, *That all Interruptions ſhall be renew'd every Seven Years.* But it was found, *February* 5. 1680. *Colſton* contra *Bearford*, that only ſuch Interruptions ſhould be renewed as were made ſince the Act of Parliament; for the firſt Part of the Act bears, *That all Interruptions as to Rights of Lands, ſhall, in all Time hereafter, be executed by Meſſengers*; and the laſt Part of the Act muſt be interpreted according to the Firſt, and agrees with the general Nature of Laws, *quæ futuris tantum dant formam negotiis.* Since this Act is only to extend to Interruptions concerning the Rights of Lands, ſome have doubted, whether it ſhould extend to heretable Bonds and Servitudes.

XI. BY our former Law, explain'd in my *Crim. Pract. Tit.* Treaſon, it appears clearly, that no Man could be forfeited in Abſence, except before the Parliament; but this being thought a great Encouragement to Rebellion, the Juſtices did, upon an Advice from the Lords of the Seſſion, alter the Concluſion of Criminal Libels for Treaſon, making the Certification to be, *That Probation ſhould be led againſt them, and they ſhould be forfeited as if they were preſent*; and therefore by this *Act*, theſe Decreets of the Juſtices are ratified, and for the Future it is ordain'd, *That ſuch as riſe in Arms in open and manifeſt Rebellion againſt the King, may be forfeited before the Juſtice Court.* So that this Method can only be taken againſt ſuch as are guilty of *Perduellion*, but not in ſtatutory or other Treaſons, ſuch as *the raiſing a Fray in the King's Hoſt, drawing treaſonable Papers,* &c. For theſe can yet only be forfeited before the Parliament, tho' they may be declared Rebels before the Juſtices. And it has been doubted, whether the Hounding out to open Rebellions, or the Reſetting thoſe who were at them, be puniſhable by the Juſtices in Abſence; for Art and Part is by the 114. *Act, Parl.* 12. Ja. VI. *to be puniſhable as the Crime*, whereof it is an Acceſſion, and it really deſerves oft-times a ſevere and ſpeedier Animadverſion: And thus a Nobleman of great Intereſt Plotting, or Hounding out, is more dangerous than a Tenent who actually riſes in Arms. But on the other Side it is urged, That riſing in Arms is to be purſued ſo in Abſence, becauſe the Probation is ſo notour, that it can hardly be deny'd, but the Probation of ſecret Treaſons may be more dangerous, if taken in Abſence.

IT has been doubted, whether ſuch whoſe Forfeitures were ratify'd by this Act, could be thereafter admitted to propone an Exculpation, ſince the Juſtices could not reſcind Sentences of Parliament; and whether ſuch as are forfeited before the Juſtice Court, can be admitted to propone any ſuch Exculpation upon their being *alibi*, (or elſewhere:) Or that there was Two of the ſame Name; or to object againſt the Witneſſes; for the Perſons forfeited being cited, *ſibi imputent*, that they appeared not. And if this were allowed, Forfeitures might be eaſily evacuated; and whatever might be ſaid as to *alibi* in the firſt Inſtance, yet it were hard to reduce a Decreet upon it; and except the Perſon forfeited could prove an invincible Neceſſity why he could not come or ſend, certainly none of theſe Defences can have the leaſt Shadow of Juſtice: Nor is it ſufficient to ſay, *That they were either afraid, or out of the Country*; for theſe are the ordinary Defences of ſuch as are guilty, and any guilty Perſon might go out of the Country purpoſely to have this Defence.

THE Method now obſerv'd in Forfeitures in Abſence before the Juſtice Court is, That the Advocate raiſes a Libel of Treaſon with the former Certification, he ſends an Herauld with a diſplay'd Coat to give the Citation, and ſends Witneſſes alongſt, who at their Return ſwear, *That they ſaw the Execution truly executed*; becauſe that was found to be the Form before the Parliament. Then the Witneſſes are adduc'd after the Relevancy is cleared by Interlocutors, who are examined whether they knew the Party who is to be forfeited, which excludes the Defence that there were more of one Name, as the purging them of partial Council does all Objections againſt the Witneſſes that can be thereafter founded upon, ſince it was their own Fault, who compeared not to object.

The Advocate uſes ordinarily to cauſe cite the Pannels upon Sixty Days, and at the Mercat-croſs, and at their Dwelling-houſe, leſt they be out of the Country; at all which Places, Copies of the Libel, the Names of the Aſſizers and Witneſſes, are left.

Tho' ordinarily the Advocate, for further Terror, cauſes reverſe and tear the Coat of the Perſons forfeited in the Juſtice Court, with Sound of Trumpet, after the Doom of Forfeiture, and proclaim them Traitors over the Croſs with Sound of Trumpet; becauſe that Solemnity is obſerved in Forfeitures before the Parliament; yet this is not thought abſolutely neceſſary.

It is obſervable, That in the Proceſs againſt the Earl of *Marr* and others, for taking away King *James* VI. from *Stirling*, and the Earl of *Gowrie's* Forfeiture, the Summons were before the King, Parliament, and His Juſtices; and the Doom is, *The King, with the Advice of His Parliament, and His Juſtices.* Some think the Juſtices ſit only in Parliament as the Judges ſit in *England*; but the Summons having been before them, inſinuates that they were conjunct Judges, and not Aſſeſſors. The Probation in that Caſe is led before the Lords of Articles, and not before the Parliament; but in *Anno 1661.* the Probation was led in plain Parliament; and this is juſter, becauſe the Parliament is the grand Inqueſt.

The laſt Words in the Act, *viz. If the ſaid Summons be found relevant, and proven by the Verdict of an Inqueſt*, are wrong Pointed; for the Summons cannot be found relevant by the Verdict of an Inqueſt.

By the 39. *Act*, *Parl.* 1. Ch. II. foreign Salt to be employ'd upon Fiſhing, was to be free of Cuſtom and Exciſe; but by ſeveral Acts of Exchequer thereafter, all Fiſhes ſpent within the Country loſt that Privilege, and by this Act, the Importer is ordain'd once to pay all the Exciſe on foreign Salt, which is to be repaid by the Cuſtomers, to ſuch as can by Certificates prove, that the ſame was employed upon Fiſhes. And tho' it was pretended, that this could not prejudge the Importer, ſince he was to be repaid if the Salt was employ'd upon Fiſhes; whilſt on the other Hand, it would ſecure the King's Cuſtoms, and would keep out much foreign Salt, whereof very much was now brought in, upon Pretext of being employed upon Fiſhing: Yet to this it was anſwered, That this would deſtroy the Deſign of Fiſhing-companies, and ſhow too much the Inconſtancy of our Parliaments. 2. Many poor Families were employed in Fiſhing, who would get Credit for Salt, and yet would not get Money to pay the Exciſe thereof *per Advance*. 3. Fiſhers were ſometimes forced to bring in great Quantities of Salt, being uncertain what Quantities of Fiſh would be taken; and ofttimes they would loſe their Salt altogether. 4. This and all ſuch Methods, which ſubjected the Merchant to the Cuſtomer, deſtroyed Trade; and in this Caſe, they had but a perſonal Action againſt public Servants for their advanced Money, and probably theſe public Servants would not have ſo much Money at once in *Lewis*, *Lochfine*, *&c.* as would pay back the Exciſe of Fiſhes exported out of theſe Places; and beſide that, the Cuſtomer might retard the Merchant at his Pleaſure. 5. The poor Merchant behov'd ſtill to make Two unneceſſary Voyages, one to pay the Exciſe, and another to ſeek Payment. XII.

By this Act likewiſe, the Merchant is ordained to give his Oath upon the Cuſtom and Exciſe, tho' by the 57. *Act*, *Parl.* 1. Ch. II. *their Oaths are diſcharged in Matters of Cuſtom.*

This Act, annexing *Orkney* and *Zetland* to the Crown, is explain'd in the Obſervations upon the 41. *Act*, *Parl.* 11. Ja. II. XIII.

By this Act it is declared *lawful to export Corns*, except when the ſame is diſcharged by the Council upon the Account of Dearth; and to encourage Exportation, Corns are to pay no Cuſtom, Bullion, or other Duty, except one Merk *Scots* for ilk Chalder. *Vide* Obſervations upon the 11. *Act*, *Seſſ.* 3. *Parl.* 1. Ch. II. XIV.

By this Act, the Lords of the Privy-Council are empowered to regulate the Prices of Ale and drinking Beer, and to ſettle a Proportion betwixt the Weight of the Bread and the Boll of Wheat, and the Price of the Ale, and the Boll of Bear; upon which Warrant, the Privy-Council do not pretend that they can ſettle a Price upon Victual, but that they may thereby only proportion the Price of the one with the other; ſo that they may diſcharge Maltmen or Baxters to give leſs than ſuch reſpective Prices, when they ſell their Bread and Ale at ſuch and ſuch Rates, as they did by their Proclamation in the Years 1677. and 1680. XV.

By this Act, Maltmen are likewiſe diſcharged to have a Deacon; and leſt this Act ſhould be eluded, it is appointed, *That no Maltman ſhall keep Correſpondence, nor meet upon any Pretext whatſoever*; and therefore I conceive, that ſuch Towns as appoint, *That none ſhall brew except Gild-brothers*, and in Meetings of the Gildry, *treat of, and ſettle the Prices of Malt, Seed and Bear*, do thereby contravene this Statute. *Vide Act* 29. *Parl.* 1. *Ja.* VI.

ACT XVI. THIS Act having appointed, *That Sheriffs and others, may convene all Tenents, and Cottars, &c. for repairing Highways and Bridges, at any Time betwixt Seed-time and Harveſt*; and that being found too ſhort a Time, it is therefore appointed by the 9. *Act* of the 2. *Seſſion* of this Parliament, *That they may be called the ſame Number of Days, in any Seaſon of the Year, Seed-time and Harveſt excepted.*

XVII. THIS Act is explain'd in the Obſervations upon the 41. *Act*, *Parl.* 1. Ch. II.

XVIII. THIS Act is explain'd in the Obſervations upon the 7. *Act*, *Parl.* 23. Ja. VI.

XIX. THIS Act is explain'd in the Obſervations upon the 6. *Act*, *Parl.* 20. Ja. VI.

XX. BY this Act, the Shires of *Roſs*, *Sutherland*, *Caithneſs*, *Argyle* and *Inverneſs*, are declared *to be liable in the Double of the Exciſe, and of the Taxation then current, laid on by the Convention, in Caſe of their being deficient.* Againſt which Act, it was alledged at the paſſing thereof, That this ſeem'd very unjuſt, ſince as to both theſe one Shire could not be put in a different Condition from the reſt in a common Concern; but that the legal Way was, *to uſe ſtricter Execution againſt them*; and whatever might be done at the firſt laying on of an Impoſition, yet after it is laid on, this ſeems hard; for probably theſe Shires would not have conſented if they had foreſeen any Singularity, nor did they conſent to the Exciſe but upon equal Terms with other Shires; and this was yet much harder becauſe both theſe Taxations were voluntar Offers, and conſequently ſhould not be otherwiſe exacted than in the Terms in which they were offered. Likeas, this would diſcourage any Shire for the Future to offer or conſent to Taxations, becauſe they could not know but a prevailing Party, or the Paſſion of ſome leading Men, might raiſe to the Double what they conſented to; which Reaſons were ſo convincing, that this Act was never put in Execution; nor do I think it could without a previous Declarator, finding that theſe Shires had incurred the Duplication by failing to pay their Shares; for otherwiſe His Majeſty's Collectors and Caſh-keeper might exact the Double when it was not incurred; and we ſee that all other Irritancies, even impoſed by the Parliament, ſuch as *ob non ſolutum canonem*, require a previous Declarator, and are purgeable at the Bar.

# *PARLIAMENT* II.

## SESSION II.

I. THIS Act is explained in the Obſervations upon the only Act of the *Parl.* 17. Ja. VI.

II. SOME Phanatics having, againſt the Laws and Cuſtoms of Nations, *refuſed to depone, when they are called as Witneſſes againſt thoſe of their own Opinion*; it is declared by this Act, *That ſuch as refuſe, ſhall be baniſhed and fined. Qui teſtimonium dicere recuſant pœnalibus mandatis compelli poſſunt. L. ſi quando & auth. ſeq. C. de Teſtibus. Vide* Ruland. *de Commiſſ. Part.* 2. *Lib.* 2. *C.* 7. *& mortaliter peccant. C. quiſquis* 11. *Quæſt.* 3. *Cap.* 1. X *de Teſt. cogend.*

IT may be doubted, whether ſuch as refuſe to depone in Matters of Treaſon, may not be puniſhed *as Concealers of Treaſon*; for this is in Effect *the worſt Kind of Concealing*: For others may conceal, becauſe they fear Want of Probation, or upon other Deſigns, without any Malice, but this ſtill proceeds from Deſign. And it ſeems, that in all other Crimes, he who refuſes to depone againſt a Delinquent, is as guilty as he who reſcues him by Force from the Hand of Juſtice; for the Contempt of Authority is equally great in both, and the Prejudice ariſing to the Commonwealth is the ſame.

IT is declared by this Act, *That nothing that any Man depones againſt another, ſhall operate againſt himſelf, as to the loſs of Life, or Member, or Baniſhment*, which ſeems to be ill con-

ACT

ceiv'd; for nothing that a Man depones as a Witneſs, can operate againſt himſelf *de jure*, as to any Effect; but it ſeems the Deſign of the Parliament has been, *that Parties ſhould be obliged to depone upon Conventicles, and reſetting of, and intercommuning with Rebels, not only as Witneſſes, but as Parties*; and in the Words immediately before, it is ſaid, *that they ſhould be forced to depone in thoſe Things, for the more ſpeedy Execution of Juſtice*: But to take off all Scruple in this, the King by His Letter in *Anno* 1674. *allowed His Advocate to declare, that He did inſiſt only, ad pænam pæcuniariam & arbitrariam*; and that thereupon they might be forced to depone in theſe Caſes. But it being alledged, that this Declaration was not ſufficient to force People to depone: Becauſe 1. Reſetting of Rebels imported Infamy, becauſe it was Treaſon, & *nemo tenetur jurare in ſuam turpitudinem*. 2. No Declaration without a Remiſſion paſt the Great Seal, can ſecure a Man in ſuch Caſes; yet both theſe Defences were repelled by the Privy Council in the Caſe, King's Advocate *contra* Laird of *Duntreath, June* 30. 1681. For as to the Firſt, it was anſwered, That ſome Crimes did defame *omni jure*, as *Inceſt, Adultery*, &c. And in theſe a Man could not be oblig'd to depone againſt himſelf, becauſe the King's Declaration could not take away the *Stigma* impreſſed by the Laws of God and Nature: But in Crimes introduc'd only by the Municipal Laws, in Favours of the King and His Government, the Infamy may be taken away by the Declaration; and where the King's Advocate declares, he inſiſts not in it as a Crime, but as an irregular Tranſgreſſion; the Confeſſion does not defame, becauſe no Crime is acknowledged. To the Second, it was anſwered, That there needed no Remiſſion, where the irregularity was not purſued by Way of Crime: Remiſſions being only of Crimes, and there was nothing more ordinary, than for His Majeſty's Advocate in all Courts, to reſtrict his Purſuits to arbitrary Puniſhments, as in the Caſes of Mutilations, Hamſucken, *&c*.

SUCH *as aſſault the Lives of Miniſters, or Rob their Houſes, or actually attempt the ſame, are to be puniſhed with Death, and Confiſcation of Goods*; by actually attempting, I underſtand not *nudum conatum*, but what the Law calls *actum proximum*, as the ſhooting a Piſtol, which miſgave; and this further juſtifies the Procedure againſt Mr. *James Mitchel*, who ſhot actually at the Biſhop of St. *Andrew*'s; for tho' this Act was poſterior to that Deed, tho' not to the Proceſs, yet it ſhews what was the Thoughts of our Parliament, as to Attempts, and ſo was ſufficient to inform Judges, how to explain the dubious Word, *Invade* or *Purſue*, us'd in the 4. *Act, Parl.* 16. Ja. VI. IV.

BY this Act, the Fines appointed for *Houſe-Conventicles*, are, for every Man and Woman having Land and Heretage, Liferent, or proper Wadſet, a Fourth Part of their valued yearly Rent; each Tenent, Twenty Five Pounds; each Cottar, Twelve Pounds; each Serving-man, a Fourth Part of their Fee; each Merchant, or chief Trades-man, to be fin'd as a Tenent; and each inferiour Trades-man as a Cottar; if their Wives or Children be preſent at Houſe-conventicles, they are to pay the Half of the reſpective Fines; and if themſelves be preſent at Field-conventicles, they are to be fin'd in the Double of theſe reſpective Fines; ſo that tho' the Act do not ſpecifie Wives and Children, yet they are to be comprehended under the Word *Others*. V.

FIELD-CONVENTICLES are by this Act *declared to be Meetings where any ſhall without Licence or Authority, Preach, expone Scripture, or Pray in the Fields, or in any Houſe where there are more Perſons than the Houſe contains, ſo that ſome of them are without Doors*; which laſt Alternative was added; becauſe ſome, to ſhun the double Avail, preached within a little Houſe, many Thouſands being without.

IT has been doubted, whether thoſe who were within, and knew not that any were without, can be puniſhed as a Field-conventicle; for tho' *verſabantur in re illicita*; yet it was ſuch *a res illicita*, as had a determined and different Puniſhment: And it were hard that where the Puniſhment is Death, as it is for the Miniſter preaching at a Field-conventicle, that he could be overtaken, where he could not know his Guilt.

IT ſeems by this Act, that if the Houſe could hold more, tho' ſome were known to be without Doors, yet that Meeting could not be call'd a Field-conventicle, ſince the Act ſays, *or in any Houſe where there be more Perſons than the Houſe contains*, and the Reaſon inductive of the Act ceaſes in this Caſe.

BY this Act, Magiſtrates of Burghs-Royal are fineable at the Council's Pleaſure, for each Conventicle keeped within their Burgh; but that which was thought ſomewhat ſevere by the Burrows, was, that they ſhould have been fin'd, where they diſcovered the Conventicles themſelves, ſince in Law, Diligence can only be requir'd in Magiſtrates; and in Policy it ſeems, that this would diſcourage Magiſtrates from doing Diligence to diſcover; nor is it ſufficient that by this Act they have Relief from thoſe who were preſent at the Conventicle, ſince theſe oft-times are neither known, nor able to relieve.

THE Maſter and Miſtres of the Houſe likewiſe where the Conventicle was kept, are liable to relieve the Magiſtrates, upon which Ground, an Act of Council was made, *making the Heretor liable for the Fines*; againſt which it was objected, *that the Parliament made*

ACT *not the Heretor liable, but the Maſter, which is the Landslord,* who becauſe he is preſent, may hinder the keeping of Conventicles in his Houſe, which the innocent Heretor, who may be very remotely abſent, cannot.

By this Act the Miniſter who preaches at Field-conventicles is *puniſhable by Death*; but the Miniſter who keeps Houſe-conventicles, cannot be ſo much as fin'd, for he is only ordain'd to find *Caution not to do the like thereafter, under the Pain of Five Thouſand Merks, or to enact himſelf to go out of the Kingdom, and not to return.*

By this Act, the half of the Fines of all who are not Heretors, are declared to *belong to Sheriffs, Stewarts, Lords of Regality*: And therefore by the 17. *Act* of the 3. *Seſſ. Parl.* 2. *They are ordained yearly to give an Account of their Proceedings to His Majeſty's Privy Council, under the Pain of Five Hundred Merks*: In which Act, this Act is explained as to ſome other Points.

VI. BY this Act, ſuch as *Offer their Children to be baptized by any but their own Miniſters, or by ſuch as are authorized by the Council, in Abſence of their own Miniſter, upon a Certificate from their own Miniſter, or in his Abſence, from one of the neighbouring Miniſters, are to be fin'd, if an Heretor, in a Fourth Part of his valued Rent; every Perſon above the Degree of a Tenent, having only a perſonal Eſtate, in an Hundred Pound* Scots; *every inferiour Merchant, conſiderable Trades-man, and every Tenent labouring Land in Fifty Pounds* Scots; *every meaner Burgeſs, Trades-man, and Inhabitant within Burgh, and every Cottar in Twenty Pounds* Scots; *and every Servant in half a Years Fee*: But becauſe upon this Act, theſe who would not conform, did, to ſhun theſe Fines, delay to Baptize their Children; therefore by the 11. *Act, Seſſ.* 3. of this *Parliament*, the ſame Fines are impos'd upon ſuch as keep their Children unbaptized for Thirty Days.

VII. THIS Act is formerly explain'd in the 1. *Act, Seſſ.* 3. of the 1. *Parl.* Ch. II. But for further clearing thereof, it may be obſerv'd that ſince by this Act Husbands are not made liable for their Fines, as by the 5. Act of this Parliament; it was urg'd, that therefore they could not be fin'd for them; ſince it was preſumeable they were deſignedly left out here, becauſe tho' a Man may hinder his Wife to go to a Conventicle; and therefore was juſtly puniſhed by that, for her going, whereas no Man can force his Wife to go to Church; and therefore he was not to be puniſh'd for her in this Act. It was alſo urg'd, that Laws ſhould not be extended *de caſu in caſum*, where it was probable, that the Omiſſion was deſign'd; and ſo tho' Adjudications and Compriſings were equipollent Diligences by our Law, yet it was found that an Adjudger was not liable to pay a Year's Rent for his Entry, as a Compriſer was, becauſe the Statute appointing the one, had not expreſs'd the other; and therefore an expreſs Statute was made, for extending this to Adjudications, which is the 18. *Act, Parl.* 2. Ch. II. and this Extenſion was leſs favourable, becauſe it was a penal Statute, and it was againſt the Principles of Law, that one Perſon ſhould be puniſhed for another. To which it was anſwered, that the Parliament had referr'd the Regulation of Conventicles to the Council, and had inveſted them for this end, with their own full Power to prevent the Cheats that might be invented, and the Dangers that might enſue. 2. This being a Matter of Government, muſt be interpreted ſo, as to preſerve the Government; and if Wives who were the half, and the more humorous half of *Scotland*, were allow'd to abſtract, all the other Remedies would be ridiculous, and they would debauch their Children, Tenents, and Servants, as well as influence their Husbands. 3. In all other Caſes they were liable for their Wives; for Conventicles, by the ſaid 5. Act; for Popiſh Withdrawing and Superſtitions by the 104. *Act*, 7. *Parl.* Ja. VI.; for their Wives ſwearing and curſing, by the 3. *Act, Parl.* 1. *Seſſ.* 1. Ch. II. In all which Acts, the Parliament conſidered more the Good of the Kingdom, than the Advantage of private Parties; and Extenſions are allow'd in favourable Caſes, and there is none more favourable than this, eſpecially ſince the Women began the laſt Rebellion, and ſince the Council has ordained Men to be liable, the Country was become much quieter. 4. There being a Communion of Goods betwixt Man and Wife, it was juſt that the Husband ſhould be liable for his Wife, and ſo he ſhould pay her Debts, whereof this Withdrawing was one; and if he offer her to the Magiſtrates, and do not converſe with her, he is to be free, and ſo he can only blame himſelf. The Council having tranſmitted theſe Reaſons to the King, His Majeſty found, that Husbands ſhould be liable for their Wives; but declared that Husbands who were Loyal, and would take the Oaths of Allegiance and Teſt, ſhould be favoured in the exacting of ſuch Fines.

VIII. THIS Act is explain'd in the 23. *Act, Parl.* 1. Ch. I. and 23. *Act, Parl.* 1. Ch. II. And the Exemption from Taxes here granted to the Senators of the College of Juſtice is alſo allow'd to the Counſellors of the Empire, *Bocer. de Regal. c.* 2. and to the Counſellors of *France*, Papon. *l.* 2. *c.* 11. and is extended in both theſe Kingdoms to their Widows, *arg. l.* 29. *c. ad. l. Jul. de adult. vid.* Jac. Benium. *privil. Juriſcon. part.* 3. *num.* 1.

IX. THIS Act is explain'd in the 16. *Act, Parl.* 2. Ch. II.

# *PARLIAMENT* II.

## SESSION III.

THIS Act is explain'd in Obſervations upon the 2. *Act, Parl.* 2. Ch. II. I.

THIS Act ordains, *That no Tutors or Curators to be named or deſigned to any Pupil, Minor, Idiot, or furious Perſon, ſhall exerciſe their Office, till they firſt make Inventar of the Pupil's Writs, Evidents, Means, or Eſtate, with the Conſent of the neareſt of Kin, of the Father's Side, and of the Mother's Side, in Manner ſpecify'd in the Act, and if the neareſt of Kin refuſe to concur, for making Inventars, they are to be ſummoned by the Tutor for that Effect, with Certification that if they be abſent, the Tutor is to make an Inventar before the Judge-Ordinary, to the End it might be known what the Tutor or Curator might be charged with.* II.

*Obſerv.* I. THAT ſince the Act only ſays, *That no Tutor, or Curator of any Pupil, Minor, Idiot, or furious Perſon, ſhall Exerciſe*; it may be doubted, whether a Curator *bonis datus*, ſhould be comprehended under this Act, becauſe he may fall under none of theſe Denominations, tho' the Reaſon of the Law extend to him; as for Inſtance, if a Man ſhould taillie his Eſtate to *A.* and failing of him to the Second Son of *B.* which failing, to the Second Son of *C.* If *A.* died, *B.* being alive, but having no Second Son, the King might nominate a Tutor to manage the Eſtate, till it were known whether *B.* would have a Second Son; and therefore it had been clearer to have ſaid in the Act, *That no Tutor nor Curator ſhould Exerciſe, &c.*

*Obſerv.* II. THAT the Words, *no Tutor or Curator nam'd, or deſign'd*, might have been better expreſſed, by ſuppreſſing theſe Words, *nam'd or deſign'd*, for that is not the proper Words of Stile.

*Obſerv.* III. THAT ſince the Act requires only *the Conſent of the neareſt of Kin of the Father and the Mother's Side indefinitely*; this is found by Deciſions to be ſo interpreted, as that Two of the Father's Side, and Two of the Mother's Side are only requiſite, conform to the 35. *Act, Parl.* 6. Queen *Mary*. And tho' Tutor Datives were formerly granted ſummarily by the King in Exchequer; yet by this Act it is appointed, *That the Craver of ſuch Gifts ſhall cite the neareſt of Kin upon both Sides*, that is to ſay, Two of each, as has been alſo decided.

THIS Act is formerly explain'd in the 14. *Act, Parl.* 1. *Seſſ.* 3. Ch. II. III.

ALL Law having thought fit to uſe more Citations than one in Matters of Importance. By our Forms before this Act, he who raiſed a Summons, cauſed execute the ſame by any Perſon he pleaſed, who is call'd *a Sheriff in that Part*; after which he did get *an Act of Continuation* from one of the Clerks, and *a ſecond Summons*; both which were called *Act and Letters*, and were ſign'd by the Clerk; but becauſe that was expenſive and troubleſome; therefore by this Act, theſe *Act and Letters* are taken away, and *Two Citations upon the firſt Summons* are declared to be ſufficient: As alſo, becauſe of old, the Execution of Summons did only bear, *That the Meſſenger cited the Parties within expreſt*, without mentioning the particular Parties; therefore ſometimes the Execution of another Summons at the ſame Parties Inſtance, was caſt on upon a Summons, which it may be, was never execute; as for Inſtance, if I had rais'd a Summons of Reduction againſt *B.* and another againſt *C.* the Executions againſt *B.* would have been ſufficient againſt *C.* tho' *C.* had never been cited, and ſo would have interrupted a Preſcription, or would have produced any other Effect againſt him, which being alledged in a Caſe of *Rowallans*: It is by this Act appointed in Times coming, *That all Executions of Summons ſhall bear expreſly, the Names and Deſignations of the Parties, Purſuers and Defenders, and that it ſhall not be ſufficient, that the* VI.

ACT *ſame do relate generally to the Summons, otherwiſe the Execution ſhall not be ſuſtained.* And tho' it was alledg'd, that this was only to hold in Caſes of Preſcription, but in no other Caſe; yet it was found to extend to all Citations indefinitely; and therefore a Citation againſt Mr. *James Alexander*, having no Deſignation, but Huſband to ſuch a Woman, and bearing only *Relation to the Letters within written*, was not ſuſtain'd; but yet the Lords thereafter upon the helping the Execution, allow'd the ſame, the Meſſenger having abidden by the Execution.

VII. IT is fit to know that there are Three Seals in *Scotland*, the Great-Seal, Privy-Seal, and Quarter-Seal; the Great-Seal is properly deſign'd to be appended to heretable Rights, and the Privy-Seal for Moveables, and the Quarter-Seal is but the Teſtimonial of the Great-Seal, and generally it is appended to Papers that are ſubſervient to heretable Rights, ſuch as Precepts of Saſine, Preſentations to Forefeitries, *&c.* The Chancellor keeps the Great-Seal, the Lord Privy-Seal keeps the Privy-Seal, and the Director of the Chancery keeps the Quarter-Seal; for as the Quarter-Seal is but a Seal ſubſervient to the Great-Seal, ſo the Director of the Chancery, is an Officer depending upon the Chancellor.

THE Servants of the Chancery, and Privy-Seal Office, having been in Uſe to give out the Papers that were to paſs their Regiſters, before they put them in a Minute-book, ſo that ſuch as deſired to know what paſſed thoſe Seals, could not know the ſame; therefore they are by this Act ordain'd *to regiſtrate all Writs that paſs their Office, before they give them out, and to make a Minute-book.*

*Nota.* THAT in the Chancery-Chamber there are Two Kinds of Regiſters, one of Parchment, for Charters, and ſuch heretable Rights, and other Two in Paper, one for temporary Rights, ſuch as Gifts, Penſions, *&c.* In which likewiſe, Adjudications, and Compriſings are included; for tho' theſe be Heretable, yet they are but temporary Rights, being redeemable; there is another Paper-Regiſter likewiſe for Retours.

OF old, the Precept of Saſine did paſs the Quarter-Seal, but becauſe that was expenſive and troubleſome, therefore they are now ordain'd to be ingroſſed in the Charter, and ſo paſs the Great Seal only.

BY this Act likewiſe, Charters which were formerly in a large Skin of Parchment, are by this Act ordain'd to be written by Way of a Book, that they may thereby be the more commodiouſly read, the Line being very much ſhorter in the one than in the other.

VIII. BY an old Cuſtom in *Scotland*, Burgeſſes might have arreſted Strangers, if they found them within their Burgh, till they found Caution to pay them what was due; but by this Act, this is reſtricted to Horſe or Man's Meat, Abuilliments, or other Merchandice, for which they have no Security; which Act was found not to extend to ſuch as lived upon the Borders of either Kingdoms. The Cuſtom having been amongſt the Borderers of each Side, to cauſe one another find Caution, *judicio ſiſti & judicatum ſolvi*, leſt otherwiſe the *Engliſh* might have drawn the *Scots* to *London*; or the *Scots* the *Engliſh* to our Seſſion, Laws unknown to either; and therefore ſince the *Engliſh* continued this Cuſtom after this Act of Parliament, it was fit that the *Scots* ſhould have the like Privilege of arreſting ſuch as dwell in *England*, *January* 13. 1676. *Bell* contra *Robertſon*; and it was found by the Council, that the ſame Cuſtom had been, and therefore ſhould be allow'd to Sheriffs, and other Magiſtrates without Burgh: So that the Sheriff upon the Borders may arreſt any *Engliſh-man* till he find Caution *judicio ſiſti & judicatum ſolvi.*

BY this Act, Burghs of Regality and Barony, are diſcharged to arreſt, or incarcerate any Perſon who are not Burgeſſes, or Inhabitants in their Burghs for any Manner of Debt; which ſeems to imply, that they may arreſt their own Burgeſſes, who are Inhabitants: Likeas *de facto*, they uſe to arreſt ſuch. This Act having diſcharg'd all ſuch Arreſtments, except for Horſe or Man's Meat, Abuilliments, or other Merchandice; The Lords *February* 22. 1677. found, That a Merchant could not arreſt a Stranger within Burgh, until he ſhould find Caution to anſwer as Law will, for Payment of the Price of a Bargain of Victual, which had fallen to the ſaid Burgeſs as a Part of his Father's Stipend, and conſequently was of the Nature of other Farms; tho' it was alledged, that this did fall under the Word *Merchandice*; and that Corn ſo falling to be due, might as well fall under this Act, as a Merchant's Shop falling under Executry or Legacy.

IX. THIS Act ordains, That no Perſon ſhall ordain or be ordained Miniſters, except in the Way preſcrib'd by the preſent Government of the Church, under the Pain of Baniſhment and Confiſcation, *and whoſoever ſhall be married within this Kingdom by the foreſaid Perſons, or any not authoriſed, they ſhall amit and loſe any Right or Intereſt they may have by that Marriage*, jure mariti vel jure relicti, *and that by and attour the Penalty contained in the Act* 1661. *which is the* 34. *Act*, *Parl.* 1. Ch. II.

UPON this Act His Majeſty having gifted the *jus mariti* of *Home* of *Kimmerghame*, who had married the young Lady *Aiton*, and a Declarator being purſu'd at the Donator's Inſtance, it was alledged, That 1. The Perſon who married them had a Licence from the Archbiſhop of St. *Andrew*'s to preach. 2. That the *jus mariti* was not declared by this Act to fall to the King, but only that the Husband had amitted the ſame; and that the King can have Right to no Confiſcation, except where the ſame is expreſly declared to belong to Him by the Statute which inflicts the Confiſcation. To which it was anſwered, That as to the *Firſt*, No Man could marry any within the Paroch of any Miniſter, without Leave from that Miniſter, who could only underſtand whether the Parties might be married lawfully; nor is the being ordained a Presbyter ſufficient, ſince that gives only Power to Preach, but not to Baptize or Marry; Marriage eſpecially requiring Proclamation of Banns, which is *de officio Parochi*. To the *Second* it was anſwered, That by Law all Confiſcations *cedunt fiſco*, whether the Act appoint ſo or not, this being the very Nature of Confiſcation, as is clear by *Peregrin. de jur. fiſc. Lib.* 4. *Cap.* 8. *Num.* 9. for *cui competit accuſatio, ei defertur pœna*; *nam pœna eſt effectus tantum accuſationis*; and Penalties being introduc'd *in ſolatium ejus cui fit injuria*, that ſhould belong to the King, to whom the Injury was done. 2. The Deſign of the Act was to puniſh ſuch as tranſgreſſed and contemned the Government of the Church, whereas it were no Puniſhment for the Husband to loſe his *jus mariti*, if the ſame fell to the Wife. 3. If it fell to the Wife ſhe was uncapable of it, being in the ſame Delict. 4. Nothing by our Law can ſubſiſt in the Perſon of the Wife; and therefore if the Husband do renounce his *jus mariti* in Favours of the Wife, it does by our Law return to the Husband. 5. If this were allow'd, not only might the Wife in other Caſes, and particularly in this be rewarded for tranſgreſſing the Law, ſince for marrying irregularly ſhe would have Right to the *jus mariti* of her Husband; but this would prompt all humorous Women to marry irregularly that they might get a *jus mariti*, and Adminiſtration of their Husband's Eſtate, and Dominion over him. 6. If this were allow'd, the Husband's Creditors might be eaſily cheated; for they might marry diſorderly, and ſo their Creditors could have no Right to the *jus mariti*, and this would open a Door to thoſe Frauds againſt which our Law has ſo ſeriouſly guarded.

It may be doubted from theſe Words of the Act, *whoſoever ſhall be married within this Kingdom*, that ſuch as are married without the Kingdom incur not this Penalty, tho' they ſhould go upon Deſign; which if it were allow'd would fruſtrate abſolutely the Act, for the Tranſgreſſors might ſtill go over the Border and be married. And by the ſaid 34. *Act*, *Parl.* 1. *all Perſons having their Reſidence in* Scotland, *are diſcharged to get themſelves married in* England *or* Ireland, *without Proclamation in* Scotland; and ſince the Law looks upon *actus eluſorios*, as *inefficaces*; ſo that if a Man ſhould go out of *Scotland* to ſhun a Citation, to the End another Compriſer may be preferr'd, coming back after he is cited by the Firſt upon Sixty Days, to the End the Second may cite him upon a ſhorter Time, and ſo be able to lead the Firſt Compriſing, the firſt Citation would be preferr'd, and conſequently it were unjuſt that this, which is a greater Colluſion, ſhould be allowed.

THIS ſumptuary Law againſt Apparel is reſtricted, and explained by the 3. *Act*, *Seſſ.* 4. of this Parliament, and the whole Act is now in Deſuetude. X.

THIS Act is explain'd in the 6. *Act*, *Seſſ.* 2. of this Parliament. XI.

THIS Act is explain'd in the 17. *Act*, *Parl.* 1. *Seſſ.* 1. Ch. II. XII.

THIS Act is explain'd, *Act* 4. *Parl.* 3. Q. *Mary.* XIII.

IN all Retours it is uſually expreſs'd, whether or how the Lands are in His Majeſty's Hands, XIV.
as if they be in His Majeſty's Hands, by Virtue of Ward, the Retour bears it; but ſince the Retour did not uſe to bear the Taxt of the Marriage, or of the Feu *cum maritagio*; therefore this Act appoints theſe to be expreſs'd; and the Reaſon why I think theſe were not expreſs'd formerly, was becauſe Taxt-ward was a very late Invention, and Lands holding Feu *cum maritagio* is a very extraordinary Thing, and ſo the Inqueſt took no Notice of either.

THIS Commiſſion for Plantation of Kirks, differs nothing from the Commiſſions given XV.
by the other Parliaments, but only in that the Power whereby Titulars were forced to ſell to each Heretor his reſpective Teinds, is only to laſt for Three Years after this Act; ſo that all that great Deſign ends here, except it be reviv'd by the next Commiſſion: But if the Impediment during that Time flow from the Titular by reaſon of his Minority or other Inability, in that Caſe the Heretor, who offered to buy his own Teind, is to have Place to buy his Teind as ſoon as the Impediment is removed; but the Act does not expreſs within what Time: And therefore it would ſeem, that except the Heretor offer to buy during the Minority, and did really renew the Offer to buy immediately after the Minority, or Inability was over, he cannot have Place to buy. It is alſo declared, That if the Heretor be Minor, and his Tutors neglect to buy his Teinds, the Minor ſhall have Action for Two Years

after his Minority to compel the Titular to ſell them; but the Act is ill conceived, not mentioning Curators; but the giving Power to buy after Minority, includes both. But it may be doubted, whether this ſhould extend to Idiots and fatuous Perſons; or where there is *tutor bonis datus ob non exiſtentiam hæredis*: And it ſeems the Liberty to buy ſhould be extended to their Heirs for Two Years after they ſucceed, or Two Years after furious Perſons reconvaleſce.

XVI. THE King, in *Anno* 1669. by a Commiſſion under the Great-Seal, did impower Noblemen and others to regulate the Judicatures; and theſe Regulations ſet down by them are here ratify'd: But it was objected, that this could not have been done in Law, becauſe by the Inſtitution of the College of Juſtice, and particularly by the 93. *Act, Parl.* 7. Ja. V. *The Seſſion has Power to make ſik Acts, Statutes and Ordinances, as they ſhall think expedient for ordering of Proceſſes, and haſty Expedition of Juſtice.* And it was thought ſtrange, how Noblemen and Gentlemen, who underſtood not *Forms of Proceſs*, could regulate incident Diligences, and the ordinary Terms in Reductions and Improbation, which with many other Things ſpecified in theſe Regulations, were ſo much Matter of Form, and were ſo little to be known by the ſtrongeſt Reaſon, that the greateſt Lawyers did oft-times underſtand leſs of them than the ordinary Leaders of Proceſſes.

THE firſt Thing in theſe Regulations is, the Roll in which all Cauſes are to be taken up, and are ordain'd to be diſcuſs'd according to the Dates of the returning of Proceſſes; which Roll was formerly in Uſe, tho' by the 12. Article it was here added, *That if any Cauſe ſhould be call'd by Anticipation out of its due Place, the Purſuer's Advocate might refuſe to inſiſt, or the Defenders Advocate to anſwer*; and upon this Article it was, that the Lord *Almond* appeal'd to the Parliament; becauſe in the Action at *Dumfermling*'s Inſtance againſt him, there having been a Debate in the *Outter-houſe*, reported to the Lords, they had ordain'd the Cauſe to be ſummarily heard before themſelves *in præſentia*; whereas by the 5. Article, where the Lords upon Intricacy, ordains a Cauſe to be heard *in præſentia*, the Proceſs ſhould have been inſert in the Roll of the *Inner-houſe*, according to the Date of that Deliverance: Which Article being controverted; it was alledg'd, that by this Article, *Almond*'s Procurators were not oblig'd to debate. To which it was anſwered, that tho' where a Cauſe is ordain'd to be inroll'd, it muſt be heard according to that Date; yet that did not hinder the Lords to call in any Cauſe for clearing the Terms of a Debate in the *Outter-houſe*, reported to them, before they give their Interlocutor therein, which, as needing no Inrolment, falls not under this Article: And this Courſe of calling in Advocates ſummarily, for clearing ſome Points, is ordinarily us'd without inrolling Cauſes in the *Inner-houſe* Roll; but after a Cauſe is once inrol'd in the *Inner-houſe* Roll, it muſt be heard according to its Date.

THE Council ſometimes likewiſe, when they ſuſtain themſelves Judges Competent to Riots, do, if any Defence be propon'd before them in Point of Right, remit the Matter of Right to the Lords of Seſſion; but ordain it to be diſcuſſed ſummarily, without attending this Enrolment; to the End, that when the Matter of Right is diſcuſs'd, they may know how to Judge the Riot.

AS to the 16. and 17. Articles, *Vide* Obſervations upon the 9. *Act, Seſſ.* 3. *Parl.* 1. Ch. II.

BY the 22. Article, it is appointed, *That the Advocate who returns the Proceſs ſhall give out all the Papers, whereupon he reſolves to found his Defences*; which was done to prevent the Purſuer's being forc'd to take a Time to ſee thoſe Papers, upon which the Defence was founded; but this was found unpracticable, becauſe the Defender's Advocates knew not what would be found, relevant, or not; and therefore the Defender's Advocate does now propone his Defence, and if it be found relevant, he takes a Day to prove it as formerly.

THE Difference betwixt *Outter-houſe* and *Inner-houſe* Advocates, which was appointed by the Regulations, is omitted in this Act, which confirms the Regulations without that Diſtinction.

BEFORE this Act in *incident Diligences*, Four Terms were allowed for producing the Writs, which were accidentally crav'd to be produc'd: The firſt was *Letters, with Certification, that if the Havers produc'd not, other Letters would be direct againſt them, charging them thereto* ſimpliciter. 2. *That Letters of Horning would be direct.* The Third was *Horning*. The Fourth was *Caption.* But by this Act, the Firſt Diligence is appointed to be *Horning*, the Second *Caption*, which may ſeem too ſhort; for it is hard that Third Parties ſhould, without any previous Advertiſement be charged with Horning; for tho' no Eſcheat will fall on this Denunciation; yet the Rebel will upon this Denunciation be debarr'd, *ab agendo*, beſide other Inconveniencies.

AS to the Regulations concerning the Juſtice-Court, it has been doubted, whether they extended to Juſtice-airs, or Circuit-Courts; and therefore it was doubted, whether a Citation given to a Pannel who is in Priſon, might be given upon fewer than Fifteen Days in a Juſtice-air; and the Judges inclined to think, that theſe Regulations extend to Juſtice-airs, as well as Juſtice-Courts, as to all the Articles here expreſt, ſince Orders are given by the Parliament for regulating Juſtice in theſe Regulations, which ſhew the Parliament deſign'd to extend them to both. ACT

From theſe Words in the Ninth Article, *That the Chancellor of the Aſſiſe mark how every individual Aſſiſer ſhall vote, whether he condemns or aſſoillies,* it clearly follows, that no Aſſiſer in Criminals may be *non liquet*: And if this were allow'd in one, it might be in all; and becauſe this was not neceſſary formerly; therefore by the 63. *Act, Parl.* 8. Ja. III. it was ordain'd, that when a Summons of Error was raiſed, each Aſſiſer, was to ſet down who aſſoillied, and who condemned; but becauſe they might forget, or for fear of Puniſhment, might be unfaithful in this; therefore this Act appoints, *That in the firſt Verdict it ſhall be marked who condemned, and who aſſoillied.*

Albeit this Act appoints, *That the Chancellor ſhall mark whether every Man aſſoillies or condemns*: Yet it is thought the Omiſſion of this would not annul a Verdict in Favours of the King, that being only introduc'd in Favours of the King, to the End that His Majeſty's Advocate may be inſtructed whom to purſue in a Summons of Error, when a Party is wrongouſly aſſoillied.

By the 11. Article it is appointed, *That when any Summons of Exculpation is executed againſt any Party, that at the ſame Time the Names of the Witneſſes and Inqueſt ſhould be given, to the End the Party may know what to object againſt the Witneſſes*: Upon which Article it was alledged, that when an Exculpation was raiſ'd againſt the King, the Witneſſes Names ſhould be given to his Advocate likewiſe; and which the Juſtices found to be neceſſary in *March* 1680. For the Act being general as to all; and there being as great Reaſon that the King ſhould know thoſe who are to be led againſt Him, as any private Party, He ought to have the ſame Meaſure: And whereas it was objected, that it were a very ſevere Thing, that a poor Pannel might not lead any Witneſs, even during the Debate, tho' his Name had not been given in Liſt; yet this has no Weight, ſince the Act is ſo clear in general Terms as to all: And it may ſeem as unreaſonable that the King ſhould not be allow'd to lead any Witneſs to prove a Crime, if He find him in the Court the Time of the Debate; for the Pannel may much better know, who can prove his Defence, ſince he behov'd to know them, if they were preſent, than the King's Advocate can know who were preſent when the Crime was committed; and tho' there may be ſome Inconvenience in this, for one particular Pannel; yet in the general there is great Advantage in this to Pannels, the King being thereby forc'd to give in the Names of His Witneſſes, ſo that the Pannel may not only know how to object againſt them, but even how to practiſe them: And whereas it may be objected, that by this Procedure there behov'd to be *progreſſus in infinitum*, ſince the King might cite Witneſſes to caſt the Pannel's Witneſſes; and the Pannel behov'd therefore to be allow'd to caſt the King's Witneſſes, and to have Citation for that Effect. It is anſwered, that this might as well be urg'd againſt all Reprobators; nor does this hold here, for the Judge ſhould not allow ſuch Citations, ſave one to each Party; becauſe Meſſengers in executing Criminal Letters, gave ſometimes only Copies of the Libel itſelf, and yet returned Executions to His Majeſty's Advocate, that they had likewiſe given Liſts of Aſſiſers and Witneſſes; therefore the Juſtices declar'd in *February* 1681. by an Act of their Sederunt, that if the Pannel ſhould produce a Copy under the Meſſenger's Hand of the Libel, except the Liſt of the Aſſiſers and Witneſſes Names were upon the ſame Paper with it, they would not ſuſtain the Execution, tho' bearing, *That Liſts of Witneſſes and Aſſiſers were given.*

THIS Act is explain'd in the 1. *Act*, 1. *Parl. Seſſ.* 3. and 7. *Act, Seſſ.* 2. *Parl.* 2. Ch. II. XVII.

COMPRISINGS were at firſt invented to pay Debt with a ſuitable Proportion of Land, and the Sheriff was to adjuſt the Sums due with the Lands compriſed; but thereafter great Eſtates being compriſed for ſmall Debts, the Parliament thought fit by this Act to ordain, that for the Future, not a Meſſenger who was Judge in Compriſings; but the Lords of Seſſion ſhould by a Proceſs before them, adjudge as much of the Debitor's Lands to the Creditor as would ſatisfie his principal Sum and Annualrent, with a Fifth Part more, becauſe the Creditor was forc'd to take Land for Money, whereas by the Common Law, *aliud pro alio invito creditore ſolvi nequit.* And albeit this Act expreſſes only that this Fifth Part ſhall be beſide the Compoſition to the Superior, and Expences of Infeſtment; yet certainly the Creditor muſt likewiſe have all the Expences beſtow'd upon the Proceſs; for as this is reaſonable in itſelf, ſo that Expences tends to the procuring of the Infeſtment. XIX.

*Obſerv.* I. This Act came in to the Parliament ſimply in theſe Terms, and the Equity of it was preſs'd from the Cuſtom of other Nations, and particularly the Common Law, where the *Prætor* did adjudge the Debitor's Land proportionally to the Debt; but it being ſtrongly urg'd by the Lawyers, Burgeſſes and other Members who were Moneyed Men, that it was moſt unreaſonable to force the Creditor to take Land, except the Debitor ſhould produce to him a good Progreſs and Security; for both, to be forced, to take Land, and yet to want a ſufficient Right thereto, was altogether unreaſonable: Therefore the Parliament ordain'd, that if the Debitor did not compear and produce a ſufficient Progreſs, and renounce

ACT XIX. the Poſſeſſion, the Debitor might adjudge the whole Eſtate as formerly he compriſed it; and this has almoſt evacuated the whole Act; for the moſt of Debitors are unwilling to produce a Progreſs, and renounce Poſſeſſion; and therefore, moſt Lands are now adjudg'd as they were formerly appriſed; and in *December* 6. 1681. it was found, that an Adjudication led for a Fifth Part more in abſence of the Debitor, was null; ſince the Fifth Part more was only to be given, where the Creditor compeared, produced a Progreſs, and renounced; albeit it ſeems that this Alternative being introduced in Favours of the Creditor, it ought to be optional to him to chooſe either.

*Obſerv.* II. That the Legal in theſe Adjudications is only Five Years, whereas it was Seven in Compriſings; for the Danger being leſs, becauſe of the ſaid Commenſuration, it was juſt that the Time for Redemption ſhould be ſhorter; and tho' it be not expreſt that the foreſaid Five Years ſhall not run againſt Minors, and that it may ſeem it ſhould run againſt them, in reſpect of the foreſaid Commenſuration, and that it ſeems unreaſonable, that a Creditor being forc'd to take ſo little Land, and ſhould yet be forced to be unſecure during a whole Minority, yet the ſaid Legal in Adjudications will not run againſt Minors; for Adjudications having come in Place of Appriſings, are to be regulated by the ſame Rules, except where it is otherwiſe provided by expreſs Law; and therefore Adjudications cannot be led upon Bonds, bearing *Requiſition*, except Requiſition be Firſt uſed, this being formerly neceſſary in Compriſings, *February* 11. 1680. *Gordon* contra *Hunter*; Albeit it was there alledg'd, that an Adjudication was a more ſolemn Action, (requiring previous Citation of Parties) than a Compriſing, and ſo there needed no Requiſition in Adjudications, as in Appriſings.

*Obſerv.* III. That where Land is decerned proportionally to the Sum, with a Fifth Part more, the Creditor is to poſſeſs the Land in Satisfaction of his Annualrent during the not Redemption, without being liable to Reſtitution, or Count and Reckoning; and therefore when the Act does thereafter ſay, *That he ſhall be paid of his principal Sum and Annualrent*, that muſt be underſtood in the Terms foreſaid, *viz.* That the Rent of the Land ſhall be allow'd for his Annualrent without Reſtriction.

*Obſerv.* IV. If the Creditor acquire once Poſſeſſion, he cannot thereafter uſe perſonal Execution; which I think ſhould be underſtood only where the Debitor compears, both becauſe this Clauſe is adjected to that Part of the Act which preſuppoſeth Compearance, and before the Clauſe puniſhing his Abſence. And becauſe it were unjuſt that a Debitor ſhould have Advantage when he will not conſent, it may be alſo doubted, whether tho' the Debitor compear, he may be free of perſonal Execution, when the Land adjudged is not able to pay the Sum according to the Terms of the Act; for the Reaſon of the Law ceaſeth, *viz.* That a Man ſhould not uſe Execution when he has attain'd Payment. And thus, albeit of old in Compriſings, the Compriſer could not uſe perſonal Execution where he was in Poſſeſſion, except he renounced the ſame, *July* 23. 1633. yet where he had not attained the Poſſeſſion, albeit the Compriſing was expir'd, he might have uſed perſonal Execution by Horning and Caption, tho' not by Arreſtment and Poinding, *December* 7. 1631.

*Obſerv.* V. That ſince this Act declares, That neither the Superior nor Adjudger ſhall be prejudged by this Act, it clearly follows, that the Superior may in this Caſe, as in Compriſings, redeem the Adjudger by Payment of the Sum, it being unjuſt that a ſtranger Vaſſal ſhould be forced upon him when he is content to pay what is due.

*Quæritur*, Whether, albeit by this Act no Compriſings can be led of Lands not already compriſed, if yet Adjudications may not be led, even where Lands are formerly compriſed; for this is not expreſly diſcharged? And this ſeems to have been introduc'd in Favours of the Creditors, who may make their own Election; and I think they may.

Whereas it is declared, That the Superior and Adjudger ſhall be in the ſame Caſe after Citation in the Proceſs of Adjudication, as if Appriſing were led and a Charge given: It may be doubted, how a ſimple Summons can be equivalent to an Appriſing and Charge; for if that were ſuſtained, he who had rais'd the firſt Summons would be preferr'd to him, who having rais'd a poſterior Summons had got the firſt Decreet, becauſe the firſt Summons would be equivalent to an Appriſing, and conſequently to a Decreet of Adjudication. But the Lords have very juſtly found, that the Meaning of this Clauſe is, That the firſt Step in an Adjudication ſhall be preferable to the ſecond Step in a Compriſing, and ſoforth; but not that the firſt Step in an Adjudication ſhall be equivalent to a complete Compriſing; and yet it ſtill remains, that a Summons in an Adjudication is equal to a Denunciation in an Appriſing: For tho' a Denunciation be the more ſolemn Act, yet a Summons publicly call'd in the Houſe does likewiſe make the Diligence very notour.

# *PARLIAMENT* II.

## SESSION IV.

I. THE King having deſigned to improve Salt made in *Scotland*, whereby poor People were maintained, and the Money kept in the Country; did buy the Salt made in *Scotland*, and ordain it to be ſold out at reaſonable Rates, which was called the Pre-emption of Salt: But the Servants and Officers employed in venting the Salt, having taken exorbitant Prices, as was alledged, and remote Places, ſuch as *Galloway* and the *Highlands*, being ill furniſh'd, ſince it was difficult to keep Store-houſes every where, and many fearing that this might be a Preparative for the Pre-emption of Coal, Corn, *&c.* His Majeſty was therefore pleaſed, for removing all ſuch Jealouſies and Prejudices, to condeſcend by this Act to diſcharge the ſaid Pre-emption, and all Pre-emption of Salt in Time coming; but to give ſome Advantage to our own Salt above foreign Salt, our own Salt is declared free of all Exciſe, and imported Salt is to pay Forty Shilling upon every Boll.

THIS Act is explained in the Obſervations upon the *7. Act*, 3. *Seſſ. Parl.* 1. Ch. II. II.

*Nota*, THAT before this Act the King had Right to Twenty Shilling of Cuſtom for every Tun of imported Beer, by the 179. *Act*, *Parl.* 13. Ja. VI.

IV. MANY Noblemen and Gentlemen having been engaged for Debts contracted by our late rebellious Parliaments and Committees, and not being able to ſhun theſe Debts becauſe they had given their private Security for the ſame; the Parliament 1661, and poſterior Parliaments, ſuſpended Execution upon them, but could not in Juſtice take away the Debt; therefore, for Payment of this Debt, an Impoſition was granted upon Tobacco to be employ'd for Payment thereof, as being the moſt unneceſſary Commodity that was imported: And yet this being complained of as a Monopoly, or at leaſt a great Impoſition upon a Commodity, which tho' at firſt uſeleſs, was now by Cuſtom neceſſary; His Majeſty did therefore diſcharge the ſaid Impoſition, and allow the Importing of Tobacco in all Time coming free of all Cuſtom and Impoſition, except the ordinary Cuſtom.

# *PARLIAMENT* III.

I. AFTER many Draughts of an Act to ſecure the Proteſtant Religion, wherein His Royal Highneſs allow'd all Liberty and Encouragement, many of them were found great Snares to the Subjects; and thereupon it was remembred, that in *Anno* 1633. King *Charles*, who was a very zealous Proteſtant, and died a Martyr for our Church, reſolved to make new Laws for its Defence; but it was found that the Laws made by King *James* VI. were ſo full that nothing could be added. And that was very probable, for that King being a moſt learned and zealous Proteſtant, and the Dangers ariſing to the Proteſtant Religion being then ſo recent and urgent, it cannot be thought that any Thing would have been omitted; and therefore, as that Parliament ſatisfy'd themſelves with a general Ratification of all former Acts, ſo did this Parliament. But to ſhew their Earneſtneſs, this Act appoints the old Laws againſt Popery, ACT and for ſecuring the Proteſtant Religion, to be put to Execution, according to the Tenor and Proport of theſe Acts; which Clauſe is here added to this Act, and is not in the 4. *Act*, 1. *Parl.* Ch. I.

II. THIS Act is explained in the Obſervation on the 8. *Act*, 1. *Parl.* Ja. VI. but more fully in my *Jus Regium, Cap. The Right of Succeſſion defended.* And it is remarkable, that it was paſt without a contrary Vote, or the leaſt Objection; only, moſt thought it ſo juſt, that it was unneceſſary, and really it had been ſo, if ſome in *England* had not controverted it.

III. THIS Act diſcharges Free-quarter and Localities; but becauſe ſome pretended, that by this Act they were free from all Neceſſity of carrying Corn, or Straw, or Graſs; whereas, if this were true, the Soldiers Horſes had been made unfit for Service by ſuch Carriages, and the Troopers and Dragoons might have been eaſily murder'd, whilſt they went out ſingly to bring it in, therefore by Act of Council this is fully regulated.

IV. THERE having been a full Debate before His Majeſty, how far Maſters were anſwerable for their Tenents, the Parliament, to prevent the like for the Future, made this Act, being fully convinc'd, that Maſters in *Scotland* could command their Tenents and Servants: Suitable whereto, there are many old Statutes commanding Maſters to preſent them, and finding that without this the Peace could not be ſecured. And upon the Event it is found, That this has ſecur'd the Peace for Tenents and Servants, knowing that their Maſters would find out their Crimes, which Sheriffs and others could not know; and that they could not get Service or Land any where. If they were diſorderly, they have conformed. And this hath reſtor'd Maſters to the juſt Influence which our Predeceſſors had over their Tenents and Servants, and which they loſt by their Fanaticiſm, by which they came to depend only on their Miniſters, and minding more Conventicles than their Work: And in which Extravagancy they were ſo far advanc'd, that they would not fee themſelves till they were ſecur'd that they ſhould be allow'd to go to theſe. Nor is the Maſter ty'd by this Act to any hard Thing, ſince by preſenting them to Juſtice, or by putting them out of his Land, or out of his Service, he is free from all Danger; and this is in his Power. As alſo to ſecure him yet further, it is declar'd that he may break their Tacks; and that if any Maſter take them who are put away, he ſhall be liable unto Three Years Duty.

IT having been alſo debated before the King, That there could be no Deputes nam'd for putting the Laws againſt Eccleſiaſtic Diſorders to Execution, within the Bounds of heretable Judges; therefore His Majeſty's Power is declar'd as to this Point by the Clauſe of this Act: But this is now unneceſſary, becauſe by the 18. Act of this Parliament, His Majeſty's cumulative Power is declared as to all Points.

V. IT is very obſervable, that the longer the World laſts, Probation by Witneſſes leſſens always in Eſteem, becauſe Men grow always more wicked. In our Saviour's Time, *out of the Mouth of Two or Three Witneſſes every Word was to be eſtabliſhed.* Thereafter by our Law, and by the Laws of other Nations, nothing above an Hundred Pounds could be proven by Witneſſes. And albeit of old the affixing of a Seal was probative without a Subſcription or Witneſſes; but as by former Acts the Subſcriptions of Parties is declared requiſite, ſo tho' formerly the deſigning the Witneſſes was ſufficient, altho' they did not ſubſcribe, yet by this Act no Writ is declared probative except the Witneſſes ſubſcribe, and without their Subſcribing the Writ is declared null. But the Act of Parliament does not condeſcend whether this Nullity ſhall be receivable by way of Exception, or if it muſt require a Reduction: But I conceive it muſt be null by way of Exception, ſince the Law hath declared ſuch Papers null, and the Want of Witneſſes appears by Production of the Paper itſelf.

THE ſecond Thing eſtabliſhed by this Act is, That no Witneſs ſhall ſign as a Witneſs to any Party's Subſcription except he know the Party, and ſaw him ſubſcribe, or ſaw or heard him give Warrant to the Notar, or touch the Pen; the Occaſion of which Part of the Act was, among other remarkable Caſes, that a Gentlewoman pretending that ſhe could not write before ſo many Company, deſir'd to ſign the Paper in her own Chamber; whereupon ſhe got the Paper with her, and at her Return brought it back ſubſcrib'd, and ſhe thereafter rais'd a Reduction of the ſame Paper, as not truly ſign'd by her; and tho' this ſhould hardly have been ſuſtainable at her own Inſtance, becauſe ſhe was heard to own it by the ſubſcribing Witneſſes and the whole Company; yet this Exception of *Dole* could not have ſecluded her Heirs or Executors from reducing it, as ſaid is. If Witneſſes without ſeeing a Party ſubſcribe, or giving Warrant to ſubſcribe, ſhall ſubſcribe as Witneſſes, they are declared to be puniſhable as acceſſory to Forgery. Which Quality ſome think was added to ſeclude the Puniſhment of Death, it being, as may be pretended, too ſevere to puniſh by Death that which is the Effect of mere Negligence, and unto which very many fall through

ACT V.

Negligence: Yet our Law knows no Difference betwixt Acceſſories and Principals, further than *ex gratia*; Acceſſories may ſometimes find a Mitigation of the Puniſhment. I conceive alſo, that a Party ſigning as Witneſs, without ſeeing the Paper ſubſcrib'd, ſhould be liable to a Third Party who got Aſſignation to that Paper in Damage and Intereſt, if it be reduced *ex eo capite*, ſince he was a Loſer by his Negligence. But *Quid juris?* 1. If the Party himſelf to whom the Paper was granted, were purſuing ſuch an Action for Damage and Intereſt, ſince he ſhould have conſidered his own Security, and the Witneſſes might have truſted to his Exactneſs. 2. *Quid juris?* If the Witneſs heard Command given to one of the Notars, ſince the Act ſays, *That unleſs they heard him give Warrant to a Notar, or Notars, and touch the Notar's Pen*; and yet even in that Caſe the Paper may be null, becauſe there was not a Command given to both the Notars; and a Third Party may thereby loſe his Right. 3. It may be doubted, if upon a Notar's asking, if the Party will warrant him to ſubſcribe, the Party do give a Nod, whether that Nod will be equivalent to a Warrant, and free the Witneſs, who thereupon ſubſcribed as Witneſs? And it ſeems it ſhould; for the Act ſays, *Except he ſaw or heard him give Command*: And a Man cannot ſee a Warrant otherwiſe than by a Nod; and *Nutus* was ſufficient by the Civil Law to infer a Mandate.

The Third Point in the Act is, That albeit in all foreign Nations the Subſcription of a Notar proves in all Obligations; (for there the Notar keeps the Paper ſign'd by the Party, and gives only a Duplicate ſign'd by him) and albeit in our Law, a Notar's Subſcription did prove in all Inſtruments, ſuch as Saſines, Intimations, *&c.* if the Witneſſes were inſert and deſign'd, tho' they did not at all ſubſcribe; yet by this Act the Witneſſes muſt likewiſe ſubſcribe: Which is another Argument to prove, how much the Faith to be given to Men is now leſſen'd. But it is fit to obſerve, that other Inſtruments taken by Notars, continue in the former Condition, and need no ſubſcribing Witneſſes, tho' for Cautiouſneſs, all Witneſſes in any Inſtrument do now ſubſcribe.

*Nota*, That the Civil Law call'd all Obligations, *Inſtruments*; but we call only Acts of Notars, Inſtruments.

The Fourth Point in this Act is, That all Executions of Meſſengers upon Inhibitions, Interdictions, Hornings, or Arreſtments, ſhall be null, if they be not ſubſcrib'd by Witneſſes; and theſe were expreſs'd becauſe they are Executions of great Importance; and yet it ſeems that Executions of Compriſings and Adjudications are of as great Importance as any of theſe, and yet it is not requir'd by this Act, that Executions of Compriſings and Adjudications ſhould have ſubſcribing Witneſſes. And a Reduction being raiſed of the Execution of a Compriſing, becauſe there being but Two Witneſſes expreſs'd in the Execution, one whereof did expreſly deny that ever he was Witneſs in ſuch an Execution, and ſo the ſame became null as wanting Two Witneſſes. To this it was anſwered, That the Depoſition of a Witneſs, denying that he was preſent upon the Land the Time of the Execution, was not ſufficient to deſtroy an Heretable Right of ſo great Importance as this Compriſing was; for this Depoſition after ſo long a Time, could amount to no more than a *non memini*. And the Reaſon whereupon this Statute is founded, appears by the Narrative to be, Becauſe the Witneſſes may, by their Forgetfulneſs, eaſily diſown their being Witneſſes; and many Men are apt to forget ſuch Circumſtances, and to deny that ever they have been in ſuch a Place or Houſe, until the ſame be brought back to their Memory by other very remarkable Circumſtances, which could not be done here, becauſe the Meſſenger and the other Witneſſes were both dead. 2. The Depoſition of one Witneſs denying his being preſent ſhould not infer a Nullity of the Compriſing, ſince the Loſs of the whole Executions, would not infer the ſame, after ſo long a Time as has been frequently decided. 3. If this were allow'd, it ſhould be in the Power of every ſingle Witneſs in an Execution of a Compriſing or Adjudication, which are now the Foundations of the moſt of our Rights, to deſtroy and overturn the ſame for Money or Prejudice. 4. No ſingular Succeſſor, buying a Compriſing, could be ſecur'd; and if theſe Executions had been thought of ſuch Importance, this Statute had required ſubſcribing Witneſſes: For a Compriſing is of far more Conſequence than an Arreſtment; the one relating to an Heretable, the other to a Moveable, and very Temporary Right. 5. No Man could, with a ſufficient *cauſa ſcientiæ*, depone that he was not upon the Ground of the Lands of ſuch a Barony, except he knew every Bit of the March of the Barony, for that Execution might have been uſed upon the very remoteſt Corner of it.

The laſt Branch of this Act is, That no Execution whatſoever ſhall be ſufficient to interrupt the Preſcription of Heretable Rights, unleſs the ſame have ſubſcribing Witneſſes; and by this, we ſee what Care our Law has taken to preſerve Preſcriptions: And for the ſame Reaſon it is appointed by the 10. *Act*, 2. *Parl.* Ch. II. *That all Citations that ſhall be made uſe of, for Interruptions, ſhall be renew'd every Seven Year*; and becauſe of this Clauſe in the Act it is adviſeable, that all Executions in Adjudications, Compriſings, Moleſtations, and generally in all Actions relating to real Rights, have ſubſcribing Witneſſes, tho' theſe be not expreſs'd, becauſe they may be made uſe of as Interruptions in other Caſes. *Vide Obſerv.* on the ſaid Act.

ACT VI. THIS Act concerning the *Teſt*, is ſo exactly and univerſally known, and all Objections againſt it have been ſo fully clear'd, that 'tis unneceſſary to write any Obſervation upon it.

VII. BY the 2. *Act*, of the 1. *Parl.* Ch. II. it is declared, *That the Nomination of the Senators of the College of Juſtice did ever belong to the King*. And His Majeſty and His Predeceſſors have ever been in Uſe of appointing the Times in which they ſhould ſit and judge for Him; and therefore His Majeſty's Royal Brother finding, that many Members of Parliament inclin'd to want the Summer Seſſion, he allow'd the Overture to be brought into the Articles. It was likewiſe propoſed, *That there might be one Month allow'd for the Summer, and Four only for the Winter*; for which it was urg'd, that this would ſave all the Inconveniencies that could be adduc'd againſt the Summer Seſſion; ſince therein Cauſes that could not well admit of Delay, ſuch as Suſpenſions, Removings, Actions upon Bills of Exchange, *&c.* might be diſcuſs'd: But this was rejected by Vote of both Articles and Parliament, as tending to as much Trouble and Expence as the Summer Seſſion itſelf, without any conſiderable Advantage. For the Lieges behov'd to attend from the remoteſt Parts of the Nation, and yet the whole Time would be ſpent in uſeleſs Preparations for Buſineſs the firſt Fourthnight, and in a dangerous Hurry the laſt Fourthnight. By this Act then there is only one Seſſion to be in the whole Year, which is to laſt from the Firſt of *November* to the laſt of *March incluſive*.

THE Arguments adduc'd for this Model, were, 1. That Two Meetings of the Seſſion did encourage our Countrymen too much to Litigiouſneſs, who were naturally too much addicted thereto; whereas one Seſſion might well enough end all our Affairs: And it was indeed obſervable, that to recommend this Overture, all poſſible Diſpatch had been made in the former Seſſion. 2. That theſe Two Seſſions occaſioned great Expence, ſince People behov'd to come Twice a Year from the remoteſt Parts of the Nation moſt unneceſſarily; for the Summer's Seſſion was ſpent in Preparation or Hurry, as ſaid is. 3. The Summer being the only Time wherein *Scotſmen* could have any Pleaſure, or could make any Improvement by Building, Imparking, *&c.* the Summer's Seſſion did, without making us any Recompence, deſtroy both our own Pleaſure, and the adorning of our Country.

THE Arguments for continuing the Summer's Seſſion as formerly, were,

I. THE Seſſion not ſitting for Seven Months, His Majeſty's Authority during all that Time wants the Support and Aſſiſtance which otherwiſe it uſes to have from the frequent Attendance of the Nobility, the King's Officers and others do meet frequently during the Seſſion, becauſe of the Conveniency they have in attending their private Buſineſs; whereas in this long Vacation of Seven Months, they can hardly be brought together, and ſo want that Correſpondence, Intelligence, and mutual Aſſiſtance which they have in Time of the Seſſion. And our Rebellions being ordinarily in the Summer Time, becauſe of the Conveniency which Rebels have of lying in the open Fields, and of getting Proviſion for their Horſes, it would be much eaſier to ſuppreſs the ſame, when His Majeſty's Authority is fully repreſented, and His Nobility and Servants fully convened; a great Inſtance whereof, appear'd in the late Rebellion of *Bothwel-bridge*.

II. THE Summer's Seſſion was very well contriv'd for the Adminiſtration of Juſtice, becauſe in the Months of *June* and *July*, ſuch as have Affairs in dependence before the Seſſion, had then no labouring at Home, thoſe Two Months falling very conveniently in betwixt Seed-time and Harveſt, and we having formerly had the Month of *March* adjected to the Winter-Seſſion, that Month was taken from it, becauſe it was a Part of our Seed-time; and conſequently to have it now a Part of our Seſſion, muſt be very inconvenient. 2. In thoſe Two Months, His Majeſty's Subjects in the Iſles, and remote Countries, cannot only come to get Juſtice adminiſtrated to them in the Summer, there being no Paſſage from theſe Places to the Seſſion in the Winter-time; or at leaſt if they do come, they muſt ſtay the whole Winter; and in ſome Years the Storms are ſuch, that there is no travelling, even from nearer Countries, nor is the Winter fit for old Men, Biſhops, Clergy-men, and ſuch as are infirm to travel in. 3. The Seaſon in theſe Two Months, being very moderate with us, and the Days long, much more Buſineſs is diſpatched, than in the Winter-time: And there is far more Conveniency of informing, than in the Cold and rigid Winter Nights, which puts Men to great Expence, and Occaſions many Diſeaſes. 4. Tho' his Majeſty's Subjects now procure Decreets, or get Bonds; yet the ſame being ſuſpended, they cannot be diſcuſs'd for Nine or Ten Months; during which Time alſo Widows and Orphans ſtarve; Maſters cannot remove Tenents, becauſe they advocate the Cauſe; and Debitors become Inſolvent; Creditors likewiſe being forc'd to uſe Adjudications within Year and Day of one another, are altogether by the ſaid long Vacation excluded. 5. Not only Buſineſs before the Seſſion by this Means, but even before inferiour Courts are ſtopt; for ſuch as are conſcious to the Injuſtice of their own Cauſe, ſtop Procedure there likewiſe by Advocations, which cannot be diſcuſs'd for Nine or Ten Months. 6. Not only in theſe Particulars, but in general, the Courſe of

ACT VII.

Juſtice is ſtopt here: Far contrary, not only to our Conveniency, but to the Cuſtom of all Nations, who allow in Place of one, Four or Five Seſſions. There being no Vacation in the World longer than Two Months, except in *Scotland*, who now allow Seven; during which Time, Honeſt Men are defrauded, Bankrupt, and violent Poſſeſſors are indulg'd; Probation by Witneſſes, and otherwiſe periſh: And to be ſhort, there is no Face of Juſtice during that Time. 7. As the Vacation is too long for the Conveniency of the People, ſo is the Winter-Seſſion too long for the Conveniency of the Judges, Advocates and other Members of the College of Juſtice, who muſt either deſtroy themſelves by toiling too much, or the Peoples Buſineſs by their languid and negligent Management thereof, it being undeniable that before the Four Months uſed to expire formerly, all Perſons concerned, did languiſh, weary, and wiſh for a Vacation. 8. The Shortneſs of the Time now allow'd, forces the Judges to give ſhorter Audience, and to frequent the Side-Bars more than is fit.

III. The want of the Summer Seſſion, deſtroys Trade and Commerce; becauſe 1. Merchants cannot get in their Money, with which they ſhould trade, wanting the Execution of Law for ſo long a Time. 2. There is now no *Whitſunday* Term, ſo that the Courſe of Money is ſtopt; and it is undenyable, that there are no Payments now at *Whitſunday*; whereas we having had Two Terms formerly, *Whitſunday* and *Martinmaſs*, there were very wiſely Two Seſſions appointed, one in the Summer for thoſe who did not pay at *Whitſunday*; and another in the Winter, for thoſe who did not pay at *Martinmaſs*. 3. There being no Concourſe and Meetings of the People for Seven Months, there can be little Commerce; for all Traffique ariſes, and Bargains are made upon ſuch Occaſions. 4. It is undenyable, that Twice more Merchants have broke in thoſe Two Years that we wanted a Summer-Seſſion, than in any Six formerly; from which Decay of Trade, alſo ariſes a great Loſs to His Majeſty in His Cuſtoms and Revenue.

IV. This Want of the Summer-Seſſion is very prejudicial to the private Eſtates and Intereſts of almoſt all Sorts of People: For 1. There is always greateſt Conſumption of Corn, Cattle, and all Products of the Nation, in more frequent and Numerous Concourſe of People; and the greater the Conſumption be, the Prices riſes ſo much the higher. 2. The Victual of the Northern Shires not being tranſportable till *April*, becauſe of the Storms, it was only vented during the Summer-Seſſion; and now the Price of the Victual there is much faln, and His Majeſty's Exciſe in thoſe Shires much prejudg'd. 3. The Heretors of Store-rooms in the South and Weſt are very much prejudg'd, ſince a great Part of their Cattle, eſpecially of the younger, was only vented in the Summer-Seſſion. 4. The Heretors in the Shires about *Edinburgh* are prejudg'd in every Thing that is pay'd to them. 5. The half of the Town of *Edinburgh* itſelf is almoſt laid waſte; Landlords having almoſt loſt half their Rent, and the beſt Trades-men running away to other Nations, becauſe they are idle for Seven Months here. By which alſo His Majeſty is a great Loſer in His Revenue, that Town paying him more alone, than a Sixth Part of what is pay'd by all the Burghs-Royal in the Kingdom; and Trade by this extraordinary Poverty decaying in *Edinburgh*, which is the Fountain of Commerce, and the Staple-port of the Nation, it muſt proportionally decay in all the other Towns, ſince their Trade and Commerce depends upon it. 6. His Majeſty's ordinary and additional Exciſe in *Edinburgh*, has very much decreaſed, and the Brewers are almoſt all broken within theſe Two Years, as the Tackſmen and Cuſtomers too well know: The Miniſter's Stipends likewiſe being pay'd out of the Annuities on Houſe-meals, they muſt likewiſe decreaſe as the Houſe-meals do. Nor is the Town able to keep up the Company, nor to furniſh His Majeſty ſuch aſſiſtance, as formerly it gave in the Rebellions at *Pentland* and *Bothwel*.

As to the contrary Arguments, it was anſwered, That as to the firſt, Buſineſs did increaſe daily in all Nations, with the Improvement of Land and of Trade, and the multiplying of Diligences; ſo that Proceſſes could not be ſooner ended than formerly, without deciding them more carefully. To the ſecond, no Man now needed to come till his Cauſe was call'd, becauſe all Cauſes were decided in their Courſe by a Roll, and ſo it was no Matter whether he came Summer or Winter. To the third it was anſwer'd, There was more Planting and Improvement in the Month of *March*, which is now loſt, than in both the Months of *June* and *July*.

It may be doubted if the King can recal the Summer-Seſſion without an expreſs Act of Parliament: And it may be urg'd, that He may, ſince the Seſſion is his own Court, wherein He does Juſtice to His People by His Judges; and therefore as any of His Majeſty's Vaſſals may hold their Courts when they pleaſe, much more may His Majeſty hold His. Likeas His Majeſty has oft-times by His Council, order'd the Seſſion to ſit when and where He pleas'd: And whereas it is pretended, that if this were true, Acts of Parliament in this Caſe were unneceſſary; and that ſuch Alterations have never been made without the Parliament. To this it is anſwered, That at firſt the Seſſion was a Committee of Parliament; and ſo the Diets of Seſſion behov'd to be appointed by Parliament: And now likewiſe it is fit, that the Inclinations of the Subjects be gratify'd by ſuch Acts, taking along their Conſent in a Caſe of ſo general a Concern; but it does not neceſſarily follow, that all Things that have been eſtabliſhed by an Act of Parliament at ſome Times, can at no other Time be order'd by His Majeſty alone; for we ſee that there are ſeveral Acts of Parliament, regulating Trade and Coinage; and yet it cannot be deny'd, but that Trade and Coinage are *inter regalia.*

VIII. ALBEIT by the 14. *Act*, 1. *Parl.* Ch. II. the Exciſe is to be taken up by the Commiſſioners of the Exciſe, or Collectors appointed by them, and for whom the Commiſſioners are anſwerable, and may be quartered upon for their Deficiency: By this Act, the Grant of the Exciſe, which is to commence from the King's Death, gives His Royal Succeſſors only a Right to what the Drink exciſeable itſelf can yield, and ſo the Shires will not be oblig'd to burden their Land with Ceſs, for Deficiency of the Exciſe, as now they do.

IX. THIS Act is formerly explain'd in the Obſervations on the 47. *Act*, *Parl.* 11. Ja. VI.

X. BY our former Law, it was generally believ'd that all Widows had Right to a Third of their Husbands Eſtates, call'd with us a Terce, except the Wife had been expreſly ſecluded by her Contract of Marriage, and that ſhe had Right to her Jointure, and to a Third of the Superplus of any Land, wherein her Husband died infeſt: But in a Caſe betwixt *Preſtongrange* and the Lady *Craigleith*, debated in the Seſſion immediately before this Parliament; it was alledg'd, that the ſaid Lady, being competently provided by her Contract of Marriage to a great Jointure, ſhe could not likewiſe have Right to a Terce, becauſe, *primo, proviſio hominis tollit proviſionem legis*; and therefore where a Wife is provided by expreſs Agreement, and the Proviſion acquieſced in by the Wife and her Friends, it is in the Conſtruction of Law reputed to be in full Satisfaction of all ſhe can crave, if the ſame amount to a Third of all the Lands, which the Defunct had at his Deceaſe. 2. This is declar'd to be our Law, by the 16. *cap. lib.* 2. *Reg. Maj. N.* 6. & 10. and by *Balfour* in his Title of the Wife's Dowry and Terce: And by *Craig lib.* 2. *cap.* 22. 3. By the Laws of other Nations it is clear, that where a Wife is ſecured by a Conventional Proviſion, ſhe can have no Right to any legal Proviſion; this the *French* expreſly determine, when they ſay, that a Wife having *dotarium præſium*, cannot claim *dotarium ex lege & conſuetudinarium.* 4. This Terce is the ſame in the Analogy of Law, that a *Legittim*, or an Aliment is to Children; but ſo it is that neither of theſe are due, when the Children are provided; and therefore the moſt that can be due in either Caſe, is *ſupplementum legittimæ*; the Law having only deſigned the *rationabilis tertia*: And there is no more due to our Queens by the 2. *Act*, 1. *Parl.* Ja. III. Albeit theſe Reaſons were thought very pungent, and tending much to the Support of old Families, and to ſecure Men againſt the Importunity of their Wives; yet becauſe ſome poſitive Deciſions had run in Favours of the Wives, tho' abundantly provided; therefore the Caſe was referr'd by the Seſſion to the Parliament, and they by this Act ordain'd that in Time coming, if the Wife be provided, tho' her Proviſion were never ſo ſmall, ſhe ſhall be excluded from a Terce, unleſs her Right to a Terce be ſecur'd to her, by and attour her particular Proviſion; but becauſe this Act was not thought a Declaratory Statute, but a Regulation; therefore the Caſe depending was remitted back to the Seſſion.

XI. THIS is fully explain'd in the *Obſerv.* upon the 16. *Act*, 22. *Parl.* Ja. VI.

XII. HIS Majeſty having, by Virtue of His Prerogative-Royal, declar'd by the 27. *Act*, 3. *Seſſ. Parl.* 1. Ch. II. *The Sole ordering, and diſpoſing of Trade with Foreigners*; He did by Act of Council *Anno* 1681. regulate the Matter of Trade and Manufactories; which Proclamations are here ratify'd, for a Security to ſuch as ſhall undertake Manufactories; and therefore it may be doubted, if His Majeſty can diſpenſe with any Thing relating to Manufactory, ſince in this, Third Parties have followed the Faith of His Majeſty's Acts and Proclamations; ſo that His Majeſty ſeems to be bound to them *ex quaſi contractu.* It is declared by the laſt Clauſe of this Act, *That no Perſons contravening this Act, ſhall be liable to the Penalties, unleſs they be found guilty within Three Months after the Delation*; upon which Clauſe it was found, that the Offenders were free, tho' they had confeſs'd their Contravention by their Oath within the Three Months; becauſe there was not a formal Sentence againſt them; albeit it was alledg'd that *in confitentem nullæ ſunt partes judicis*; and the King had done ſufficient Diligence; and the Reaſon of the Act did only militate in Favours of thoſe, who were not oblig'd to depone after ſo long a Time; and the King could not be prejudg'd, where his Officers had done ſufficient Diligence, for this in Effect was a Preſcription, which runs only againſt the Negligent. Likeas in this Caſe, the Want of a Decreet could not be oppon'd, ſince it was occaſioned by a Petition, given by the Defender's craving a Delay, with which the King gratify'd them: But yet the Council thought the Words of the Act ſo poſitive, that they would not go over them; eſpecially ſince the Clauſe did reſolve in an Indemnity to People who might have, and did ordinarily contravene by

Miſtake, or through Neceſſity, and all ſuch indemnifying Clauſes ſhould be favourably interpreted. ACT

XIII. BY the 212. *Act*, 14. *Parl.* Ja. VI. the Lords of Seſſion can only be declined to vote, or judge in Cauſes belonging to their Fathers, Brothers, or Sons; but becauſe the Prohibition of that Act, was too narrow, and that the Reaſon thereof did equally militate againſt all Judges; therefore by this Act the Prohibition of the former Act is extended to Degrees of Affinity as well as Conſanguinity: As alſo to Uncles and Nephews, ſo that now no Lord of Seſſion, or other Judge whatſomever, is capable to vote where either the Purſuer or Defender is Father, Brother, or Son in Law to him, which is moſt juſt, ſince theſe may have an equal Influence upon him, and ſometimes greater than thoſe formerly diſcharged.

IT may be doubted, whether this Act ſhould extend to Cauſes carried on in the Names of *Confidents* and *Truſties*, for the Behove of the Perſons comprehended in this Act; and it ſeems rational to extend it; for a Cauſe cannot ſo much be ſaid to be his, in whoſe Name it is purſued, as the Perſons to whoſe Behove it is purſued: And if this were otherwiſe, the Deſign of this excellent Act might be altogether evacuated: But yet I remember that the Earl of *Rothes* in Exchequer, gave by his Vote the Gift of Non-entry of the Eſtate of *Levin* to Sir *William Bruce*, tho' it was alledged that it being to his own Behove, he could not *jus ſibi dicere*. To which it was anſwered, that he did not vote for himſelf, but that he was neceſſitate to ſit to make up a *quorum*, becauſe there behoved ſtill to be ſuch a Number of Commiſſioners of the Treaſury preſent in Exchequer, as *ſine quibus non*.

IT may be doubted, whether Judges may be declined, where their Relation is equal to the Purſuer and Defender, or in Caſes of Affinity, where the Affinity has ceaſed by the Diſſolution of the Marriage.

*Item*, IT may be doubted, if a Judge can be declined where he is related only to one who is a Member of a Society, which is Purſuer or Defender; as for Inſtance, if the Proceſs be againſt a College, and the Judge be Brother to one of the Maſters of the College.

*Obſerv.* FROM theſe Words, *The Exchequer and other Judicatures*, That the Exchequer is a Judicature in our Law.

XV. AS Laws do ordinarily ſhow the Genius of the Nation; ſo do they likewiſe ſhow the Genius of the Time wherein they are made; and this Law was occaſion'd by a dreadful Principle, whereby the Fanaticks had declar'd, *That it was lawful to Kill all who ſerv'd the King*: And tho' none were puniſh'd in *Scotland* for mere Principles of Religion, yet it is very lawful to puniſh thoſe who maintain Principles which tend neceſſarily and naturally to the raiſing of Rebellion, or committing of Crimes; whereof this and the 2. *Act*, 2. *Seſſ. Parl.* 1. Ch. II. are juſt Inſtances.

XVI. BY this Act it is declared, That the High Court of Admiralty is a Sovereign Judicature in itſelf, and imports *ſummar Execution*, by which laſt Words is meant only, that Execution of Horning may paſs upon their Decreets immediately, without ſeeking a Decreet conform before the Lords, as of old conform to the 15. *Act*, *Parl.* 20. Ja. VI. which is here wrong cited, and called the 12. *Parl.* But this ſummar Execution is no Mark of its being a Sovereign Court; for Sheriff and Bailiff Courts have the ſame Privilege. But that which makes this Court a Sovereign Court, is, that by this Act it is declar'd, that they may not only review the Decreets of inferiour Admirals, but their own; and the Reaſon why they are allow'd to review their own, is, becauſe it is their Cuſtom to grant oft-times Decreets ſummarly, for not finding Caution; and it were hard not to allow the Perſons concern'd to be heard upon an Offer to find Caution: As alſo, it is declar'd by this Act, *That no Advocations ſhall be granted from them to the Seſſion*; but even this is not obſerv'd, tho' it was the great Deſign of this Act, for this Act reſtricting this Privilege to *maritim* and Sea-affairs, the Lords advocate Cauſes from that Court, as not *maritim*, it not being determin'd what Caſes are *maritim*, and ſo can be comprehended under that Term.

THE Lords are ſtill allow'd to ſuſpend the Decreets of the Admiral *in præſentia*, or by Three Lords in the Vacance, which is hardly to be reconciled with its being a Sovereign Court: And yet in ſome Caſes, the Lords ſuſpend the Decreets of the Juſtice-Court, and of the Commiſſion of the Kirk, which are certainly Sovereign Courts. The Admiral-Court has got alſo Power by this Act to apply the Fines and Amerciaments of their own Courts, to their own Uſe, which formerly belong'd to the King; and they have alſo the ſole Power to grant Paſſes and Safe-Conducts to Ships, which by a ſpecial Privilege was granted immediately before this Act, very irregularly, to Magiſtrates of Burghs Royal, and in the Time of the late *Dutch* War, it was granted to a particular Perſon, named by His Majeſty, who was called *Surveyer-general*; and was bound by his Inſtructions, not to grant a Paſs to any Ship till he was aboard, and ſurveyed all that was in it; only he had Power to make a Depute for *Aberdeen*, and beyond it.

ACT XVII. BY this Act, becauſe common Things are neglected, and Creditors are diſappointed of all the Rents where the ſame are controverted amongſt them; therefore they are allow'd to roup the Lands of the common Creditors, when become Bankrupts, which is now done by Summons, narrating this Statute, in which all the real Creditors are cited, and thereupon the Lords grant a Commiſſion for trying the Value of the Eſtate, and then they determine what ſhall be the leaſt Price, and they name a Lord before whom the Roup is to be made, and Letters are raiſed, charging Creditors to appear on Twenty one Days, at ſuch an Hour at the New-Seſſion Houſe, to offer before ſuch a Lord; at which Day he comes to the Outter-houſe, and the Clerk reads the Acts and Commiſſion to that Lord, and the Macer offers the Lands at the Price put on them by the Lords Three ſeveral Times, and if none offer more, he who raiſed the Summons gets them at that Price.

After all this, the Creditors go on in their Multiple-poinding, and being rank'd according to their due Preference, the Price is diſtributed amongſt them accordingly, tho' it may be debated that this Preference ſhould be firſt determined, ſince till then Creditors will not willingly offer.

It ſeems more reaſonable that Roups ſhould be in the Shires where the Lands to be ſold do ly, for there will be more Buyers found there than at *Edinburgh.* I could likewiſe wiſh, that where any of the Lords of the Seſſion are Purſuers, they would name Commiſſioners in the Country to make the Roup, for Societies ſhould ſhun *ſibi jus dicere,* where the ſame can be ſupply'd by others.

I think alſo that it were fit that Roups were made Three ſeveral Days, and not all at one Time, as is required by the Doctors; for this would give all Perſons concerned Time and Opportunity to appear, and conſider what is fit to be offered; for Men may be ſurpriſed, or be ſick, or buſie at one Hour or Time. I conceive alſo, that the Lord who makes the Roup, ſhould ſtay all the Two Hours allow'd, not only to the laſt Moment, but from the Firſt, as we ſee the Judges do in Roups abroad, and before our Admirals, where the Roups are therefore appointed to be made *ad candelam,* or *clepſidram*; and in Orders of Redemption, we ſee that the Redeemer muſt wait from Sun to Sun: And tho' where the Common Good is to be rouped in Towns, or the Cuſtoms in Exchequer, the ſame uſe to be done in Half an Hour or ſo, yet it is a different Thing where Creditors are to offer for getting Payment of their own juſt Debts: And for the ſame Reaſon it ſeems, tho' a juſt Creditor come ſomewhat late, yet if he offer more he ought to be preferred, *nam de minimis non curat prætor,* and the Intereſt of lawful Creditors ought to have greater Favour.

It is doubted, if a Part of the Bankrupt's Lands may be rouped, ſince the Act ordains in general his Eſtate to be rouped, and a Part of the Eſtate cannot be call'd the Eſtate; and it were hard to chooſe out the Mannor-place, and ſome little Part of the Land, by the Want whereof the reſt would become of little Value. The Act, alſo by ordaining the Price to be diſtributed among the Creditors, inſinuates, that one Creditor cannot chooſe a Part to be rouped for Payment of his particular Debt.

Whether the Lords may ſtop Offers when they grow exorbitant in Prejudice of Offers of a juſt Price made by lawful Creditors? And whether a Creditor ſhould be preferr'd to a Stranger, both offering the ſame Price, tho' the Stranger made the firſt Offer? And if a Creditor in Paſſion may be allow'd to repent, and if he ſhould get Deductions in Caſe of ſupervenient War, Peſtilence, or *vis major*; may be ſeen, with many other intricate Queſtions, fully diſcuſs'd by Mattheus *de auctionibus,* and Poſtillus *de ſub-haſtationibus,* where all the Matter of Roups are excellently treated.

XVIII. WHEN Field-conventicles, and other Inſolencies grew inſupportable, the Privy-Council required the Sheriffs, Baillies of Regalities, and other Magiſtrates, to call together theſe within their Juriſdictions for repreſſing the ſame; but they anſwered, that this was not poſſible: Whereupon the Council being juſtly jealous that the Sheriffs did not their Duty, gave Commiſſions to the commanding Officers, and other Gentlemen to be Conjunct-Sheriffs as to all Eccleſiaſtic Diſorders, and found that theſe contributed much to quiet the Country; but this being complained of, as a Stretch of the Prerogative, this Act was made, declaring, *That His Majeſty may, by Himſelf, or others commiſſionated by Him, take Cognizance and Deciſion of any Cauſes He pleaſes, notwithſtanding of any Juriſdiction beſtow'd by Him and His Predeceſſors*; for underſtanding whereof, it is fit to know, that all Juriſdictions granted by abſolute Princes, are cumulative, and not privative: For tho' they impower others to diſtribute Juſtice to their People, for their and their People's greater Conveniency, yet they never thereby denude and debar themſelves from judging or appointing others; for the King may ſee, and the People may find Judges very unfit, and that the Government is ruined by them, and yet a Crime cannot be prov'd whereby Deprivation may be inferr'd: Whereas there is no Inconveniency on the other Hand. 2. This is clear by *Craig,* to be our Law, *Lib. 2. Diag. 8. Illud tamen generaliter obſervandum, quod juriſdictio nunquam privative, ſed cumulative delegari poteſt: Non eſt enim quaſi tranſlatio juris ex una perſona in aliam,* *ſed tantum mandata juriſdictio, quæ, non obſtante delegatione, adhuc remanet in delegante.* 3. This is no more than what was allow'd to the King by the 27. *Act*, *Parl.* 5. Ja. III. whereby it is declared, *That it ſhall be lawful to the King, at his Empleaſance,* (*or Pleaſure*) *to take Deciſion of any Matter that comes before Him, likeas it was wont to be as before.* 4. This keeps heretable Officers in a juſt Awe, and ſecures People; for if they will be partial or remiſs, they know that others may be nam'd to ſupply their Defects. ACT

XIX. THE Occaſion of this Act, was a ſolemn Debate betwixt Provoſt *Curry* and *Charles Oliphant*, in *December* 1677; in which the ſaid Provoſt rais'd a Reduction of a Right made by the Maſter of *Mordington* to the ſaid *Charles*, of the Lands of Nether-*Mordington*, and *Edrington*, as made by a Minor; and tho' an Oath was adjected by the Minor to ratify at his Majority, yet that was likewiſe null, ſince by the ſame Facility that Minors will contract to their Leſion, they will likewiſe ſwear to their Leſion; and therefore it is the public Intereſt, as well as the Intereſt of the Minor, that ſuch Oaths ſhould not bind.

To which it was anſwered, That tho' the World, whilſt *Pagan*, did reſcind ſuch Oaths, yet by the famous Law *ſacramenta puberum*, ſuch Oaths were to be obſerv'd: And tho' Oaths given againſt a public Law were not to be obſerv'd, yet in ſuch a Caſe as this, where the Public was not concerned, and where there was no Statute againſt the interpoſing ſuch an Oath, the Oath ought to be obſerved, as being a Matter of far greater Conſequence than the Contract: Nor ſhould Judges favour Perjury, or enſnare People who truſted Oaths. And even in Countries where Statutes were made againſt the Validity of ſuch Oaths, they ordained the Minor to be firſt abſolved by a Churchman; and ſince we had no ſuch Abſolutions, we could admit of no Reſtitution. To which it was reply'd, That the Laws reſtoring Minors were founded upon public Good and Intereſt, and therefore it were abſurd to ſuffer the Contravention of them to be ſecur'd by an Oath, and that an Oath adjected by a Minor, ſhould no more bind than an Oath adjected by a Wife, which has been by many Deciſions found not to be binding: And even in theſe Countries where the Canon Law takes Place, this authentic Conſtitution is not obſerv'd, *viz.* in *France*, *Flanders*, *&c.* as is obſerved by *Guidilinus*, *De Jure noviſſimo*, *Lib.* 3. *Cap.* 12. It was, 2. alledged, That ſuch Oaths ought not to ſecure where the Deed is in itſelf invalid and illegal, as here where the Father authorizes the Son to confirm a Deed to the Father's own Advantage, *nam nemo poteſt eſſe author in rem ſuam.* 3. It ought not to be reſpected even by the Opinion of Civilians, where there is *enorme Leſion*, which *enorme leſion* is *dolus præſumptus*; and no Oath can ſecure againſt *Fraud* or *Dole.* 4. Tho' the Minor might have prejudged himſelf by that Oath, and thereby have ſecluded himſelf from craving Reſtitution; yet he could not prejudge the Provoſt who was a Third Party, and was his Creditor; for the Effect of the Oath being only Perſonal, could not reach him. The Lords upon this Debate ſuſtained the Contract, and repelled the Reaſon of Reduction, tho' rais'd by a ſingular Succeſſor; but they cauſed draw this Act of Parliament, diſcharging for the Future, the exacting of ſuch Oaths; annulling likewiſe the Contract, and declaring the Elicitor of the Oath to be infamous.

*Nota*, THESE Words in the Act, *That it ſhall be competent to any Perſon related to the Minor, to obtain the Writs to be declared null*, were adjected, becauſe ſome Minors might ſcruple to purſue a Reduction of a Writ that they themſelves had granted upon Oath; and albeit this Act declares only ſuch Contracts to be null, yet it will certainly extend to Bonds, Diſpoſitions, and other Writs; for as the Reaſon is the ſame, ſo both the Narrative and the laſt Words of the Act has the Word *Writs*, which comprehends all theſe; and I conceive the Remedy of this Act will extend likewiſe to Promiſes, tho' theſe be not comprehended under the Word *Writs*; for if it were otherwiſe, the Act might be eluded by taking of Promiſes upon Oath from Minors: As alſo, albeit the Narrative relates only to Writs of Importance, by which are only meant in our Law, ſuch wherein the Sum exceeds an Hundred Pounds *Scots*; yet ſince the ſtatutory Part is general, and that an Hundred Pounds may ruin poor People; nor ſhould Men of Subſtance baffle an Oath, by interpoſing it to mean Matters; therefore I think, that this Remedy ſhould be extended to all Caſes whatſoever.

XX. BY this Act for facilitating the Courſe of Trade, Bills of Exchange are ordain'd to be regiſtrated within Six Months after they are due, and tho' the Bill bear no Conſent to the Regiſtration as Bonds do; yet they are regiſtrated by Virtue of this Act, which is narrated in the Beginning of the Paper that is regiſtrated; but this is of no great Uſe; and therefore Merchants chooſe rather to purſue ſummarly before the Dean of Gild's Court, who is with us, *le Conſul des Merchants*, and even theſe Purſuits are diſappointed by Advocations; nor have they ſo much as the Privilege of being diſcuſt ſummarly, without attending the Courſe of the Roll, as was crav'd by the Draught of the Act that was Firſt under Conſideration. It was alſo crav'd, that Compenſation ſhould not be receiv'd againſt Bills of Exchange, as is cuſtomary Abroad; and a Bill is in Effect, in the Conſtruction of Law, a Bagg

ACT

of Money truſted by the Drawer, and to be redelivered in another Place; and Compenſation is not even by the Common Law received againſt Depoſitations.

THE Reaſon why this Act was only extended to Bills drawn from Abroad, or in Favours of Perſons Abroad, and not to Bills drawn from one Place within the Kingdom to another, was, becauſe if that had been allow'd, all Debts had ſtill been conſtituted by Bills, and not by Bands, and ſo had been privileged by too ſummar Execution.

XXI. BEFORE Parliaments can proceed to public Affairs, all the controverted Elections muſt firſt be cleared and determined, which being the Occaſion of great Delays in the Diſpatch of Buſineſs, gave the riſe to this Act, whereby it is ordain'd, that none ſhall have Vote in the Elections of Commiſſioners for Shires or Stewartries, except thoſe who are publicly infeſt in Property or Superiority, Liferent or proper Wadſet, and in Poſſeſſion of a Forty Shilling Land of old Extent, holden of the King or Prince, or in Lands of 400 Pounds Valuation, whether Kirk-lands, or other Blench, Few or Ward-lands, and that appearand Heirs being in Poſſeſſion by Virtue of their Predeceſſor's Rights, and Huſbands for the Freeholds of their Wives, or as Liferenters by the Courteſie of *Scotland*, of the Extent and Valuation foreſaid, have Right to vote.

THE Shire of *Berwick* having made croſs Elections of Commiſſioners to the late Parliament, the Committee for controverted Elections decided theſe Points for clearing this Act, which Report was approven in Parliament.

I. THAT a Charter confirmed by the King of a Forty Shilling Land, does not give a Party Right to vote, except his Saſine thereupon be produced, and that the Confirmation be of the Saſine, ſince the Confirmation of a Charter, imports no more but the Confirmation of a perſonal Obligement.

II. VASSALS of Kirk-lands of the Extent and Valuation foreſaid, have no Vote unleſs they hold their Lands of the King as their immediate Superior; for ſince it is optional to them, either to hold of the King, or Lord of Erection, by the 53. *Act*, 1. *Parl.* Ch. II. it is preſumed they ſtill hold of the Lord of Erection, unleſs they inſtruct that they hold of His Majeſty.

III. WHERE Vaſſals produce Rights to a Part of a Barony, that will give them no Right to vote, except they can inſtruct that their Lands are retour'd to ſuch a Proportion as put them in the Terms of the Act of Parliament.

IV. LIFERENTS not conſtitute by Infeſtments, but by perſonal Obligments, give not the Liferenter's Right to vote.

V. PERSONS interdicted, ſeem to be debarr'd from voting, ſince they who were not fit for managing their own Affairs, ought not to be truſted to vote for Commiſſioners to Parliaments; but this I think ſhould only hold in Interdictions, *cauſa cognita*, very judicious Men conſenting to voluntar Interdictions.

VI. IF the King be only Superior *ſupplendo vices* of the immediate Superior, by his not entering to the Superiority: This will not give the Vaſſal a Vote, ſince the immediate Superior retains all the Caſualities, and conſequently remains ſtill Superior, albeit *pro hac vice* the King ſupplies the Defect of the immediate Superiors lying out, by infeſting the Vaſſal.

VII. APPEARAND Heirs, albeit in the Terms of this Act have no Right to vote, if they have renounced, or if their Predeceſſors were denuded, albeit they were in Poſſeſſion, the ſamen being only by a Tollerance from the Party in whoſe Favours the Predeceſſor was denuded.

VIII. APPEARAND Heirs by the Mother's Side, gives not a Title to vote, except they be actually entered Heirs, ſince it is preſumed there are Heirs Male, except the contrair be proven by a Service.

IX. VASSALS who have expired Appriſings, or Adjudications, have liberty to vote, albeit by an Act of the Lords of Seſſion, the Lands are declared to be redeemable for the Sums truly due, ſince by this Act Appriſings, Adjudications, and proper Wadſets, are not to be queſtioned upon Pretence of any Order of Redemption, Payment, or Satisfaction, unleſs a Decreet of Declarator, voluntar Redemption, Reſignation, or Renunciation be produced.

X. IT was found in the Election of the Commiſſioners of *Eaſt-Lothian*, that no Votes are ſuſtained, but theſe who voted and ſigned before the Meeting was diſſolved; and the Votes of thoſe who came immediately after, were not ſuſtain'd, tho' the Preſes return'd with ſome of the Number. But in the Elections for the *Mers*, it was found that a Perſon was capable to vote, albeit he was detained Priſoner by a Miſ-information from one of the Competitors; he having given an Account of the Way and Manner of his Impriſonment to the Meeting, and declared his vote to them, and after his Enlargement did immediately take the Teſt, and ſign the Commiſſion.

# *Some* Supplements *to the* Obſervations *upon the Acts of Parliament.*

Act 13. Parl. 22. K. *Ja.* VI. P. 378.

NOTWITHSTANDING of the Deciſion I have there cited, it ſeems that this Act of Parliament is deſigned to make all Retours, even at the Inſtance of the neareſt of Kin, irreducible after Twenty Years, and that even where Competition is betwixt Heirs of the ſame Kind; as if a ſecond Brother had ſerved himſelf Heir to his Father during the Life of the elder Brother, or his Deſcendents *in linea recta*; and it ſeems this has been the Opinion of the Lords in the Caſe *Younger* contra *Johnſton*, 22. *November 1665*. Likeas, the Act of Parliament makes no Diſtinction; but on the contrary, having extended the Preſcription of Retours from Three Years to Twenty, and that only in Favours of the righteous Heir and neareſt of Kin, it declares generally, that after the ſaid Twenty Years no Party ſhall be heard; but yet it ſeems very hard, that if a ſecond Brother himſelf, who knew he had an elder Brother; or yet more, if he were keeping daily Correſpondence with him whilſt he were abroad, ſhould ſerve himſelf Heir to their Father, that thereafter this Service might not be reduced, notwithſtanding of this Preſcription of Twenty Years. But it would likewiſe ſeem that there might be a Speciality in this Caſe, becauſe the *Dole*, or it may be the Knowledge of the ſecond Brother, without any *Dole*, in ſome Caſes might hinder Preſcription, which requires in Law *bona fides*, as one of its eſſential Requiſites; and yet if a Third Party bought or compriſed that Eſtate, the Preſcription might be valid; becauſe the Impediment being perſonal, could not prejudge him. And it is fit to obſerve, that what I ſaid in general in my Obſervations upon that Act concerning ſingular Succeſſors, was only meant of ſingular Succeſſors acquiring Rights before that Act; for they having bought *bona fide* before that Act, a ſupervenient Law could not prejudge them.

Act 14. Parl. 1. K. *Ch.* I. P. 392.

FOR clearing the Fourth Obſervation upon the ſaid Act, it is fit to take Notice, that albeit it be there inſinuated, that Lords of Erection pay only a Blench-duty for the Lands feued out to them the Time of the Erection; yet it appears both by the Surrender and Decreet-arbitral following thereon, that they ſtill pay a Feu-duty for the Lands feued out to them ſince the Erection.

*Nota*, AFTER a ſolemn Debate before the Exchequer, upon the 22d of *January* 1686, it was decided, in a Caſe betwixt *Beilhaven* and the Caſhkeeper, that the King has Right to the Feu-duties which anciently were due to Abbots, or Churchmen, before the Annexation, or to King *James* VI. before the Erection; and that theſe Feu-duties need not be redeemed as the Feu-duties of the Superiorities, which were holden of the Lords and Titulars of Erection, and whereof they had not acquired the Property before the Surrender; and that notwithſtanding that for Fifty Years together, there was a Blench-duty paid for the ſaids Lands and *Æques* made in Exchequer conform.

Act 24. Parl. 1. K. *Ch.* II. P. 402.

THE Diligence mentioned in the ſaid Act of Parliament, muſt be a complete, not an inchoate Diligence; for elſe it would run not for Three Years, as it is deſigned, but for Forty.

Act 53. Parl. 1. K. *Ch.* II. P. 406.

ALBEIT by the 10. *Act*, *Parl.* 1. Ch. I. it was declared, That all Rights and Deeds made prior to that Act, which might prejudge His Majeſty, as to the Superiorities and Feu-farms of Kirk-lands ſhould be null; yet to elude that Act, there was Commiſſions procured from the King to ſerve the King's Vaſſals in Kirk-lands Heirs, and to receive Reſignations, *&c.* with Right to apply the Compoſitions and Caſualities to their own Behoof; as alſo, they procured long Tacks, both of the Feu-duties and Caſualities of the Superiorities, for Payment of inconſiderable Tack-duties, to furniſh a Pretext that the King was ſtill kept in Poſſeſſion, that they might not ſeem to contravene the Act. As alſo, others than the proper Vaſſals of Kirk-lands procur'd from the King Rights of the Feu-duties after the King had redeem'd the ſame from the Titulars of Erection, or procur'd a Right from His Majeſty to redeem them, and ſo did in Effect interpoſe themſelves betwixt the King and His Vaſſals of Kirk-lands; therefore, by this Act, all theſe indirect Courſes are diſcharged. And the Earl of *Dumfermling* having procur'd a long Tack of the Caſualities of the Vaſſals of the Abbacy of *Dumfermling*, containing a Commiſſion to enter the Vaſſals *ut ſupra*, the Exchequer would not allow the ſame, albeit he had procured a Ratification of that Right in Parliament, and a Letter from King *Charles* II. declaring that it fell not under his Revocation.

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MVSEVM BRITANNICVM

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